THE ENGLISH REPORTS

KING'S BENCH DIVISION

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III

CONTAINING

LEONARD, VOLUMES 1 TO 4; OWEN; AND NOY

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REPORTS and CASES OF LAW Argued and Adjudged in the Courts at Westminster, in the times of the late QUEEN ELIZABETH and KING JAMES. In Four Parts. The Second Impression, carefully Corrected, with the Addition of many Thousand of References, never before Printed. Collected by a Learned Professor of the Law, WILLIAM LEONARD, Esquire, then of the Honourable Society of Gray's-Inn. Published by William Hughes of Gray's-Inn, Esquire. Part I. 1687.

[1] HILL. 25. ELIZ. IN THE KINGS BENCH.

I. BORNEFORD AND PACKINGTON'S CASE.

Custom of Free-Bench.

In trespass, It was found by special verdict, that the defendant was seised of the manor of B. whereof the place where is parcel, demised and demiseable by copy, &c. And that B. the grandfather of the plaintiff was seised of the place where, &c. according to the custom of the said manor, in fee-simple, and that within the said manor there is this custom, that if any copy-holder dieth seised, his wife over-living him shall hold all the land during her widowhood as free-bench, and shall be admitted tenant to the lord, and that the heir shall not be admitted to it during the life of his mother: and found also another custom within the said manor, that if any copy-holder be convicted of felony, and the same be presented by the homage, that then the lord might seize, &c. And it was further found, that the grandfather of the plaintiff took a wife, and died seised, having issue A. father of the plaintiff. The wife is admitted to her free-bench, A. is convicted of felony, and that is presented by the homage; and afterwards A. died, after which the wife died, &c. It was argued by Atkinson, that A. is not within the danger of this custom, for during the life of his mother, who by a claimer is tenant to the lord, and admitted to it, she is copy-holder; and it is not like to the case lately adjudged of possessio fratris, without admittance, for there the party was admittable, and so he was not here: And also it appeareth by the custom as it is found, that the lord upon such matter shall seize, and therefore we ought to make construction that this custom doth not extend to cases where the lord cannot seize; but in the case at bar, the lord cannot seize by reason of this free-bench; and we ought not by any construction to extend a custom beyond the words in which it is conceived, but it shall be taken strictly, and

not be supplyed by equity with a custom in the place of a seisure. But notwithstanding all this, afterwards judgment was given against the plaintiff.

2 Brownl. 21.

[2] II. HILL. 25 ELIZ. IN THE KINGS BENCH.

A copy-holder doth surrender to the use of one A. upon trust, that he shall hold the said land until he hath levyed certain monies, and that afterwards he shall surrender to the use of B.; the monies are levyed, A. is required to make surrender to the use of B. he refuseth, B. exhibits a bill to the lord of the mannor against the said A. who upon hearing of the cause decrees against A. that he shall surrender; he refuseth, now the lord may seize, and admit B. to the copy-hold, for he in such cases is Chancellor in his own Court, per totam curiam.

HILL. 25. ELIZ. IN THE KING'S BENCH.

III. WADE AND BEMBOES CASE.

In a writ of error by Wade against Bembo upon a judgment given in the Court of the City of Bristol, the case was, that Bembo was plaintiff in the said Court against Wade in an action of covenant, and declared of a covenant made by word by the testator of Wade with Bembo; and declared also, that within the said city there is a custom, that conventio ore tenus facta, shall bind the covenantor as strongly as if it were made by writing: and it was holden by the Court, that that custom doth not warrant this action, for the covenant binds by the custom the covenantor, but doth not extend to his executors, and a custom shall be taken strictly, and therefore the judgment was reversed.

25 PASCH. 25. ELIZ. IN THE KINGS BENCH.

IV. THE LORD PAGET AND SIR WALTER ASHTONS CASE.

The Lord Paget brought an action of trespass against Sir Walter Ashton, who justified because he is seised of three messuages to him and his heirs, and that he and all those whose estate he hath, &c. have had the woodwardship of the forrest of C. within which, the place where, &c. and also have had within the said forrest estovers without number: And that one Rowland Bishop of Coventry and Lichfield was seised of the forrest aforesaid in the right of his church, and by indenture betwixt him and Sir Edw. Ashton his ancestor, whose heir he is, setting forth that divers debates had been betwixt the said parties concerning some profits within the said forrest; it was agreed betwixt them, that the said Sir Ed. Ashton should release unto the said Rowland all his right in the said office and estovers, and that the said Rowland should grant de novo unto the said Edw. and his heirs the said office, and one hundred loads of estovers per annum out of the said forrest: after which the said Ed. according to the said agreement, did release to the said bishop ut supra, after which the said bishop by indenture reciting the said former covenants in compl. indenturæ prædict. convent. did grant to the said Sir Ed. the said office and estovers pro easiamento dicti Edwardi, & hæred. suorum by assignment of the officers of the said forrest; and if the assignment be not made within ten days after request, that then the said Ed. and his heirs should cut down wood where they pleased; and averred, the things released were of as great value as the things granted: and upon this matter the plaintiff did demurr in law, and it was adjudged for the plaintiff, for here no inheritance in the things granted passed to the said Sir Ed. but only an interest for his own life; for the grant was to Sir Ed. only without the word, heirs; and the reference to the indentures, by which the bishop hath covenanted to grant the inheritance, nor the words in the grant imply an estate in fee, s. pro easimento dict. Ed. [3] & hæred. suorum, and that in default

of assignment it should be lawful for Sir Ed. and his heirs, shall not supply the defect of the words in the grant.

1. Inst. 148. a. 398. b. ib. Dy. 253. 1 Cro. 644.

MICH. 25 AND 26 ELIZ. IN THE KINGS BENCH.

V. GILBERT AND SIR GEORGE HARTS CASE.

Escape.

Gilbert brought debt upon escape against Sir George Hart Sheriff of Kent, and declared, that he recovered a certain debt against A. who was taken in execution, &c. And the case was, that the said A. was taken in execution in the time of the old sheriff, and escaped also then: and afterwards the defendant being sheriff, the plaintiff again sued a scire facias against the said A. upon the judgment aforesaid, upon which execution was awarded by default, and thereupon issued a capias ad satisfaciendum, by which A. was taken, and escaped: and by the opinion of all the justices, the defendant in this case shall be charged for notwithstanding that A. was once in execution, which was determined by escape in the time of the old sheriff, yet when execution was now awarded against him upon his default in the scire facias, the same shall bind the sheriff out of whose custody he escaped.

1. Cro. 188. 271.

MICH. 25 AND 26 ELIZ. IN THE COMMON PLEAS.

VI. MOOR AND FARRANDS CASE.

Condition where shall not bind Administrators.

Moore leased lands to Farrand upon condition that he, his executors or assigns should not alien without the leave of the lessor; Farrand died intestate, his wife took letters of administration, and aliened without leave, and by Periam Justice, she is not within the penalty of the condition, for the administrator is not meerly in by the party, but by the ordinary: and by Meade and Periam, if a lease for years upon such a condition be extended upon a recognizance, the same is not an alienation against the condition: but if feme lessee for years upon such condition taketh a husband and dieth, the husband is within the danger of the condition, for he is assignee: if the King grant to a subject bona & catalla felonum, and the lessor for years upon such a condition be out-lawed, upon which the patentee enters, now by Periam the patentee is not bound by the condition. Mead, contrary, for the condition shall go with the land.

1. Cro. 26. 1. Anders. 123. Dy. 6. 1 Cro. 26. 757. 3. Len. 67.

MICH. 25 AND 26 ELIZ. IN THE EXCHEQUER.

VII. MAYNYES CASE.

Dower. Attainder where an Estoppel.

Mayney seised of lands in fee, took a wife, made a feoffment to a stranger, committeth treason, and thereof is attainted, and hath a charter of pardon and dieth. It was moved by Plowden in the Exchequer, if the wife of Mayney shall have dower against the feoffee: Manwood Chief Baron, by reason of this attainder dower cannot accrue to the wife, for her title begins by the enter-marriage, and ought to continue and be consummated by the death of the husband, which cannot be in this case; for the attainder of the husband hath interrupted it, as in the case of elopement: and this attainder is an universal estoppel, and doth not run in privity only betwixt the

wife and him to whom the escheat belongs, but every stranger may bar her of her dower by reason thereof; for by the attainder of her husband the wife is disabled to demand dower as well as to demand his inheritance; and he cited the resolution of all the justices of England in the case of the Lady Gates, 4. Ma. Dyer. 140. and the pardon doth not help the matter, for the same extends but to the **[4]** life of the offender, but doth not take away the attainder by which she is barred to demand dower during the said attainder in force: see the statute of 5. E. 6. cap. 11. Vid. Fitz. Dower 82. 13. E. 3. 8 E. 3. Dower 106 Fitz. Utlag. 49.

Co. 1. Inst. 41. a.

8 MICH. 25, AND 26 ELIZ. IN THE EXCHEQUER.

Leases for three lives of Copy-hold estate are not within Stat 41. *Eliz. Copy-holders Interest.*

In the Exchequer it was found by special verdict, that the guardians and chanons regular of Otlery, were seised of the mannor of O, &c. and that 22 H. 7. at a Court holden there, granted the lands in question to W. and W. his son for their lives by copy, according to the custom of the said mannor, and that afterwards 30 H. 8. they leased the lands by indenture to H. rendering the ancient and accustomed rent, and afterward surrendered their colledge, &c. and afterward W. and W. dyed: and if that lease so made during the customary estate for life, notwithstanding the statute of 31 H. 8. be good or not, was the question, being within a year before the surrender, &c. It was argued by Egerton sollicitor, that the said lease is void by the statute; the words of which are (whereof or in the which any estate or interest for term of life, year, or years, at the time of the making of any such lease, had his being or continuance, and was not then determined finished, or expired) and therefore we are to see, if that right or possession which W. had at the time of the making of the lease were an interest, or an estate for life: And as to this word (estate) it is nothing else than measure of time, for an estate in fee-simple is as much as to say, an interest in the lands for ever, and the like of other estates, and therefore here W. and W. had at the time of the making of this lease an estate for life in the thing demised: And although such customary tenants are termed in law tenants at will, yet they are not simply so, nor meerly tenants at will, but only tenants at will, secundum consuetudinem manerii, which custom warrants his possession here for his life, and therefore it is a more certain estate than an estate at will, for the copyholder may justifie against his lord, so cannot a tenant at will, whose estate is determined at the will and pleasure of his lessor: and although this estate is but by custom, and by no conveyance the estate is raised; it is as material, so as it be an estate: and this estate being supported by custom is known in law an estate and so accounted in law; and the law hath notably distinguished copy-hold tenancies by custom, and tenancies at will by the common law; for a copy-holder shall do fealty, shall have aid of his lord in an action of trespass, shall have and maintain an action of trespass against his lord, his wife shall be indowed, the husband shall be tenant by the curtesie without new admittance: and it was adjudged in the Common Pleas, 8. Eliz. that if a copy-holder surrender to the use of another for years, the lessee dieth, his executors shall have the residue of the term without any admittance, M. 14. and 15. Eliz. a copy-holder made a lease for years by indenture warranted by the custom, it was adjudged that the lessees should maintain ejectione firm. although it was objected, that if it were so, then if the plaintiff doth recover, he should have habere facias possessionem; and then copyholds should be ordered by the laws of the land, 10. Eliz. lord and copy-holder for life, the lord grants a rent-charge out of the mannor, whereof the copy-hold is parcel, the copy-holder surrenders to the use of A. who is admitted accordingly, he shall not hold it charged, but if the copy-holder dieth so that his estate is determined, and the lord granteth to a stranger de novo to hold the said lands by copy, this new tenant shall hold the land charged: and so was it rated and adjudged in the Common Pleas. It was adjorned.

4. Len. 117. Post. 16. 2 Len. 119.

[5] MICH. 25 & 26 ELIZ. IN THE KINGS BENCH.

IX. THE LORD PAGET AND THE BISHOP OF COVENTRY AND LEICHFIELDS CASE.

Endictment. Challenge.

The Bishop of Coventry and Leichfield was endicted of trespass in the county of Stafford, of breaking and entring of the close of Thomas Lord Paget, called the Vineyard; the bishop traversed the endictment, and at the day of appearance of the jury, the bishop challenged the array, because that he being a peer of Parliament, no knight was returned, &c. Upon which challenge the Queens Counsel did demur in law, but at last, for expedition, &c. the Court delivered to the councel of the bishop, a bill sealed to save him the advantage of the said challenge: and the enquest was taken, de bene esse, who found, that one A. by the commandment of the bishop entred into the said close called the Vineyard, being then in the occupation of one B. at will, of the said Lord Paget, and did the trespass, viz. digged a turff there, and there left it, and so departed. The matter of challenge was many times argued, and it was argued against the said challenge, because that the King is party, against whom no lord of Parliament shall have such prerogative. To which it was answered on the other side, that so much the rather the challenge lyeth in the case, for where a peer of the Parliament is to be tryed upon an endictment of treason or felony, it shall be per pares; if upon appeal of murder, or felony by ordinary tryal, see 33. H. 8. Br. Tryal 42. and Br. Enquest, 49. It was said on the plaintiffs side, that here the bishop is quodam modo, and the venire facias issued at his own sute, and therfore the mismaking of the pannell is his own fault; but by Gaudy Justice, the venire facias in this case is reputed in law, the sute of the Queen, notwithstanding that the party endicted for his expedition, doth pay the fees for the process, for that the Clarks of the Court have encroached for their gain, for otherwise there should be none paid by the Queen; and by the better opinion of the Court, the challenge was holden good. Another matter was moved, because the endictment is (clausum Domini Paget) and it appeareth by the verdict, that the said close at the time of the trespass was in the occupation of B. at the will of the Lord Paget: for the Lord Paget cannot have an action of trespass against the said bishop, or the said A. upon the matter; and by Wray, the Lord Paget cannot have trespass, Quare clausum fregit & intravit upon this matter; but for digging upon the land, demised, or cutting of trees, an action lyeth, 19 H. 6. Tit. trespass, 36. But here the endictment is, that one F. entred by the commandment of the bishop, upon which matter no action lyeth against the bishop, by the Lord Paget, and especially in this case where the said A. did not carry away the said turff from thence. But by Wray; notwithstanding that the action of trespass doth not lye for the lessor, yet it is well enough by way of endictment. Another exception was taken to the endictment, because it is alleadged, that A. by commandment of the bishop entred, and did the trespass, and no place is shewed where the commandment was, and for this cause the bishop was discharged.

2 Len. 183.

MICH. 25 & 26 ELIZ. IN THE KINGS BENCH.

X. STONLEY AND BRACEBRIDGES CASE.

Livery, where it prevents operation of an Enrolment.

In ejectione firmæ, by Stonley against Bracebridge, the case was, Thomas Bracebridge father of the defendant was seised of the mannor of Kingsbury, to him and to the heirs males of his body, and 32 H. 8. leased a field called Stalling, parcell of the said mannor, to Tho. Coke for years, and afterwards, 4 E. 6. leased the said field (the first lease be-[6]-ing in esse) to Sir Geo. Griffith for seventy years, who assigned

the same to A. Bracebridge brother of the lessor, and to Joyce wife of the lessor, and afterwards, 5 E. 6. the said Tho. Bracebridge, the lessor, by his deed indented, gave the said mannor to the said Sir George by these words (dedi, concessi, barganizavi, & vendidi) proviso, and upon condition, that the said Sir George, should pay to the said Thomas Bracebridge, within fifteen days after, ten hundred pounds, and if he fail of payment thereof, that then after the said fifteen days, the said Sir George should be seised of a tenement, parcel of the said mannor of the yearly value of three pounds (now of late in the occupation of Thomas Smith) to the use of the said Thomas Bracebridge for his life, and after to the said Sir George, until he had levyed five hundred pounds for the payment of the debts, and the education of the children of the said Thomas Bracebridge, and after to the use of the defendant in tail: and of the residue of the said mannor, to the use of the said Tho. Bracebridge, and of the said Joyce his wife for their lives, &c. Tho. Bracebridge, made livery to the said Sir George, in one place parcel of the said mannor, which was in his own occupation in the name of the whole mannor: the fifteen days incur without payment of the said ten hundred pounds, the indenture is enroled, Coke attorns, Joyce dyes, Tho. Bracebridge grants the lands to a stranger by fine, and before proclamations, Thomas his son and heir apparent, within age, enters in the name of the feoffees by reason of the forfeiture, proclamations are made, Tho. Bracebridge the father dyeth, the term of Coke expireth, A. enters, and leaseth to the plaintiff, who enters, upon whom Tho. Bracebridge the son enters, upon which entry the action is brought, it was argued by Beamount the elder: although here in the indenture of bargain and sale, there is not an express consideration set down in the common form of a consideration, yet because the consideration is implied in the condition, it is good enough (see the proviso and condition, ut supra, that the said Sir George should pay, &c.) As if I bargain and sell to you my land, proviso that you pay to me for the same at such a day one hundred pounds, that consideration set down in the form of a condition is as effectual, as if it had been formally expressed in the usual terms. As to the second payment, where a man bargains and sells his lands by deed indented to be enroled, and before enrolment he makes livery to the bargainee, and afterwards the indentur is enroled, the Court discharged Beamount from the arguing of that point, for by Wray, the livery doth prevent the operation of the enrolment, and Sir George shall be accounted in by the livery, and not by the bargain and sale; for livery is of more worth, and more worthy ceremony to pass estates, and therefore shall be preferred: and then the livery being made in such part of the mannor, which was in the possession of the feoffor in the name of the whole mannor, no more of the mannor passeth but that which was then in the possession of the feoffor: and the reversion of such part of the mannor which was in lease shall not pass without attornment, but when the enrolment cometh, now the whole passeth, and then the reversion being setled by the enrolment, the attornment coming afterwards hath no relation: see 48 E. 3. 15. 16. The jury here have found the default of payment, whereby the conditional use which passed by the bargain and sale, upon the condition broken, shall be reduced to the bargainor without any entry, and then the uses limited after are void, for an use limited upon an use cannot rise; quod fuit concessum per totam curiam: then Bracebridge the father, having the inheritance of the said mannor in his own right, and the interest de futuro for years in the right of his wife joyntly with the said A. when he sells the said mannor by deed indented and enroled now thereby the interest for years which he hath in the right of his wife doth not pass, for a bargain and sale is not so strong a conveyance as a livery. As if I have a rent-charge in the right of my wife, out of the manor of D. which manor [7] afterwards I purchase, and afterwards by deed indented and enroled, I bargain and sell the said manor, &c. the rent shall not pass. Then the said Thomas Bracebridge the father having the said right of an entail to him and to the heirs males of his body, and being tenant for life, by his own conveyance, the remainder in tail to his son and heir apparent, the now defendant, when he levyeth a fine, and the son enters for forfeiture before proclamations pass, and his father dyeth, in that case the defendant is not remitted unto the first entail, although after proclamations pass in the life of the father, and so he shall not avoid the leases; for notwithstanding that the issue in tail by that entry hath defeated the possession which passed by the fine,

yet as to the right of the old entail, the fine doth retain its force, and so he entred, quodam modo, in assurance of the fine: as if tenant in tail doth discontinue and disseiseth the discontinuee, and levieth a fine with proclamations, and the discontinuee enters within the five years, now although the fine as to the discontinuee be avoided, so as the possession which passed by the fine is defeated, yet the right of the entail doth continue bound: Egerton solicitor contrary: and he conceived, that all the mannor doth pass by the livery to Sir George, and nothing of it by the enrolment, and that the meaning of the parties was, that all should pass by the livery, for if the assurance should enure by the bargain and sale, then the second uses limited upon default of payment, should never rise; for an use upon an use cannot rise, and then the said uses limited for the payment of the debts of the feoffor, &c. should be defeated; and also where at the begining of the assurance, the condition was entire, the warranty entire, &c. and if such construction should be allowed, here shall be a divided condition, a divided warranty: and also the meaning of the parties that the whole mannor should pass, by such construction should be dismembred, and part pass by the livery, and part by the bargain and sale, and we ought to make such constructions of deeds, that things may pass by them according to the meanings of the parties; as if I be seised of a mannor to which an advowson is appendant, and I make a deed of feoffment of the same mannor, cum pertinencijs, and deliver the deed to the party, but no livery of seisin is had, the advowson shall not pass, for then it should be in gross, whereas the meaning of the parties was, that it should pass as appendant, and that in such case cannot be, for there is no livery, therefore it shall not pass at all, and so it hath been adjudged: so if I bargain and sell my mannor of D. and all the trees in the same, and I deliver the deed, but it is not enrolled, the trees shall not pass, for the intent of the parties was, that the trees should pass, as parcel of the free-hold and not as chattels. And as to the remitter, I conceive, that the heir entring as heir, by the law is remitted, but where the entry is given by a special statute, there the entry shall not enure further than the words of the statute; as land is given to the husband and wife, and to the heirs of the body of the husband, the husband levieth a fine and dieth, the wife entreth, this entry shall not avail to the issue in tail, for the entry is given to the wife by a special law: and he cited Sir Richard Haddons case, the husband alienes the lands of his wife, they are divorced, the husband dieth, the wife shall not enter by 32. H. 8. but is put to her writ of cui in vita ante divor. And afterwards the same term the justices having considered of the case, delivered their opinions upon the matters by Wray chief Justice, viz. that the one moyety of the lease was extinct by the livery, viz. the moyety of Ioyce the wife of the lessor; and as to the other moyety it is in being, for here is no remitter; for if any remitter had been in the case, it should be after the use raised, which is not as yet raised, for the land ought to remain in Sir George until the said five hundred pounds be levyed, and that is not found by the verdict, and therefore for the said moyety, the plaintiff had judgment.

Plo. Com. 417, 418. 1 Cro. 382.

[8] MICH. 25 & 26 ELIZ. IN THE EXCHEQUER.

XI. TRESHAMS CASE.

Fine for Alienation without Licence. Entry for Condition, what acts it shall defeat. Condition shall not avoid an Interest vested.

Sir John Tresham seised of the manor of D. holden of the King in capite by knights service, 4 H. 7. enfeoffed Edmund Earl of Wilts and N. Vaux knight, who gave the said manor to the said Sir John in tail, upon condition that he should not alien, &c. quo minus, &c. John Tresham dyed seised, by whose decease the manor descended to Tho. Tresham, who entred, and 18 H. 8. aliened with licence, by recovery, &c. N. Vaux the surviving feoffee died, having issue W. Lord Vaux; the purchasor died seised, his son and heir 14 Eliz. levied a fine sur conusans de droit, &c. and

that fine was levied to the use of the conusee, &c. and that without licence: the Lord Vaux within five years after the fine levied, entred for the condition broken: and now issued forth a scire facias against the conusee for that alienation without licence, who made default, whereupon issued process to seize the lands; whereupon came Sir Tho. Tresham, and shewed the whole matter aforesaid, and prayed to be discharged. It was said, that this prerogative to have a fine for alienation without licence, had lately beginning upon the original creation of seignories, so as this prerogative is as it were paramount the seignory, and shall go paramount the condition, as well as the condition is paramount the alienation, but if the disseisor of the tenant of the King maketh a feoffment in fee, now upon the entry of the disseisee, the person of the feoffee shall be charged with a fine, but the land by the re-entry of the disseisee is discharged: and such is the opinion of the Lord Frowick, in his Reading upon the Statute of Prerogativa Regis, and the reason is, because the disseisor is not tenant to the King, and so when he aliens, it cannot be said an alienation by the Kings tenant. See 45 E. 3. 6. If the tenant of the King in chief leaseth for life with licence, and afterwards grants the reversion over without licence, the tenant for life is not bound to atturn in a quid juris clamat; wherefore it seems, that if such tenant doth attorn, the King shall seize presently. This entry for the condition broken is not to have so violent a retrospect to the first livery to which the condition was annexed, that it shall defeat all things mean between the creation and the breach of the condition, but it shall defeat all mean things which rise upon the act of the party, as kent, dower, &c. But charges which accrue by reason of tenure, do remain, notwithstanding the entry for the condition broken: as if such a tenant of the King maketh a feoffment in fee upon condition, which is broken, the feoffee dieth seised, his heir of full age, the feoffor re-entereth, this re-entry by force of the condition broken hath not so avoided the descent, but the King shall have relief upon the said descent, for the relief is paramount the livery, and the condition. So if a feoffee upon condition disclaim in avowry, by which the lord brings a writ of right sur disclaimer, and hath judgment; the feoffee entreth for the condition broken, the said re-entry shall not avoid the interest of the lord by the judgment on the writ of disclaimer, but he may enter at his pleasure; and it was moved by Plowden who argued for Tresham, that if the tenant of the King, being non compos mentis, makes a feoffment in fee, and dieth, his heir entring upon the feoffee shall not pay a fine for the alienation of his father, but the person of the father shall be charged with it. And at the end of this term, after many arguments and motions, judgment was given for the Queen, that she should seize the land and hold the same for the fine, and that she should not be driven to sue the person of the feoffee or conusee: and by Manwood chief Baron, at the Common Law in many manors, tenant in [9] soccage upon every alienation shall pay a fine, nomine relevii, a fortiori, in the Kings case, and therefore he was of opinion, that this prerogative to have a fine for alienation without licence is by the common law, and not by any statute.

2 Len. 55, 56.

Mich. 25 and 26 Eliz. in the Exchequer Chamber.

XII. Caters Case.

Intrusion. Error. Privy Seal. Fugitives.

A bill of intrusion was in the Exchequer against Cater, who pleaded the grant of the Queen, the plaintiff replicando said, that before the Queen had any thing, &c. Sir Francis Englefield was seised of the manor, of which, &c. and he being beyond the seas, the Queen sent her letters under the Privy Seal, quod ipse in fide, & legeantiâ quâ dictæ Reginæ tenebatur, indirecte rediret in Angliam, prædict. tamen Franciscus (spretis mandatis dict. Reginæ) venire recusavit, for which a certificate was by the said Queen into the Chancery, quod dictus Franciscus in portibus transmarinis

sine licentia dict. Reginæ remansit; and thereupon a commission was awarded to seize the lands of the said Sir Francis, which was entered in the replication in hæc verba, reciting also the Queens Privy Seal, and that the said Sir Francis did stay there (spretis mandatis, &c.) for which the Queen seised and granted to the plaintiff: and afterwards the statutes of 13 and 14. Eliz. were made: after which the said grant was made to the defendant, upon which matter there was a demurrer and judgment given for the plaintiff. And now Cater brought a writ of error in the Exchequer Chamber, and it was first assigned for error, because that the record is entered inter Johannem Cater present. hic in curia by I.S. attornatum suum, and that cannot be, for it is oppositum in objecto, that one can be present in Court and also by attorney, simul & semel, for the attorney is to supply the default of the personal presence. To which it was said by Wray, Anderson and Periam, that the matter assigned was no error, for there are many presidents in the Exchequer of such entries, which were openly shewed in Court 48 E. 3. 10. R. 2. 20 H. 7. 20 H. 8. And by Manwood chief baron it is not so absurd an entry as it hath been objected, for if one hath an attorney of record in the Kings Bench, and he himself is in the Marshalsey, there is an action against him, he is present as prisoner, and also by attorney, and by them, notwithstanding that here appeareth a contrariety for such entry properly is (presentem hic in curia in propriâ persona sua) yet because many proceedings are according, it is the more safe course to follow them, for if this judgment be reversed for this cause, many records should be also reversed, which should be very perillous: an other error was assigned, because it is not alledged in the replication, of what date the Privy Seal was, nor that any notice of the said Privy Seal was given to Sir Francis, to which it was said, that the Privy Seal need not any date, especially in this case, for the matters which are under the Privy Seal are not issuable. See 2 Eliz. Dyer. 177. nor any traverse can be taken to it; and this Privy Seal is not as other writs and præcipes are, returnable in any Court, but the Queen her self from whom originally it came shall receive it, and also the message upon it, and she her self in such case is judge of the contempt, and no record of that Privy Seal doth remain in any Court, but the Queen her self shall keep it, and then when the Queen is informed of the contempt, she makes a warrant sometimes to the Chancellor to award a commission, sometimes to the Treasurer and Barons of the Exchequer to the same purpose to seize the lands, and that warrant is signed, with the seal manual of the Queen, and the Queen may certifie, and set down the cause of such seizure in such warrant, and no other certificate is made by the Queen, and the Queen may certify the same commission by word of mouth, and if the other party will say that the Queen hath not certified it, he shall be concluded by the commission which is under the Great Seal, and di-[10]-vers prsidents were shewed openly in Court to that effect. And all the matter aforesaid, was agreed by the Chancellor, Treasurer, and the said justices, and no certificate at all needs to be in the case, and then a superfluous certificate being nought, shall not hurt: for nugation is surplusage. Another matter was to consider, what interest the Queen hath in the lands of fugitives by the common law; and as to that they were all clear of opinion, that the Queen in such case as aforesaid may seize, and assign her interest over: and that such assignees may grant copy-holds, parcel of the manor assigned, which grants shall bind him who cometh in after, cum manus domini regis amoventur; and also when the statutes of 13 and 14 Eliz. come, the statutes do not amend the estate of the Queen, but the estate of the Queen doth continue as before, and all the estates under it. And there was shewed unto the Court divers presidents of seizures in such cases, 18 E. 2. Edmond de Woodstock, Earl of Kent, went beyond sea without licence of the King, and he went with Robert de Mortimer, and the King did certifie the same into the Chancery, reciting that he had sent his Privy Seal, &c. but that the said Edmond (spretis mandatis nostris redire recusavit) upon which issued a commission to seize, &c. And it was holden that the Queen having seised by force of the common law, and making a grant of a copyhold out of it, now when the statutes of 13 & 14 Eliz. are made, she hath not any estate thereby, for she had such interest before, and this new seisure after the statutes works nothing, and nothing accrues to her thereby, whereof she can make a seisure: for she hath departed with the whole before, see 23 Eliz. Dyer 376. And note, that the grant of the Queen in the case at

bar was, quamdiu in manibus nostris fore contigerit. And afterwards judgment was given, that judicium prædictum in omnibus affirmetur.

7 Co. 12. 1 Anders. 95. Dy. 375 b.

TER. MICH. 25 & 26 ELIZ. IN THE COMMON PLEAS.

XIII. SUTTON AND DOWSES CASE.

Tithes.

Sutton, vicar of Longstoke, libelled against Dowse in the Spiritual Court, and shewed in his libel, that upon the erection and endowment of his vicaridge, four quarters of corn were assigned to the vicar out of the granary of the prior of B. of the tithes of the parson of Longstoke, and that the parson or fermor of the said rectory of Longstoke, had always paid the said four quarters of corn to the said vicar and all his predecessors, and alledged further, that the Lord Sands was seised of the said rectory, and leased the barn and tithe-corn parcel of the said rectory, to the said Dowse, his wife and son, habendum to Dowse for term of his life, the remainder to the wife for term of her life, the remainder to the son for life: and shewed further, that the said Dowse had covenanted with the said Lord Sands, to render the said four quarters of wheat to the vicar and his successors, upon which Dowse procured a prohibition, and Sutton prayed a consultation, and it was moved in stay of the consultation that the vicar had libelled upon a covenant wherein Dowse is taxed to pay the said corn, and that is a lay title, and determinable by the law of the land, and not in the Ecclesiastical Court: but as to that the opinion of the Court was, that the libel is not grounded upon the covenant, as the sole title to the said corn against Dowse, but upon the endowment of the vicaridge, and the lease by which Dowse is become fermor of the rectory. Another matter was moved, because that upon the libel it appeareth, that the lease aforesaid made by the Lord Sands was made to Dowse his wife, and his son, joyntly, in the premises, habendum ut supra, in which case it was objected, that Dowse his wife, and his son, are all three fermors of the said barn and tithes joyntly in possession, against all whom Sut-[11]-ton ought to have libelled, &c. and not against Dowse only, for the habendum hath not severed their estates which were joynt before, quod tota curia negavit, for the habendum hath severed the joynt estates limited by the premises, and hath distinguished it into remainders, but if the habendum had been habendum successive, the estate had remained joynt: another matter was moved, because it appeareth upon the libel, that the parson, or fermor of the said rectory ought to pay to the vicar the said corn, and also it appeareth upon the matter that Dowse is not parson, nor fermor of the said rectory, for the Lord Sands had leased to Dowse and his son, only the barn and the tith-corn parcel of the said rectory; so as Dowse is fermor but of parcel of the rectory, and the residue of the rectory doth remain in the Lord Sands, in which the said Sut. ought to have libelled against the Lord Sands, and Dowse, and not against Dowse only; and for that cause the consultation was denyed. And in this case it was further agreed by the Court, that if upon a libel in the Spiritual Court, the defendant makes a surmise in banco to have a prohibition, if such surmise be insufficient, the other party needeth not to demur upon it, and to have it entered upon record, but as amicus curiæ, he shall shew the same to the Court, and the Court shall discharge him.

Co. 1 Inst. 783 l.

MICH. 25 & 26 ELIZ. IN THE KINGS BENCH.

XIV. PUNSANY AND LEADERS CASE.

Prescription of Foldage.

Osmond Punsany brought an action upon the case against Leader, and declared, that one Bedingfield was seised of the manor of D. and that he and all those whose

estate he hath in the said manor time out of mind have had libertatem faldagij & cursum ovium, in the town of D. & pro meliori pasturatione omnium ovium suorum, the inhabitants of the said town having any lands within the said town, every second year left their lands to lye fresh and untilled, and prescribed further, that the tenants of the lands within the said town might erect herdals in their lands, with the licence of the lord of the said manor, and not otherwise: and further declared, that the said Bedingfield had let to him the said manor, and that the defendant had erected herdals upon his lands without licence, so as the profit of his foldage is impaired by it: and all this matter was found by verdict: and it was objected in stay of judgment, that the prescription is not good, for it is against law and common right to abridge the subject of the profits of his lands: but the whole Court was clear of opinion, that the prescription is good enough, as 15 E. 2. Prescription 51. prescription to have common appendant in other land after that the hay is cut, and v E. 1. Prescription, 55. A. seised of lands may plow it and sow it, and cut and carry away the corn, and afterwards when the corn is carried, B. by prescription may have the said land as his several, and the other who sowed it cannot meddle with that land, but to plow and sow it in season, &c. And the cattel cannot eat and pasture in the land when they come to plow or sow it, or to carry it away, nor have any profit but the corn, and yet the free-hold of the land is in such person, &c. and that was holden a good prescription, and a difference was taken by the Court, where one doth prescribe to take away the whole interest of the owner of the land, and where a particular profit is restrained: and here this prescription doth not extend but to restrain the ter-tenant to erect herdals, which is a reasonable prescription, see 1 H. 7. 24. The lord of the town doth prescribe to have free foldage of the beasts of his tenants in D. and see there, that libera falda is not any other, but to hav the beasts of the tenants to manure the lands of the lord, &c. And afterwards Punsany the plaintiff had judgment to recover.

[12] XVI. MICH. 25 & 26 ELIZ. AT SERJEANTS INN.

The King not bound to demand Rent.

In the Dutchy Chamber, the case was, that King E. 6. leased for years certain lands parcel of his dutchy of Lancaster, rendring rent, with clause of re-entry, and that a lease was made to one Bunny; it was found by office that the rent was arrear, and by another office, that the servant of the said lessee, had tendered the rent in his absence, and by the commandment of his master, and that afterwards one I. S. receiver general of the dutchy, received the said rent, and had accounted for it, and upon his account it was allowed; and this matter was opened at Serjeants Inn in Fleet-street, before Wray, Anderson, Manwood, Clench, Rhodes, Plowden, and Stanhop; and it was argued by Shuttleworth, that in this case of rent reserved upon a lease for years, made by the King of dutchy land, the King is not bound to demand it, but he may for default of payment of it, re-enter without demand, and that the lessee is tied to tender it at his peril, as well as if the Queen had been seised of the said land in the right of her Crown; and as to that payment, the statute of 1 H. 4. is to be considered, by which it is enacted, that the possessions of the said dutchy taliter, & tali modo, & per tales officiarios & ministros in omnibus remaneant, deducantur, & gubernentur sicut remanere, deduci, & gubernari debuissent, si ad culmen regis dignitatis assumpti non fuissemus, and these words ought to be intended of things which concern the lands themselves, but this act of demand is a personal thing, and concerns the person of the King, and toucheth the majesty, and dignity of the King, and in all cases of the dutchy the person of the King shall hold his priviledge, notwithstanding that the possession of the land be carried in the course of a private person: and therefore if the Queen will alien lands parcel of her dutchy, she ought to make livery, for now she meddles with the possession it self: but if the Queen will sue for parcel of her dutchy, non omittas shall be in the writ, for she cannot sue but as Queen, and the Queen hath such prerogative, that none shall execute her writs of her own sute, but the officer of the Crown, 21 E 4. 60., for

livery, if it be not land within the county palatine, and for the residue, see 10 H. 4. 7. 3. Eliz. 216, 217. Plowden, lessee for years of lands of the dutchy, shall have aid of the King before issue joyned, &c. And if the King make a feoffment of lands of his dutchy out of the county palatine, to hold of him in capite, the feoffee shall hold it so, and a feoffment of such lands upon condition that the feoffee shall not alien is a good condition, and lapses shall not bind the Queen in case of an advowson which the Queen hath in the right of the dutchy, and if the villain of the Queen in the right of the dutchy purchaseth lands in fee, and aliens, yet the Queen shall seise, and that hath been adjudged in the Exchequer Chamber; and if the Queen make a lease of such land, and afterwards makes another lease of the same land without recital of the first lease, it hath been adjudged that the second lease is void. It was argued contrary by Beamount the younger, that this condition which goeth to the realty, to reduce the land again, ought to be ordered and governed by the Queen, as it ought to be by a subject; and therefore, if the Queen will take advantage of this condition, she ought to make a letter of attorney under the dutchy seal, to her own officer, authorizing him thereby to make demand of the said rent, &c. And by Shuttleworth here be two offices, the one contrary to the other, the best shall be taken for the Queen, 14. E. 4. 5. in Skreens case in the end of it: And if the rent of the kings farmor be behind, now although that after the receivor of the dutchy doth receive it yet the same doth not purge the forfeiture, as if the bayliffs of a manor receive rent of a new feoffee, the same will not change the avowry of the **[13]** lord without notice given to him, 41 E. 3. 26. And if a copy-hold escheat, the steward without a special warrant cannot grant it over de novo.

MICH. 25 AND 26 ELIZ. IN THE KING'S BENCH.

XVI. REARSBIE AND REARSBIES CASE INTRAT. TRINIT. 25 ELIZ. ROT. 746.

Construction of Devise. Distress.

Replevin by W. Rearsbie against A. Rearsbie, and L. Rearsbie, who avow the distress, because that one W. Vavasour was seised of the manor of Deniby, whereof the place where, &c. is parcel in his demesne as of fee, and so seised gave the said manor to one L. Rearsbie father of the plaintiff, and of the avowants and Jane his wife, and to the heirs of Lyonel, who by his will devised unto A. Rearsbie a rent of four pounds out of the said manor, with clause of distress, for his childs part, to be yearly paid, Lyonel the father died 3. Eliz. and afterwards, 22. Eliz. Jane died, and for the arrearages of the said rent encurred mean between the death of Lyonel and Jane his wife, &c. upon which avowry the plaintiff did demurr in law, for the rent doth not begin in effect, but after the death of the wife of the devisor, for such construction ought be made of the devise, as not to charge the inheritance with the whole arrearages, &c. and it was argued to the contrary, that the defendant might well avow the distress for these arrearages; for if he in the reversion upon a lease for life grant a rent charge after the death of the grantor, the grantee shall distrein for all the arrearages encurred after the grant, etiam, during the life of the grantor, quod curia concessit: and it was said by the council of the avowant, that the case at bar is a stronger case, for this rent, as it appeareth by the words of the devise, was devised to the avowant for his livelihood, and for his childs part, which words imply a present advancement, and these words yearly to be paid are strong & pregnant to that intent. It was adjourned.

XVII. HILL. 25 ELIZ. IN THE KINGS BENCH.

Account.

The Earl of Northumberland brought debt upon arrearages of accompt, the defendant shewed that before the accompt, the plaintiff of his own wrong did

imprison the defendant, and assigned auditors to him being in prison, and so the accompt was made by duress of imprisonment: and the same was holden a good plea by all the justices of both the benches. And judgment was given accordingly.

XVIII. Pasch. 26 Eliz. in the Kings Bench.

Forman and Bohans Case.

Replevin. Averment. Reputation. Rent charge parcel of a Mannor. Reputation. quid.

Replevin by Forman against Bohan, the defendant avowed for a rent charge, and shewed, that one Wingfield was seised of the manor of Wesham, whereof the place where, was parcel: and 33 H. 6. made a feoffment in fee of the place where, &c. to one Orlow, rendring rent and sute at the court of the said manor, and that the said Wingfield was seised of the said rent and sute accordingly, and died thereof seised, and that the same descended to Anthony Wingfield as son and heir, &c. who was seised of the said rent as parcel of the said manor, and that the said Anthony, so seised of the said manor and rent, bargained and sold the said manor and rent, 26 H. 8. to Nicholas Bohan father of the avowant, by these words; Manerium de Wesham, & omnes omnimodos redditus, reputed, deemed, or adjudged part or parcel of the said manor, who entred, and died seised, and the same descended to the now avowant, as son and **[14]** heir, &c. and averred, that the said rent at the time of the bargain and sale aforesaid, & diu ante, was reputed parcel of the manor aforesaid: upon which avowry, the plaintiff did demur in law, and it was argued by Gawdy serjeant for the plaintiff, and he took an exception to the avowry, because the avowant sheweth, that Anthony Wingfield 26. H. 8. bargained and sold the said manor to Bohan, virtute quar. bargaine & venditionis, & vigor. cujusdam Actus Parliamenti 27 H. 8. de usibus, &c. the said Bohan was seised, &c. where he ought to have said; by force of which bargain and sale the said Anthony Wingfield was seised of the said manor aforesaid, to the use of the said Bohan, and that afterwards by reason of the said statute of 27 H. 8. the said Anthony then seised to the use aforesaid, the said Bohan was seised in his demesne as of fee: for it might be for any thing appearing in the avowry, that before the said statute of 27 H. 8. Anthony Wingfield had made a conveyance upon consideration to him who had not notice of the use, so as the use being suspended, when the statute came, it could not be executed, for there was not any seisin to the use, and to that purpose he cited the case of 7 H. 7. 3. where a gift of trees by cestuy que use is pleaded, without alledging that the feoffors were seised to the use of the donor at the time of the gift: to that exception it was answered by Popham attorney general, that there is a difference betwixt the case at bar, and the case of 7 H. 7. for where a man entitles himself by cestuy que use, he ought to maintain such title by every necessary circumstance, which the law without expressing will not intend; but where a man alledgeth a matter, which is but a conveyance, there needs no especial recital; as if a man will pretend the grant of a reversion, and that the lessee for years did attorn, he needs not to shew, that at the time of the attornment the grantor was seised, &c. and he cited the case of 10 E. 4. 18. In trespas, the plaintiff by way of replication made to him a title, that A. was seised and leased to him at will, by force of which the plaintiff was possessed, until the defendant did the trespass, and exception was taken to it, that the plaintiff in his replication had not averred, that A. was alive at the time of trespass, and it was not allowed, for the subsequent words (by force of which the plaintiff was possessed until the defendant did the trespass) do amount unto so much, for the plaintiff could not be possessed by force of the said lease at will if A. were not alive. So here, Bohan could not be here seised by force of the said statute, if the seisin of the use which was raised by the bargain and sale had not continued until the coming of the said statute: as to the matter in law, Gawdy conceived that the averment in the perclose of the avowry is contrary to the matter of the avowry, for the creation of the rent set forth in the avowry proves, that the rent is not parcel of the manor, but a rent in gross, and then the general averment,

that the rent is parcel of the manor, without shewing how, against the special matter of the avowry, is not receivable. And also nothing can be by reputation parcel of a manor which in rei veritate cannot be parcel of a mannor, but a rent charge cannot be in rei veritate parcel of a manor, ergo, nor by reputation: Popham contrary; that the averment is not contrary to the matter of the avowry, for the matter disclosed in the avowry proves, that it is not rei veriate parcel of the manor, but it doth not exclude reputation, and the averment doth not extend ad veritatem facti, which is set forth in the avowry, but only to reputation, and so both stand together well enough: and that a rent charge may be parcel of a manor, see 22 E. 3. 13. 31. E. 3. 23. in the Lord Tiptofts case, where it is ruled, that title made to a rent charge as parcel of a manor is a good title, and the assize awarded upon it, and in our case the reputation is enforced by the sute at the Court, which was also reserved upon the said feoffment together with the said rent, so as the intent of the parties to the feoffment was, that this rent so reserved and accompanyed with the said **[15]** sute shall be esteemed a rent service, and so parcel of the manor; and as to the continuance of reputation it sufficeth, if at the time of the bargain and sale aforesaid, which was 26 H. 8. it was by many reputed parcel of the manor, and he cited the case of the Marquess of Winchester. The king gave to his ancestor the manor of Dale and all lands then antea reputed parcel of the said manor, and in a bill of intrusion against the said marquess he pleaded the grant with averment, that the land then antea reputed parcel manerii prædict. And because he did not shew certainly at what time the land was reputed parcel of the manor, judgment was given for the Queen; for it might be for any thing in his plea, that the said land was reputed parcel of the said manor before time of memory, which reputation would not serve: but such reputation ought to be within time of memory and understanding: he cited also the case of the Earl of Leicester. King Edward the sixth seised of the manor of Clibery, of which a wood was parcel, granted the said wood in fee, which afterwards escheated to the King for treason; Queen Mary granted the said wood to another in fee, who granted it to the now Queen, who granted the said manor & omnes boscos modo vel ante hac cognit. vel reputat. ut pars, membr. vel parcel. maner. prædict. to the Earl of Leicester, and it was resolved in the Exchequer, that by that grant the said wood did pass to the earl, and judgment was given against the queen, for it was part of the manor in the time of E. 6. at which time (ant' hac) without the word (unquam) shall be extended ad quoddamcunque tempus præteritum. and reputation needs not so ancient a pedigree for to establish it; for general acceptance will produce reputation: as the house of the Lord Treasurer now called Tibould was of late a private manor, but now hath a new name by which it is known, and that within these twenty years, which is not so long a time as we have alleged for our reputation, and would pass in a conveyance by such name; so none-such. But as to reputation, I conceive that reputation is not what this or what that man thinketh, but that which many men have said or thought, who have more reason to know it; & quænam est inter illos reputatio, there was a case ruled in the Exchequer 13 Eliz. in a bill of intrusion; the case was, that King Hen. 6. was seised of a manor, to which a neif was regardant, who purchased lands, which the King seised, and let by copy as parcel of the said manor, and so continued until the time of E. 6. who granted the same to Alice Hardwick, and all lands, tenements, reputed parcel of the said manor; and it was adjudged, that the said land so purchased by the said neif, and demised by copy, did pass by the said grant to Hardwick. And afterwards, the same term, the justices, without any solemn argument, shewed their opinions in the principal case, viz., that this rent did not pass by the bargain and sale made as above, by Anthony Wingfield, to Bohan father of the avowant; for here in the premisses of the avowry is not any matter set forth importing reputation, or by which it may appear that the rent in question was ever reputed parcel of the said manor, but rather to the contrary; and the bare averment of reputation in the conclusion of the avowry is not sufficient to induce reputation. But if the avowant had set forth in his avowry any special matter to induce the Court to conceive a reputation upon the matter of the avowry, as to shew that the bayliffs of the said manor had always received the said rent as parcel of said manor, and as bayliffs of the said manor had accounted for it, as parcel of the manor, and that the lessees of

the said manor had enjoyed the said rent as parcel of the said manor, the same had been good matter to induce a reputation, & to have incorporated the said rent with the said manor; and so judgment was given against the avowant; and **[16]** of such opinion (as was affirmed by Wray) was Anderson, chief Justice of the Common Pleas, and Manwood, chief Baron of the Exchequer.

1 Cro. 39. 1 Cro. 746. 747. Dy. 362 a.

Pasch. 26 Eliz. in the Kings Bench.

XIX. Cham and Dovers Case.

Ejectione firmæ. Custom ad pasturandum, non ad colendum. Dower discharged of a grant of Copyhold.

In an ejectione firmæ, the case was, that one Michel was seised of the manor of D. within which diverse parcels of land, part of the said manor, where customary tenements demised and demisable by copy, &c. according to the custom of the said manor for one, two or three lives, within which manor there was a custom, scil. that the lord of the manor, for the time being, might grant copy-hold estates for life in reversion; the lord granted such lands for life by copy in possession, took a wife, and granted the same copy-hold to a stranger in reversion for life, and died, the copy-holder in possession died, the land demised by copy is (inter alia) assigned to the wife for her dower, who had judgment to recover in a writ of dower, who entred and made a lease thereof to the defendant, who entred, against whom, the lessee of the copy-holder brought ejectione firmæ, and all this matter was found by verdict, and further found, that every copy-holder of the said manor, might lease his copy-hold for a year, ad pasturandum, sed non ad colendum, and that the lease made to the plaintiff was for a year, ad pasturandum. Popham Attorny General, of council with the defendant, took exception to the declaration, because the plaintiff had declared a lease at the common law, and the jury have found a lease by the custom, which cannot stand together: and such a verdict doth not maintain the declaration, as if the plaintiff had declared upon a lease for years of lands, and the jury found a devise for years, &c. but the exception was disallowed by the Court. As to the matter in law he argued, that the tenant in dower should hold the land discharged of the copy-hold for her life, and he put this case, if the lord of such a manor taketh a wife, a copy-holder for life dieth, the lord grants a rent-charge out of the customary land, and afterwards grants the said land by copy for life, & dieth, the wife shall hold the land discharged of the rent, but the copy-holder shall be charged, and he put a difference where the lord grants such copy-hold in possession, and where in reversion, for in the first case the wife shall hold charged, but contrary in the last: and he cited the case of one Slowman, who being lord of a manor (ut supra) by his will devised, that his executors should grant estates by copy, and died having a wife, the executors make estates accordingly, the wife in case of dower shall avoid them: Plowden contr. the lord of such a mannor is bound by recognisance, and afterwards a copy-holder for life of the said mannor dieth, the lord grants his copy-hold, de novo, the said new grantee shall hold his copy-hold discharged of the recognisance, which Gawdy Justice granted, and by Wray, if the lord of such a manor grants a copy-hold for three lives, & takes a wife, the three lives end, the lord enters and keeps the lands for a time, and afterwards grants them over again by copy, and dieth, the copy-holder shall hold the land discharged of the dower, and this is a clear case, for the copy-holder is in by the custom which is paramount the title of dower and the seisin of the husband; and by him in the case of the Earl of Northumberland, 17 Eliz. Dyer 344. that the grant of a copy-hold in reversion by the Earl of Northumberland, doth not make such an impediment as was intended in the condition there, for it is by the custom, and not by the act of the party; and afterwards, the same term judgment was given for the plaintiff, that he and his lessor should hold the lands discharged of the dower.

1. Cro. 469. Wells versus Partridge. Post 100. 2 Len. 109.

[17] PASCH. 26 ELIZ. IN THE KINGS BENCH.

XX. FRINGE AND LEWES CASE.

Debt. Uncore prist a good Plea.

Debt by Fringe against Lewes upon a bond who pleaded, that the condition was, that whereas the defendant was executor to one Morris Degle, that if the defendant should perform, observe, fulfil, and keep the will of the said Morris Degle in all points and articles according to the true intent and meaning thereof, that then, &c. and pleaded further, that the said Morris by the said will bequeathed to the poor of such a town ten pounds, to be distributed amongst them, and also to the church-wardens of the parish ten pounds, and to I. S. three pounds, and that he had distributed the said ten pounds to the poor, and that he had paid the ten pounds to the church-wardens, and as to three pounds, he said that he is and always was ready to pay the same to the said I. S. if he had demanded it, upon which there was a demurrer: And as to the ten pounds to be distributed amongst the poor, the same was holden good enough without shewing the names of the poor amongst whom the mony was distributed; so the pleading of the first payment to the church-wardens was sufficient without nameing of them, see 42 E. 3. brief, 539. scire facias out of a recovery against executors, and the writ was challenged, because it was scire facias executors, not naming their proper names; it was holden to be no exception, for executors are as a corporation known, in that they are executors; and as to the third part of the plea, scil. always ready and yet is, the plea is well enough, for this obligation (the condition of which being general to perform the will &c.) hath not altered the nature of the payment of the legacy, but the same remains payable in such manner as before upon request, and not at the peril of the defendant. See 22 H. 6. 57, 58. 11 E 4 10. 6 E 6. Br. Tender 60. And afterwards the same term, the Court was clear of opinion, and so delivered the law to the counsel on both sides; that in this case the legacies are to be paid upon request, and not at the peril of the executors in such manner as they were before the obligation, and afterwards judgment was given against the plaintiff.

Poph. 104.

PASCH. 26 ELIZ. IN THE KINGS BENCH.

XXI. SIR JOHN SMITH AND PEAZES CASE.

Covenant. Averment. Averment where superfluous.

Sir John Smith brought debt upon an obligation against Peaze, who pleaded, that the bond was upon condition to perform covenants contained in an indenture, and shewed what, and that he had performed them, the plaintiff assigned the breach of one covenant, that where the plaintiff had leased to the defendant for years, certain messuages by the same indenture, the defendant by the same indenture, did covenant to repair all the said messuages, alia quam quæ appunctuatæ forent divelli per script. dicti Johannis Smith, and shewed further, that the defendant had not repaired the said messuages to him demised as aforesaid, and averred that the said house in which the breach of the covenant is assigned, non fuit durante termino prædicto appunctuata divelli, and upon that matter of reparation they were at issue, and found for the plaintiff: it was moved in arrest of judgment, that the averment in the replication was not sufficient, for the lease was made in November to begin the Michael. and after it might be that the messuage, in the not repairing of which the breach of the covenant is assigned, was appointed to be pulled down, scil. divelli, before the term for years began, and then the defendant is not bound to repair it, and then the breach of the covenant is not well assigned, and so the aver-[18]-ment doth not answer the exception, and because this clause (alia quam) is in the body of the covenant, it ought to be satisfied by him who pleads it, scil. by him who assigns

the breach in the covenant, in which the exception is contained; as by the Lord Dyer in his argument, in the argument of Stowels case, reported by Plowden 376. Where a man pleaded the feoffment of cestuy que use, he ought to plead, that cestuy que use, at the time of the feoffment was of full age, sanæ memoriæ, &c. for that is within the purview, contr. upon the statute of 4 H. 7. in pleading of a fine, for that is in a clause by itself, which conceit of Plowden, the Lord Wray denyed to be law, for he said, he that pleads the feoffment of cestuy que use, or a fine according to the statute of 4 H. 7. shall not be driven to shew that the feoffor, or conusor at the time of the feoffment, or fine levyed was of full age, &c. but he who comes in by such fine, or feoffment shall shew the same for his own advantage. And at last after many motions it was resolved by all the justices, that the averment aforesaid was superfluous & ex abundanti, for it had been sufficient for the plaintiff to have assigned the breach of the covenant in the not repairing the messuage without any averment, de non appunctuando, and if the house in the not repairing of which the breach of covenant is assigned, was appointed to be pulled down, the same shall come in on the defendants part to whose advantage it trencheth, for such appointment doth discharge the covenant as to that: in the same plea, it was moved in stay of judgment that one Sharp, solicitor of the said Sir John in the said suit, had given eight shillings to the jurors, mean betwixt the charge and their verdict, and that matter was testified by the oaths of two men, upon which the Court examined the said Sharp, who upon his oath denied the matter, and also the foreman of the jury to whom the mony was supposed to be given, who upon his oath denied the same: and it was moved, if receipt of mony by any of the jurors should make the verdict void; and by Wray it shall not, for it is but a misdemeanor, which is punishable on the person of him who takes the mony: but Gawdy and Ayliff Justices, the verdict is void. See 24 E. 3. 24. 14 H. 7. 1. 20 H. 7. 30. And for that cause the judgment was reversed.

Post. 213.

PASCH. 26. ELIZ. INTR. TRIN. 25 ELIZ. ROT. 492. IN THE KINGS BENCH.

XXII. CORDALL AND GIBBONS CASE.

In an ejectione firmæ, upon not guilty pleaded the jury found the special matter, viz. that one Hierom Heydon was seised of two messuages, whereof the action is brought, and came to Cordall the plaintiff, and prayed him to lend him ten pounds; Cordall asked him, what assurance he would give him for the re-paymunt of it; he answered, that he would mortgage to him the said two messuages, whereupon Cordall lent him the money, and afterwards they both went to the said two houses, and being before the doors, of them, Heydon called, tenants at will of the houses, and said to them, Sirs, I have borrowed of this Cordall ten pounds upon these houses, and if I pay this mony at Michaelmas next, I must have my houses again, and if not, then I bargain and sell these houses to Cordall; and my will is, that you become his tenants, after which Heydon put the said Cordall into the houses, and seeing him in the houses, he put in the keys of the said Cordall, by the windows, &c. And it was adjudged by the whole Court, that this conveyance, by word of mouth, was good enough to pass the estate, ut supra, and the words of bargain and sale in this case, are as strong, as of gift and grant, see 38 E. 3. 11. 43 E. 3. 11. 27 E. 3. 62. 28 E. 3. 11.

[19] PASCH. 26 ELIZ. INTR. MICH. 25 & 26 ELIZ. ROT. 72.
IN THE KINGS BENCH.

XXIII. RICHARDS AND BARTLETS CASE.

Assumpsit.

Dorothy Richards, executrix of A. her former husband, brought an action upon the case upon a promise against Humfrey Bartlet, and declared, that in considera-

tion of two weights of corn delivered by the testator to the defendant, he did promise to pay to the plaintiff ten pounds, to which the defendant said, that after the assumpsit the plaintiff in consideration, that the said two weights were drowned by tempest, and in consideration that the defendant would pay to the plaintiff for every twenty shillings of the said ten pounds three shillings four pence, scil. in toto thirty three shillings four pence, did discharge the said defendant of the said promise, and averred further, that he hath been always ready to pay the said sum newly agreed, upon which there was a demurrer. And the opinion of the whole Court was clearly with the plaintiff, first because that here his not any consideration set forth in the bar, by reason whereof the plaintiff should discharge the defendant of this matter, for no profit but damage comes to the plaintiff by this new agreement, and the defendant is not put to any labour or charge by it, therefore here is not any agreement to bind the plaintiff, see 19 H. 6. Accord, 1. 9 E. 4. 13. 12 H. 7. 15. See also Onlies case, 19 Eliz. Dyer, then admitting, that the agreement had been sufficient, yet because, it is not executed, it is not any bar: and afterwards judgment was given for the plaintiff.

PASCH. 26 ELIZ. IN THE KINGS BENCH.

XXIV. LENDALL AND PINFOLDS CASE.

Trespass. Bar.

In trespass for breaking of his close, by Lendal against Pinfold, the case was, that two brake the close and entred, and did the trespass, the owner of the land brought an action of trespass against one of them, and had judgment, and execution accordingly, and afterwards brought trespass against the other, and declared upon the same trespass: And by Ayliff Justice, it is a good bar, and he likened it to the case of one Cobham, who brought an action of trespass of assault and battery, and recovered and had execution, and afterwards brought an appeal of mayhem against the same person upon the same matter, the said recovery and execution is a good bar, &c. so here as to the breaking of the close, but not as to the entry: But by Wray, it is a good bar for the whole, and he likened it to the case of Littleton, Pl. 376. A release to one of the trespassers, shall discharge both. Gawdy agreed in opinion with Ayliff.

1 Cro. 667. 2 Cro. 73. 1 Cro. 30, 31.

PASCH. 26 ELIZ. IN THE EXCHEQUER.

XXV. KEMPE, AND HOLLINGBROOKS CASE.

Tithes. Tithes in London. Misnosmer.

In an ejectione firmæ for tythes, the case was upon the statute of 18. Eliz. cap. 6. by which it is enacted, that no masters, and fellows of any colledge in Cambridge, or Oxford shall make any lease for life or years of any farm, or of any their lands, tenements, or other hereditaments to the which any tythes, arable land, meadow, or pasture doth, or shall appertain, unless the third part at least of the accient rent be reserved, and payed in corn for the said colledges, **[20]** &c. otherwise every lease without such reservation shall be void, &c. If now, the said statute shall be construed to extend to leases of such extraordinary pecuniary tithes which are not natural or paid in kind. It was argued, that the said statute is to be intended of tithes in kind, and also of such things to be demised which render corn, hay, &c. But the tithes in London which is the thing demised in our case, doth not render any such thing, but only mony according to the decree made for payment of tithes in London in the time of E. 6. And although the words of the statute be (other hereditaments) to the which any tithes, &c. yet the said statute doth extend to

tithes in gross, but they ought to be such tithes which are of such nature as tithe-corn, and tith-hay: and Manwood chief Baron held clearly, that the lease of these tithes is good enough, notwithstanding the defect by the special reservation which is limited and appointed by the statute, and so by him, a lease of a house, rent, mill, ferry, &c. are out of the said statute: and as to the tithes, notwithstanding the words of the statute are general, any tithes; yet he conceived, the statute ought to be intended of tithes of common right, and not of such customary tithes as those of London are, and therefore, if all the parishoners prescribe in modo decimandi, scil. to pay a certain sum of mony for all manner of tithes, upon demise of such a rectory, such special reservation is not necessary, for these are tithes against common right, and no tithes are within the purview of the said statute but those which are annual, and therefore a lease of tithe-wood is out of the meaning of this statute, for non renovantur in annum; and he said that upon a lease of the tithes of chery trees, a rent ought to be reserved according to the statute, and the farmer may bring his cheries to the market, and buy corn. Shute Justice contrary, for the words of the statute are general. And note, that this lease was of the rectory of Saint Lawrence in the city of London. There was another matter moved in this case, because the lease whereof the action is brought, was made by the name of master or guardian, and the fellows, whereas the true name of their colledge is master and fellows. And it was argued by Atkinson, that the same is not such a misnosmer which makes the lease void, for (sive custos) are words of surplusage, v. 7 H. 6. 13. And also the case of the Cooks, 20 Eliz. Plow. 531. The corporation was by the name of masters or governors and comonalty, mysterii coquorum, &c. And they made a conveyance by the name of masters or governors, and comunalty, artis sive mysterii, &c. the same is no such misnosmer as shall make void the conveyance, for art and mistery are both of one sense.

Pasch. 26 Eliz. In the Kings Bench.

XXVI. Harvey and Harveys Case.

Consultation.

Clare Harvey, one of the daughters of Sir James Harvy alderman of London libelled in the Spiritual Court against Sebastin Harvy, son and executor of the said Sir James, for a legacy bequeathed to her by her father; Sebastian did not appear, for which he was excommunicated and taken by a writ of excommunicat. capiendo, and imprisoned; and afterwards he came into this Court, and surmised to the Court, that the said Sir James in his life had given to the said Sebastian all his goods and chattels, and was also bound unto the said Sebastian in a statute-staple of two thousand pounds, whereupon he had prohibition, and now the plaintiffs counsel prayed a consultation, quatenus non agitur ad validitatem facti, aut statuti. And Egerton solicitor of counsel with the plaintiff cited a judgment given in the like case betwixt Lodge and Luddington, where such a special consultation was granted: but Wray put a difference betwixt the said case and the case at bar, for here in this **[21]** case is a gift by the testator himself, but in the case cited, the gift was by the executor; and also here is a statute of two thousand pounds, in which case the obligations which could not pass by the deed, shall be subject to the said statute.

Trin. 26 Eliz. In the Exchequer.

XXVII. The Duke of Northumberlands Case.

Bargain and sale.

The late Duke of Northumberland seised of five messuages in the parish of St. Sepulchres London, in the tenure of W. Gardiner, by deed intented and enrolled for

money bargained and sold to I. L. all his tenements situate in the parish of St. Andrews in Holborn in the tenure of W. Gardiner, to have to the said I. L. for life, the remainder to K. his daughter in fee. Atkinson, the bargain and sale is void by reason of the misnosmer of the parish, notwithstanding the truth of the tenure, for by the grant and bargain and sale of all his tenements in the parish of St. Andrews nothing passeth, and the truth of the tenure subsequent shall not help it: and by Manwood chief Baron, the sale is utterly void, for the falsity doth preceed the truth and certainty: and it was argued, that I. L. entring by colour of the same bargain and sale is a disseisor; as the case is betwixt Croft and Howel, 20. Eliz. Com. 537. Yet if he was but tenant at will when he made the lease for years, the same was a disseisin to the said duke; and then the duke being disseised, he is attainted of treason, 10. Mariæ. And now we are to see what things accrue to the Queen by the said attainder: and as to that it was said, that at the common law a right of entry should escheat, but not without office found thereof, no more than lands in possession: and by the statute of 26 H. 8. it is enacted, that every person attainted of high treason, shall forfeit all his lands and tenements which he had of any estate of inheritance, by which statute a bishop, abbot or tenant in tayl in such case shall forfeit even without office: but in the statute of 33 H. 8. there is a saving to every other person all such right, possession, so as in that case by that statute the King shall not be in possession without office, but shall have a right, but cannot enter before office or after. And he is to have sci. facias against him, who hath the possession, and he shall make his defence as well as he can; and the words of the said statute, that the King shall be in actual possession, shall not be construed to extend to an actual and absolute possession, but such a possession, only which he had at the common law after office found, so as the statute doth not give to the King a larger possession but an easier, without the circumstance of an office: and of that opinion was Manwood chief Baron, and Shute second Baron: and then it was moved further by Cook, because that the Queen by the attainder hath but a right, and the Queen makes the grant of the messuages themselves, the same grant is void. And he granted that the Queen might grant a real action, and a right of entry; but such a grant ought to be conceived in special words, as to say, that the Duke of Northumberland was seised of five messuages, and by such a one disseised, and after the duke was attainted, and so granted; for the Queen may grant such a right by reason of her prerogative, and therefore the same ought to be granted by special words, as in the case of Mynes in the Commentaries, and according to that was the opinion of the justices in Cromers case, 8. Eliz. which case see reported by Coke in the case of the Marquess of Winchester.

3 Co. 9.

[22] TRIN. 26 ELIZ. IN THE KINGS BENCH.

XXVIII. DAYREL AND THINNS CASE.

Error. Certiorare. Diminution.

Edward Dayrel brought a writ of error against Sir John Thinn upon a judgment had by the defendant against the plaintiffs father of the manor of Mexden: And error was assigned for want of warrant of attorney. And the plaintiff prayed one certiorare to the chief justice of the Common Pleas, and another certiorare to the custos brevium, both which returned, non inveni aliquod warr. and now Sir John Thinn being dead, the plaintiff brought another writ of error by journeys accounts against John Thinn son and heir of the said Sir John Thinn, who appeared and alledged diminution, in hoc, that the warrant of attorney is not certified, and prayed another certiorare unto the chief justice of the Bench, and another to the custos brevium, and it was argued by Clark, that in this case certiorare ought not to be granted, for a certificate is in the nature of a tryal, which shall not be crossed in the same action: but the parties to the action, and their heirs shall be bound by it, especially when the matter is certified by one who is judge of the record, and that

certiorare sued at the prayer of the plaintiff shall be as peremptory, as if it had been sued at the prayer of the defendant, for the plaintiff may alledge diminution as well as the defendant. 7 E. 4. 25. by Yelverton. And a man cannot have certiorare of a thing which is contrary to the record, which is certified, 11 E 4. 10 by Laicon: so diminution cannot be alledged in this warrant of attorney, because it hath been certified here, that no warrant of attorney is to be found, &c. 9 E. 4. 32. by Billing; Egerton sollicitor, contrary: for the certiorare obtained at the sute of the plaintiff, shall not prevent the defendant. And the course of proceeding in a writ of error, when error is assigned out of the record, and not of a thing within the record, is such: after error assigned, before that a sci. fac. issueth against the defendant ad audiendum errores, the plaintiff may pray a certiorare to the custos brevium, in whose hands such collateral things remain, for the Plea Roll doth remain in the custody of the chief justice, but the original writs, essoins and warrants of attorney remain in the hands of the custos brevium; and such a certiorare the Court may grant to the plaintiff, without making the defendant privy to it. And notwithstanding that the defendant hath pleaded, in nullo est erratum, and so hath affirmed the record to be such as is certified, yet the Court ex officio, shall award a certiorare to ascertain themselves if there be any such warrant of attorney or not: which see 9 E. 4. 32, by Billing, and therefore the certiorare being awarded ex officio, shall not prejudice the defendant; and to this purpose he cited the case betwixt the Lord Norris and Braybrook in a writ of error, where the Lord Norris being plaintiff prayed a certiorare to the custos brevium, to certifie an original writ, upon which a common recovery was had, and had it, and the custos brevium certified, that there was no original; and afterwards the defendant prayed another certiorare, and had it: and so in our case here especially, because the defendant was not party to the record, nor hath day in Court, at the time that the said certiorare was granted, for the defendant is not party before the sci. facias ad audiendum errores be issued forth against him: and therefore he comes timely enough to pray a certiorare. See 28 H. 6. 10. and 11. And I grant that the certificate upon a certiorare which was awarded after a sci. fac. ad audiendum errores is peremptory and final, but contrary where it is granted before the awarding of such scire facias: See Book of Entries 271. The plaintiff assigneth error in the original writ, & petit br. domini regis custodibus brevium, &c. ad breve illud origin. certificand. and up-**[23]**-on the return of the certiorare, the plaintiff prayed a scire facias ad audiendum errores. And see there 293, where it appeareth, fol. 272. that certiorare issued at the suit of the defendant in error after he had alledged diminution: and that is after scire facias ad audiendum errores returned; and see certiorare before sci. facias awarded 271, &c. and this certiorare is only ex officio, and awarded only to enform the Court: and in respect of the certiorare the chief justice of the Common Pleas, to whom the certiorare is directed, is but a minister, and not a judge. And as to the case of 9 E. 4. 32. before cited, he could not have a certiorare, for he could not alledge diminution, because he had pleaded in nullo est erratum, by which plea he had confessed the record which is certified to be a full and perfect record, and fully certified, and against that matter he shall not alledge diminution: And in our case there is not any such contrariety as hath been objected, for the return of the certiorare is, non inveni aliquod warrant. not precisely, quod non habetur aliquod warrantum; and therefore if the Court now at the prayer of the defendant grant another certiorare, upon which is a retorn (quod habetur warr. attornat.) the same is not contrary to the return of the first certificate, but they may both stand together, for upon further search such warrant of attorney may be found: so upon the matter the Court shall not be enveigled by any such contrariety, for (non inveni aliquod warrant.) returned upon the first certiorare, and (inveni quoddam warr.) upon the second certiorare are not meer contrary; and it seemed to Wray chief Justice, that it would be hard to grant a new certiorare in this case, but if any variance could be alledged it should be otherwise, as it was adjudged in the case of one Lassell, who certified no warrant of attorney, and afterwards it was moved for another certiorare, as it is here, and because the original was inter Johannem Lassels ar. executor. testi. &c. where he was not named executor in the first certiorare; upon that matter a new certiorare was granted.

3 Cro. 91. 2 Cro. 13. 597. 396. 5 Co. Pag. 36. b. 446.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

XXIX. WITHY AND SAUNDERS CASE.

Tithes will not pass by grant without deed.

Withy libelled against Saunders in the Spiritual Court, and now came Saunders and surmised, that Withy had libelled against him for tithe-grass, and shewed, that all the claim that Withy had to the said tithes was by a grant without deed, and by the law such things would not pass without deed; and also that the Spiritual Court would not allow of this plea, and therefore prayed a prohibition: and the Court upon the first motion conceived a prohibition should pass, for if the grant be without deed, nothing passed, and then hath not Withy cause to claim these tithes against the said Saunders. And notwithstanding that tithes are quodam modo spiritual things, and so demandable in a Court of that nature, yet now in divers respects they are become a lay-fee, and lay-things, for a writ of assise of mortdauncester, and an assise of novel disseisin lyes of them, and a fine may be levyed of them. But it hath been doubted, whether tithes be devisable by will: but at another day the matter was moved, and the Court was clear of opinion, that a consultation should be awarded, for whether Withy hath right or not right to these tithes, Saunders of common right ought to pay his tithes, and he ought to sever them from the nine parts, and whosoever takes them, whether he hath right to them or no right, Saunders is discharged: but Saunders may prescribe in modo decimandi, without making mention of any severance, and may surmise, that the tithes do belong to I. S. with whom he hath compounded to pay such a sum for all tithes and afterwards a consultation was awarded.

[24] TRIN. 26 ELIZ. IN THE KINGS BENCH.

XXX. STACY AND CARTERS CASE.

Averment. Bar.

Stacy brought an action of trespass for breaking his close against Walter Carter, and declared of a trespass in Somers-Land in Tunbridge; the defendant pleaded, that heretofore he himself brought an assise of novel disseisin against the now plaintiff, and supposed himself to be disseised of his free-hold in Lee juxta Tunbridge, and the land where the trespass supposed to be done was put in view to the recognitors of the said assise, and further averred, that the land where, &c. and the land then put in view is one and the same, &c. upon which there was a demurrer: exception was taken to the form of the demurrer, because in the perclose and conclusion of the demurrer these words are omitted, Et hoc paratus est verificare. But as to that, it was said by the Court, that the demurrer was well enough, with or without such averment in the conclusion of it, which see oftentimes in the Commentaries, &c. and in the Book of Entries 146. the greater part of the demurrers have not any such conclusion. Another exception was taken to the bar, because the defendant pleads, that heretofore Walter Carter had brought an assise against the now plaintiff, &c. and that the land put in view to the recognitors of the assise per præfatum Warrhamum Carter, &c. and the land where, &c. is all one, &c., here is Warrhamum for Walterum, and notwithstanding that it was after demurrer, and not after verdict, it was adjudged amendable; and as to the matter of the bar, it was said by the defendants council, that recovery of lands in one town, by præcipe quod reddat, is not a bar for lands in another town; but where the recovery is by assise it is otherwise, for there the plaint is general de lib. teñto, and the plaintiff shall recover per visum juratorum, and the view is the warrant of the judgment and execution. And therefore if a recovery in an assise be pleaded in bar, not comprised, is not any plea against it, as in the case of recoveries upon a præcipe quod reddat;

but not put in view, and so not comprised, &c. which proves that the record doth not guid the recovery, but the view of the jurors. See 26 E. 3. 2. Assise brought of lands in D. the tenant saith, that he holdeth the said lands put in view joyntly with A. not named in the writ, &c. and sheweth the deed of joynt-tenancy, which speaks of tenements in B. and the plea holdeth good, because he alledgeth the joynt-tenancy and the lands put in view: see 24 E. 3. It was said on the plaintiffs side, that recovery in Lee juxta Tunbridge could not extend to lands in Tunbridge, no more than a recovery of lands in one county can extend to lands in another county: see 23 E. 3. 16. Assise of novel disseisin brought of lands in N. the defendant pleads recovery in assise, &c. brought before by him against the now plaintiff of lands in H. and the same lands put then and now in view, and adjudged no bar. See also 16 E. 3. 16. in an assise of tenements in W. the tenant pleads a recovery of the same lands against one A. by assise brought of tenements in C. which was found by the assise, and that C. is a hamlet of W. and the plaintiff notwithstanding that recovery so pleaded had judgment, for a recovery of lands in one town shall not be a bar in an assise of lands in another town. See Br. tit. Judgment 66. 10 E. 3. And the whole Court was clear of opinion, that the plea in bar was not good, for in the assise which is pleaded in bar in the principal case, the tenant there, who is now plaintiff in this action of trespass, pleaded nul tort nul disseisin, which is no plea, as to the free-hold in Lee juxta Tunbridge, and therefore it cannot be like to the case which hath been put of 26 E. 3. for there the tenant pleaded, that he held **[25]** the said lands put in view joyntly, for there he agreeth with the plaintiff in the lands demanded, the which lands are put in view; but if in the case at bar the defendant being plaintiff in the assise, the now plaintiff being then tenant, had pleaded to the land put in view in bar, and the plaintiff in the assise had recovered, now in this action of trespass the plaintiff in the assise being defendant in the action of trespass, might well plead this recovery in bar, for by his plea in the assise he hath tyed himself to the view, and to the land put in view, but it is not so in the case at bar, where the tenant in the assise pleads, nul tort, nul disseisin, for there he doth not plead expressly to the land put in view, but to the supposal of the plaintiff, sc. de libero tenemento in Lee juxta Tunbridge: afterwards Wray, with the assent of the other justices awarded, that the plaintiff should recover his damages: see by Wray, 44 E. 3. 45. in assise of tenements in B. the plaintiff pleads, that he himself brought an assise of the same tenements, and his plaint was of tenements in E. and the same tenements put in view, and recovered, and holden a good plea, because the tenant hath said, that the same tenements were put in view, and that took by assise, upon which the plaintiff said, not put in view, and so not comprised.

TRIN. 26. ELIZ. IN THE KINGS BENCH.

XXXI. BENICOMBE AND PARKERS CASE.

Feoffments.

In an action of trespass the jury found this special matter, that the grandfather of the plaintiff was seised, and made a feoffment to the use of himself for life, the remainder to the use of John father of the plaintiff in tail, the grandfather died, the father entred, and by indenture by words of bargain and sale, without any words of dedi & concessi, conveyed the lands to the use of A. in fee, and in the same indenture was a letter of attorney to make livery, which was made accordingly; and the said A. by the said indenture covenanted, that if the said John should pay before such a day to the said A. forty shillings, that then the said A. and his heirs would stand seised, &c. to the use of the said John and his heirs; and if the said John did not pay, &c. then if the said A. did not pay to the said John within four days after ten pounds, that then the said A. and his heirs from thenceforth shall be seised to the use of the said John and his heirs, &c. and the said John covenanted further, by the said indenture, to make such further assurance as the council of the said John should advise. Each party failed of payment. John levied a fine to A. without any consideration;

it was adjudged upon this matter a good feoffment well executed by the livery, notwithstanding that the words of the conveyance are only by bargain and sale; and that the covenant to be seised to the new uses upon payment, and not payment being in one and the same deed, should raise the use upon the contingency, according to the limitation of it; and judgment was given for the plaintiff accordingly.

Hob. 151. Dyer 361. a. More 194. Post. 195, 196, 197. More 35. b.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

XXXII. BEDOWS CASE.

In an action of debt upon a bill sealed against one Bedow; he demanded Dyer of the bill, which was, Memorandum that I John Bedow have agreed to pay to R. S. the plaintiff twenty pounds, and thereupon there was a demurrer, first, that the deed wanted the words In cujus rei testimonium, &c. but notwithstanding that the Court held the deed good, and said so it was lately adjudged: another matter was **[26]** because the words of the contract are in the preter tense, I have agreed; but notwithstanding that exception the plaintiff had judgment to recover, as by Wray, these words dedi & concessi, according to the grammatical sence imply a gift precedent, but yet they are used as words of a present conveyance, & judgment was given for the plaintiff.

PASCH. 27. ELIZ. IN THE COMMON PLEAS.

XXXIII. MARSH AND SMITHS CASE.

Grants. Mannor. Mannor, what it is. Reputation. Grants of the King. Court Baron.

George Marsh brought a replevin against Smith and Paget, who make conusans as baylies to Ralph Bard, and upon the pleading the case was, that Sir Francis Askew, was seised of the mannor of Castord in his demesne, as of fee, which mannor did extend unto Daston, North-kelsey, South-kelsey D. and C. and had demesnes and services, parcel of the said mannor, in each of the said towns, and so seised, granted totum manerium suum de North-kelsey in North-kelsey, to the said Bard and his heirs, and granted further, all his lands tenements, and hereditaments, in North-kelsey; and to that grant, the tenants in North-kelsey did attorn; and the land in which the said distress was taken is in North-kelsey; the only question in the case was, if, by this grant to Ralph Bard, a mannor passed, or not: and the case was argued by the justices; and Periam Justice argued, that upon this grant no mannor passed, for before the grant, there was no mannor of North-kelsey, or in North-kelsey, therefore no mannor can pass, but the lands and services in North-kelsey shall pass as in gross, for they were not known by a mannor, but for parcel of a mannor: and a mannor is a thing which cannot be so easily created, for it is an hereditament which doth consist of many real things, and incorporated together before time of memory; common reputation cannot be intended of an opinion conceived within three or four years, but of long time; and appendancy cannot be made presently, but by a long tract of time: as an advowson in gross cannot be made by an act appendant, and the Queen herself by her letters patents cannot make a mannor at this day, à multo fortiori a subject cannot, and the Queen cannot by her letters patents without an act of parliament annex a mannor to the duchy of Lancaster, which see 1 Ma. Dyer 95. And where it is usual, that the Queen doth grant lands, tenendum de manerio suo de East Greenwich in communi soccagio, if upon the death of such a grantee without heir, the said land doth revert unto the Queen in point of escheat, the said land shall not be parcel of the said mannor, for the land was not parcel of the mannor in truth, but in reputation: and he cited a case, that the Lord Sturton was seised of the mannor of Quincamore, and was also seised of the mannor of Charleton which was holden of the said mannor

of Quincamore: the Lord Sturton was attainted of felony; and afterwards Queen Mary gave the said mannor of Quincamore to Sir Walter Mildmay cum omnibus suis juribus & parcellis, it was adjudged that the mannor of Charleton did pass, for it is now become parcel of the mannor of Quincamore; and I grant, that things which go with the land shall pass well enough: as if the Queen grant to three coparceners of three mannors, the liberty of warren in all the said three mannors, they afterwards make petition so as each coparcener hath a mannor, and the one of them grants her mannor, the grantee shall have warren: but if the Queen grant a leet (ut supra) and the coparceners make partition, and each of them hath a mannor, she shall not have also a leet, but the leet which was granted doth remain in common, and there shall not be there, upon such partition, several leets: and also I grant that in the case of two coparceners of a mannor, if to each of them upon partition be al-[27]-lotted demeans and services, each of them hath a mannor, for they were compellable to make partition by the common law being in by descent, see 26 H. 8. 4. 9 E. 4. 5. contrary of joynt-tenants, for they are in by purchase, and were not compellable by the common law to make partition, and therefore upon partition betwixt them a rent cannot be reserved for the equality of the partition: and in every manor a court is requisite, for a court baron is incident to a manor, but a court cannot at this day be founded or erected, but it ought to be of long time: and in our case, no court hath ever been holden in North-kelsey; and if I be seised of the manor of B. which extends into C. and B. and I grant my manor of B. in D. now a manor passeth, and both extend into D. and the residue which is in C. shall remain in me in gross, v. 9 E. 4. 17. Catesby; and if I be seised of a manor which doth consist of services, and of twenty free-holders, and one hundred acres of demesnes, and I grant the services of my twenty free-holders, and forty or twenty acres of the said one hundred acres, a manor shall pass, although it was not granted by the name of a manor; but if I grant the services of three, four, or five of my free-holders, and forty or twenty of the said one hundred acres, upon such a grant no manor shall pass: Windham Justice contrary, We are not here to speak of the creation of a manor, that is a forraign matter, but we are here to consider upon the division, and apportionment of a manor. They that have argued in this case at the Bar, have stood much upon the words of the conveyance, manerium suum de North-kelsey, and that Sir Fr. Askew at the time of that assurance, had not any manor of North-kelsey, or in North-kelsey, but that is not any reason, for if cestuy que use (mean between the statute of 1 E. 3. & 27 H. 8.) will make a feoffment of the manor which was in use, by these words, manerium suum, the same had been good, and yet it is not manerium suum, but the manor of the feoffees, but it may be said suum, by receiving of the profits according to the trust and confidence reposed in the feoffees; so in our case, in as much as Sir Fr. Askew had before this grant as well demesnes as services in North-kelsey, it may collaterally be said a manor there, and notwithstanding that tempore concessionis (proprie loquendo) no manor was in North-kelsey, yet now upon operation of the law, upon this grant a new manor shall rise; for in divers cases where a thing which was not in esse before, upon a grant may rise; as if I grant unto you out of my land a rent de novo; and also a thing which was not in esse before, may upon a grant take upon it a new nature; as if I. seised of a great wood, grant to you estovers out of it, they were not before in me but as woods and trees, now by this grant they are become estovers in the grantee, so as they are in the grantee in another nature, than they were in me: so in our case, although North-kelsey was not a manor in Sir Fr. Askew, yet now upon the grant it is a manor in bard, 9 E. 4. 17. And as to the matter which hath been objected, because a court cannot now begin, the same is not any reason, for the court baron is incident to the manor, and also to every part of the manor, and transitory through the whole manor, and if Sir Fr. Askew had sold all the demesnes of the manor in Castord, where the court baron for the said manor had always been held and not else-where, yet such a court might be holden in any part of the demeans in any other of the said towns: the Lord Anderson, to the same purpose, it hath been argued of the other side, that the manor doth not pass, because the grant is in these words, manerium de North-kelsey, in North-kelsey, I conceive that these words, (de North-kelsey) are void, as matter of surplusage, and the grant shall be construed as if the words had been

manerium suum in North-kelsey: and a manor is such a thing, as may be determined, divided, and suspended: as if the lord of a manor leaseth for years all the demeans of the manor, the manor is suspended du-[28]-ring the term for years, as lately it hath been adjudged. And a warranty may be divided, as if a feoffment in fee be made to two with warranty, and the one of them releaseth the warranty: vide L. 5. E. 4. 103. A. seised of a manor which extendeth in four towns, B. C. D. and E. and he gives his manor in B. C. and D. by this gift the manor and all that is in the said four towns passeth. And he cited also a case 21 E. 4. 3. The lord of a manor erected a chapel within his said manor as a chapel of ease, &c. and afterwards it is a parish-church, now it is become presentable; an advowson appendant, as the soil upon the which the church is built is parcel of the manor. See 32 H. 6. 9. One manor may be parcel of another manor, as A. holdeth of B. twenty acres of land, as of his manor of C. which manor B. holdeth of D. as of his manor of E. B. dieth without heir, so as his manor of C. is escheated unto D. now the twenty acres are holden of the manor of C. as they were before, and the manor of C. is by the escheat become parcel of the manor of E. and by lease of the manor of E. it shall pass. And I do not know any difference between the case of parceners, and the case of Joynt-tenants, for now they are both equally compellable to make partition: and he cited the case of one estopp. lately adjudged, viz. the Queen was seised of the rectory of D. which extended into the counties of Lincoln and York, and the Queen granted her rectory of D. in Lincoln, these are several grants, and now upon the matter they are become several rectories. And as to that which hath been objected concerning a court baron which ought to belong to this new manor, and that such a court cannot now at this day be erected, and therefore here cannot be a manor; here needs not the erection of any new court, but forasmuch as the court baron before this grant might be by law holden in any place within the manor: therefore every part of the demeans of the manor is capable of a court to be holden there. As where one is seised of a manor to which an advowson is appendant, now is the advowson appendant, not only to the said manor, but to every part of it; for if he alien an acre, parcel of the manor with the advowson, the advowson is now appendant to the said acre: see 43 E. 3. 26. So in the case at Bar, because this liberty and franchise of a manor is throughout the whole manor, and in every part of the services and demesnes upon this grant of the services and demesnes in North-kelsey, and of his manor in North-kelsey, a manor passeth; which Windham also granted and agreed unto. Note at this time there were but three judges in this Court: and afterwards judgment was given for the defendant.

1 Cro. 38. 39. 2 Len. 41, 42. 1 Inst. 122. a. 32 H. 6. 11. Post. 32.

PASCH. 27 ELIZ. IN THE KINGS BENCH, ROT. 584.

XXXIV. ALINGTON AND BALES CASE.

Arbitrament.

Alington and others, executors of Sir W. Cordel late Master of the Rols, brought an action of debt against Bales: the case was this, one Bream being seised of certain lands by indenture, bargained and sold the same to one Platt by these words (give, grant, bargain, sell) and by the said indenture covenanted with Platt, that the said Platt and his heirs should quietly enjoy the said lands without interruption of any person or persons: and afterwards certain controversies rising betwixt them concerning the said lands, the said Bream and Platt submitted themselves to the award and arbitrament of Sir W. Cordel, to whom they were bounden severally for the performance of such award, the which Sir W. amongst other things awarded, that the said Platt and his heirs should enjoy quietly the said lands, in tam amplo modo & forma, as the said land is conveyed and assured by the coveyance and assurance aforesaid: and the truth was, that the said Bream at the time [29] of the said assurance was bounden in a recognizance of six hundred pounds to one More, 15 Eliz. and afterwards More 16 Eliz. sued a sci. fac. upon the said recognizance; and 18 Eliz. the bargain and sale aforesaid was made; and afterwards 19 Eliz. More sued forth execution by

elegit, and the moyety of the said land assured to Platt was delivered in execution to More. And if upon the whole matter the arbitrament was broken was the question. It was argued by Godfrey, that the plaintiff ought to be barred; and first, he conceived that these words in the indenture (give and grant) did not help the action, for the lands passed with a charge, and the general words dedi and concessi, do not extend to this collateral charge, but to the direct right of the land only; but if a stranger had put out the bargainee, there upon such general words, an action would lie, but as the case is, they do not give any cause of action, for the recognizance was a thing in charge at the time of the assurance: and yet see 31 E. 3. Br. Warr. Chartæ, 33. A. enfeoffeth B. with warranty, who brings a Warrantia Chartæ, and recovers pro loco & tempore, and afterwards a stranger doth recover against him a rent charge out of the said land, and it was holden, that upon the matter B. should have execution: the special words of the arbitrament, upon which the action is brought, are, that the said Platt and his heirs should enjoy the said lands in tam amplo modo & forma, as it was assured and conveyed to the said Platt; ergo, not in more ample manner; and the said land was conveyed to Platt, chargeable to the said recognizance, therefore if Platt enjoy it charged, there is no cause of action: and as to the covenant in the indenture, that Platt and his heirs should enjoy quietly the said lands without interruption of any person, the same is a collateral surety; and the words of the award are, that Platt shall enjoy it in tam amplo modo & forma, as it is conveyed and assured by the assurance aforesaid without interruption, these are not words of assurance, for the assurance doth consist in the legal words of passing the estate: scil. bargain, sale, dedi, concessi, and in the limitation of the estate, and not in the words of the convenant: and therefore it hath been adjudged, that if I. be bounden to A. in an obligation, to assure to him the mannor of D. &c. if A. tender to me an indenture of bargain and sale, in which are many covenants, I am not bound upon the peril of my bond to seal and deliver it. Also here doth not appear any interruption against the covenant in the Indenture, for here is not any lawful execution, for it appeareth here, that More hath sued execution by elegit 4 years after the judgment in the scire facias, in which case he shall be put to a new scire facias, for the sheriff in this case ought to have returned, that the conusor after the recognizance had enfeoffed divers persons, and shewed who, and upon that matter returned, the conusee should have a sci. facias against the feoffees, vide F. N. B. 266. And the Court was clear of opinion against the plaintiff.

1 Cro. 660, 661. 1 Hob. 35. Mor. 175. 3 Len. 43. Post. 93. Post. 179, 279. 1 Inst. 366. a. b. 388. Dy. 42. 1 Cro. 660, 661. Owen Rep. 65. 2 Cro. 571. 1 Roll. 425.

TRIN. 27 ELIZ. IN THE KINGS BENCH.

XXXV. FLOUD AND SIR JOHN PERROTTS CASE.

Judgments in the Kings Courts not to be defeated by particular custom of places.

Floud recovered against Sir John Perrot, in an action upon the case upon a promise, eighty six pounds, against which Floud and Barlow affirmed a plaint of debt in London, and attached the said moeny in the hands of the said Sir John, and had execution according to the custom of London. And now the said Floud sued a scire facias against the said Sir John, who appeared, and pleaded the said execution by attachment; upon which Floud the plaintiff did demur in law: and it was adjudged no plea, for a duty which accrueth by matter of record cannot be attached by the custom of London. And notwithstanding that the custom of London be layed generally in aliquo debito, and damages recovered are quoddam debitum, as it was urged by the Coun-[30]-cil of the defendant: Yet the law is clear, that judgments given in the Courts of the King ought not, nor cannot by such particular customs be defeated and avoided, as it was lately adjudged in a western case, damages were recovered, the sheriff by virtue of a fieri facias levyed the money, which one to whom the plaintiff was endebted, did attach by the custom, in the hands of the sheriff; but

it was adjudged the attachment was not good, for the custom of attachment cannot reach upon a thing of so high a nature as a record is; the same law of debt upon a recognizance and statute, &c. and it was affirmed by Wray chief Justice, that upon great deliberation it was agreed, by Bromley Lord Chancellor himself, the Lord Anderson, Mead and Periam Justices, that where a merchant, having in an action recovered certain damages, became bankrupt, upon which issued an commission upon the statute of 13 Eliz. of Bankrupts, that such commissioners could not entermeddle with such damages, to dispose of them to the creditors, according to the said statute: But now see the statute of 1 Jacobi. The commissioners have power to dispose of such debts, &c.

1 Cro. 63. Post. 264. 3 Len. 240.

TRIN. 27 ELIZ. IN THE KINGS BENCH.

XXXVI. SIR WALTER HUNGERFORDS CASE.

[See *Savill Brothers, Ltd.* v. *Bethell* [1902], 2 Ch. 538.]

Grants of the King. Election.

In a replevin by Sir Walter Hungerford, the case was this, the Queen being seised of a great waste called Ruddesdown in the parish of Chipnam, granted to the Mayor and Burgesses of Chipnam, the moyety of a yard-land in the said waste, without certainty in what part of the waste they should have the same, or the special name of the land, or how it was bounded, and without any certain description of it. And afterwards the Queen granted to the said Sir Walter the said waste, and afterwards the said mayor and burgesses by warrant of attorney under the Common Seal, authorized one A. to enter in the said waste, and in the behalf of the said mayor and burgesses to make election of the said moyety, &c. who did so accordingly. And upon this matter gives in evidence the parties did demur in law, and the jury were discharged. And it was holden and resolved by the whole Court, that the grant to the mayor, &c. was utterly void for the incertainty of the thing granted: and if a common person do make such a grant it is good enough, and there the grantee may make his choice where, &c. and by such choice executed, the thing shall be reduced into certainty: which choice the grantee cannot have against the Queen, which difference was agreed by the whole Court: and it was further holden, that this grant was not only void against the Queen her self, but also against Sir Walter Hungerford her patentee. It was further holden by the Court, that if a common person had made such a grant, which ought to be reduced to certainty by election, and the corporation to whom the grant was made (ut supra) should not make their election by attorney, but after that they were resolved upon the land, they should make a special warrant of attorney, reciting the grant to them, and in which part of the said Waste their grant should take effect, east, west, &c. or by buttals, &c. according to which direction the attorney is to enter, &c.

12 Co. 86. 87. Dy. 372. b. 281. Noy. 29.

TRIN. 27. ELIZ. IN THE COMMON PLEAS.

XXXVII. WATTS AND JORDENS CASE.

Error.

In debt by Watts against Jorden, process continued until the defendant was outlawed, and upon the capias utlagatum he appeared and pleaded to issue, which was found for the plaintiff, and judgment giv-**[31]**-en accordingly. And now came Jourden and cast in a writ of error, and assigned for error, that he appeared upon the capias utlagatum, and pleaded to issue, the original being determined, and not revived by

scire facias, upon his charter of pardon; Anderson Justice was of opinion, that it was not error, for the statute of 18 Eliz. had dispensed with it, being after verdict; for the words of the statute are, for want of any writ original or judicial. Windham Justice contrary, for the statute doth not extend, but where the original is imbeselled, but in this case it is not imbeselled, but in law determined, and at last the writ of error was allowed:

XXXVIII. Trin. 23 Eliz. In the Common Pleas.

Fines levyed. Devise.

The case was, A. seised of lands by his will devised, that his executors should sell his lands, and died, the executors levy a fine thereof to one F. taking mony for the same of F. If in title made by the conusee to the land by the fine, it be a good plea against the fine to say, Quod partes ad finem nihil habuerunt, was the question. Anderson conceived that it was: but by Windham and Periam, upon not-guilty, the conusee might help himself by giving the special matter in evidence, in which case the conusee shall be adjudged in; not by the fine, but by the devise: as by Windham A. deviseth, that his executors shall sell a reversion of certain lands, of which he dieth seised; they sell the same without deed, and good; for the vendee is in by the devise and not by the conveyance of the executors: see 19 H. 6. 23. And by Periam the conusee may help himself by pleading, as he who is in by the feoffment or grant of cestuy que use by the statute of 1 R. 3.

3 Len. 119. Co. 1 Inst. 113. a.

Trin. 27 Eliz. In the Common Pleas.

XXXIX. Albany and The Bishop of St. Asaphs Case.

[S. C. Cro. Eliz. 119. See *Marquess of Abergavenny* v. *Bishop of Llandaff*, 1888, 20. Q. B. D. 471.]

Quare impedit. Departure.

Albany brought a quare impedit against the Bishop of St. Asaph, who justified for lapse: the plaintiff by replication said that before the six months expired, he presented to the said bishop one Bagshaw, a master of arts and preacher allowed, &c. The defendant by way of rejoynder said, that the church upon the presentment to which the action is brought is a church with cure of souls, and that the parishioners there are homines Wallici, Wallicam loquentes linguam & non aliam. And that the said Bagshaw could not speak or understand the Welsh language, for which cause he refused him, and gave notice to the plaintiff of such refusal, and of the cause of it, &c. upon which the plaintiff did demur in law. And first it was agreed and resolved by the whole Court, that in the computation of the six months in such cases, the reckoning ought not to be according to the kalender, January, February, &c. but secundum numerum singulorum dierum, allowing eight and twenty days to every month: Walmesley Serjeant argued for the plaintiff, and he took exception to the rejoynder; for in that the defendant had departed from his bar; for in the bar the defendant intitles himself to the presentment by reason of lapse, and in the rejoynder he confesseth the presentment of the plaintiff, and pleads his refusal of his clark, and shewes the cause of it; sc. the want of the Welsh language, which is a departure: and he cited divers cases to the same purpose, 27 H 8. 3. In forfeiture of marriage, the defendant pleaded the feoffment of the ancestor of the heir to divers persons, absq; hoc, that he died in the homage of the plaintiff; the plaintiff by Replication said, that the said feoffment was made to the use of the said ancestor and his heirs:

the defendant by rejoynder saith, that **[32]** the said ancestor did declare his will of the said lands, the same was holden a departure, for he might have pleaded the same in bar, and 21 H. 7. 17, 18. & 37 H. 6. 5. in trespass the defendant pleaded, that I. S. was seised of the land where, &c. being land devisable, and devised the same to him and his heirs; the plaintiff by replication said, that I. S. at the time of the devise was within age, &c. The defendant by rejoynder said, that the custom there is, that every one of the age of fifteen years might devise his lands, &c. the same was holden a departure: but to this exception the Court took not much regard: but as to the matter in law, it was argued by Walmesley, that the defect of the Welsh language assigned by the defendant in the presence of the plaintiff is not a sufficient cause of refusal; for notwithstanding that it be convenient that such a presentee have the knowledge of such language, yet by the law of the land, ignorance of such language, where the party hath more excellent languages, is not any disability; and therefore we see, that many bishops in Wales, who have the principal cure of souls, are English-men; and the Welsh language may easily be learned in a short time by converse with Welsh-men: and the statute of 1 Eliz. which establisheth the Book of Common Prayer, ordaineth, that the said Book of Common Prayer shall be put in use in all the parish churches of Eng. and Wa. without any provision there for the translation of the said book into the Welsh language. But afterwards by a private act it was done, by which it is enacted, that the Bishop of Wales should procure the Epistles and Gospels to be translated, and read in the Welsh language, which matter our presentee might do by a curate well enough: and he conceived, that by divers statutes, aliens by the common law were capable of benefices. See the Statute of 7 H. 2. Cap. 12. 1 H 5. Cap. 7. 14 H. 6. Cap. 6. and before the said last statute Irish-men were capable of benefices. Gawdy Serjeant contrary: and he confessed, that at the Common Law the defects aforesaid were not any causes of refusal; but now by reason of a private act made, 5 Eliz. entituled, An act made for the translating of the Bible, and of the Divine Service into the Welsh tongue, the same defect is become a good cause of refusal; in which act the mischief is recited, viz. that the inhabitants of Wales did not understand the language of England, therefore it was enacted, that the bishops of Wales should procure so many of the Bibles and Books of Common Prayer to be imprinted in the Welsh language, as there are parishes and cathedral churches in Wales, and so upon this statute, this imperfection is become a good cause of refusal. And he likened it to the case of coparceners and joynt-tenants, who now, because that by the statute of 32 H 8. joynt-tenants are equally capable to make partition as coparceners were by the common law; now partition betwixt joynt-tenants within age is as strong as betwixt parceners within age. But as to that point it was said by the Lord Anderson, that it is very true, that upon the said statute the want of the Welsh language in the presentee is now become a good cause of refusal; but because the said act being a private act hath not been pleaded by the defendant, we ought not to give our judgment according to that Act, but according to the common law. Another matter was moved, because here appeareth no sufficient notice given to the patron after the said refusal, for the plaintiff did present the thirteenth of August (the church voyding the fourteenth of March before) the nine and twentieth of August the six months expired; the fourth of September the defendant gave notice to the patron of the refusal, and the fourteenth of September was the collation; and it was said by the Lord Anderson, that it appeareth here, that there are two and twenty days between the presentment and the notice; which is too large a delay: and the defendant hath not shewed in his plea any cause for the justifying or excuse of it **[33]** and therefore upon his own shewing we adjudge him to be a disturber: see 14 H. 7. 22. 15 H. 7. 6. and note by Periam, it was adjudged in the case of Mollineux, if the patron present, and the ordinary doth refuse, he ought to give notice to the person of the patron thereof, if he be resident within the county, and if not, at the church itself, which is void.

Co. 2 Inst. 361. Co. 6. 61. b. Yel. 100. 2 Cro. 141. Ante 28.

XL. MICH. 27 & 28 ELIZ. AT SERJEANTS INN.

This case was referred by the lords of council to the justices for their opinions, I. S. by indenture between the Queen of the one part, and himself of the other part, reciting that where he is indebted to the Queen in eight hundred pounds, to be paid in form following, twenty pounds at every Feast of St. Michael, until the whole sum aforesaid be paid, covenanted and granted with the said Queen, to convey unto the Lord Treasurer, and Barons of the Exchequer, and to their heirs, certain lands to the uses following, viz. to the use of the said I. S. and his heirs, until such time as the said I. S. his heirs executors or administrators shall make default in payment of any of the said sums; and after such default, to the use of the said Queen, her heirs and successors, until her heirs and successors shall have received of the issues and profits thereof such sums of money parcel of the said debt as shall be then behind and unpaid, and after the said debt so paid and received, then to the use of the said I. S. and his heirs for ever. I. S. levyeth a fine of the said land to the said lord treasurer and the barons, to the uses aforesaid; and afterwards being seised accordingly, by deed indented and enrolled bargains and sels the said land to a stranger: default of payment is made, the Queen seizeth, and granteth it over to one and his heirs, quousque the money be paid, and after the money is paid: and upon conference of the judges amongst themselves at Serjeants Inn, they were of opinion, that now I. S. against his indenture of bargain and sale, should have his lands again, for at the time of the bargain and sale he had an estate in fee, determinable upon a default of payment, ut supra, which accrued to him by the first indenture and the fine, which estate only passed by the said indenture of bargain and sale, and not the new estate which is accrued to him by the latter limitation after the debt paid, for that was not in esse at the time of the bargain and sale; but if the conveyance by bargain and sale had been by feoffment or fine, then it had been otherwise, for by such conveyance all uses and possibilities had been carried by reason of the forcible operation of it.

Post. 93. 3 Len. 43. Owen. Rep. 6. 1 Inst. 49. a.

HILL. 28 ELIZ. IN THE KINGS BENCH.

XLI. TAYLOR AND MOORES CASE.

Debt. Error.

Taylor brought debt upon an obligation against Moore, who pleaded in bar, upon which the plaintiff did demurre, and the Court awarded the plea in bar good, upon which judgment the plaintiff brought a writ of error, and assigned error in this, that the bar upon which he had demurred, as insufficient, was adjudged good: upon which now in this writ of error the bar was awarded insufficient, and therefore the judgment reversed: but the Court was in a doubt what judgment shall be given in the case, viz. whether the plaintiff shall recover his debt and damages, as if he had recovered in the first action, or that he shall be restored to his action only, &c. And Wray cited the case in 8 E. 4. 8. and the case of attaint 18 E. 4. 9. And at last it was awarded, that the plaintiff should recover his debt and damages: see to that purpose 33 H. 6. 31. H. 7. 12, 20. 7. Eliz. Dyer 235.

[34] HILL. 28 ELIZ. IN THE KINGS BENCH.

XLII. HIGHAM AND HAREWOODS CASE.

In an ejectione firmæ the case was, that one Butty was seised of the land where, &c. and also of a messuage, with which messuage the said land had been usually occupied, time out of mind, &c. and being seised and lying sick, commanded a

scrivener to be brought to him, and the said scrivener being brought to him, he gave him instructions to make his will, and amongst other things declared unto him, that his meaning was, that the said messuage, and all his lands in Westerfield should be sold by his executors; and the scrivener in making of the will penned the matter in this manner: I will that my house, with all the appurtenances, shall be sold by my executors: Butty died, the executors sell forty acres of the said land to the def. and all this matter was found by special verdict, and it was moved by the plaintiffs counsel, that the sale of this land by the executors is not warranted by the will: another matter was moved, scil. admitting that the executors have authority by the will to sell the land, if the sale of parcel of the land be good and warrantable: as if I make a charter of feoffment of ten acres, and a letter of attorney to make livery of them to the feoffee, if the attorney makes several liveries of the several acres the same is void: but by Cook the cases are not like, for in the case put he hath a special commission, in which the party to whom, and all the other circumstances are set down certainly, contrary in the case at the bar, there the commission is general, &c. and peradventure the executors shall never find a chapman who will contract with them for the whole. And afterwards upon conference amongst the judges, Clench, Gawdy, and Wray, it was resolved, that by this devise the lands do pass by the sale of the executors to the defendant, which sale also by process is warranted by the will, for by Wray, these words, with all the appurtenances are effectual and emphatical words to enforce the devise, and that doth extend to all the lands especially; because it is found, that the testator gave to the scrivener his instructions accordingly: and afterwards judgment was given against the plaintiff. See 3 Eliz. Plowd. 210. Betwixt Sanders and Freeman, there the devise is pleaded in this manner. Messuagium cum pertinentiis ad illud spectantibus in perpetuum in villa de Arthingworth.

More Rep. 221. 3 Len. 132. More Rep. 222. Co. Inst. 113. a.

Trin. 28 Eliz. In the Kings Bench.

XLIII. Watkins and Astwicks Case.

Tender to redeem a Mortgage.

In an ejectione firmæ, it was found by special verdict, that one Maynard was seised, and made a feoffment in fee upon condition of payment of mony on the part of the feoffor by way of mortgage at a certain day, before which day the said Maynard dyed, his son and heir being within age, afterwards at the day of payment limited by the mortgage, a stranger at the instance and request of the mother of the heir tendred the money to the mortgagee in the name of the heir being within age, who refused it. And it was resolved by the whole Court, that the same is not a sufficient tender to redeem the land, according to the mortgage, for it is found by the jury, that the heir at the time of the tender was within age, generally, not particularly of six or ten years, &c. then it might well stand with the verdict, that the heir at such time was of the age of 18 or 19 years, at which age he is by the law out of the ward of his mother, or any other prochein amy, in which **[35]** case it is presumed in law, that he hath discretion to govern his own affairs: and in this case the mother is but a stranger, for the law hath estranged the mother from the government of the heir; but if the jury had found that the heir at the time of the tender was of tender age, viz. within the age of fourteen years, in which case by law he ought to be in ward, in such case the tender had been good.

1 Cro. 132. 2 Len. 213.

TRIN. 28. ELIZ. IN THE KINGS BENCH.

XLIV. LEPUR AND WROTHS CASE.

Replevin. Construction of Statutes. Leases.

A replevin by Lepur against Wroth, and declared upon a tortious taking in Burnham in the county of Essex; the case upon the pleading was, that Robert Earl of Sussex was seised of the manor of Burnham in fee, and leased the same to the King for one and twenty years, and afterwards the said earl died, by which the said manor descended to Thomas late Earl of Sussex, and he being seised, 4 and 5 Phil. and Mary it was enacted by Parliament, that the Lady Frances, wife of the said earl, by virtue of the said Act of Parliament should have, hold and enjoy; &c. during the widowhood of the said Frances, for and in consideration of the joynture of the said Frances the said manor: provided always, and it is further enacted, that it should be lawful for the said earl, by his writing indented, dimissionem vel dimissiones facere pro termino 21. annorum vel infra de eodem manerio pro aliquo redditu annuali, ita quod super omnes & singulos hujusmodi dimissionem & dimissiones antiquus redditus & consuetus vel eo major & amplior reservaretur, and that every such demise should be of force, and effectual in law against the said Frances for term of her life, if the said term should so long continue: and further the said act gave to the said Frances, distress, avowry, covenant, &c. against such lessee, and for the said lessee against the said dame; and afterwards the said Thomas, the said former lease not expired, leased the said manor to Wroth the defendant for one and twenty years, to begin at the Feast of St Michael next following (and note the lease was made the third of April before) rendring three hundred and forty pounds per annum, which was redditus amplior antiquo & usuali. Popham Attorney-General argued, that the said lease did not bind the said Lady Frances, and that for two causes: 1. because it is to begin at a day to come: 2. because it was made, a former lease being in esse, and he argued much upon construction of statutes to be made not according to the letter, but according to the meaning of them: and he cited a case upon the statute of 2 H. 5. 3. by which it is enacted, that in no action in which the damages do amount to forty marks, any person should be admitted to pass in trayl of it, who had not lands or tenements of the clear yearly value of forty shillings, yet the said statute shall not be by construction extended, where in an action between an English-man and an alien, the alien prayeth medietatem linguæ; and yet the statute is general. So in our case, although this private act doth not seem to provide expressly but for two things: 1. the number of the years, 21, & non ultra: 2. antiquus redditus vel eo amplior, yet in reason and good understanding we ought to think, that the intent of the act was, that the said manor should now come to the said Lady Frances surcharged with leases in reversion, or to begin at a day to come, for if by this act the said earl might make a lease to begin three months after, by the same reason he might make a lease to begin twenty years after, and also to begin after his death. It hath been objected, that the Lord Treasurer had a commission to make leases of the Queens lands, and that by virtue thereof he made leases in reversion: I know the contrary to that, for every such lease is allowed by a bill assigned, and not by the ordinary commission afore-[36]-said, the words of our act are, Dimissiones facere pro termino 21. annorum, that shall be meant to begin presently: as if I lease to you my lands for one and twenty years, it shall be intended to begin presently; and he cited the case betwixt Fox and Collier upon the statute of 1 Eliz. concerning leases made by bishops: that four years of a former lease being in being, the bishop leased for one and twenty years, the same was a good lease, notwithstanding the former lease, for the lease began presently betwixt the parties. And it hath been adjudged, that a lease for years by a bishop, to begin at a day to come, is utterly void. And he cited the case of the late Marquess of Northampton, who by such an Act of Parliament as ours was enabled to make leases of the lands of his wife for one and twenty years, and of the said lands an ancient lease was made before the said act, which was in esse, and before the expiration thereof he made a lease by virtue of the said Act to commence

after the expiration of the former lease, and that lease was allowed to be a good lease warranted by the said statute, because that the first lease, which was in esse, was not made by force of the said act, but if the said former lease had been made by virtue of the said statute, the second lease had been utterly void.

6 Co. 33. 3 Len. 132.

XLV. Trin. 28 Eliz. In the Kings Bench.

Copy-hold Surrender by Attorney not good.

A copy-holder of the manor of the Earl of Arrundel did surrender his customary lands to the use of his last will, and thereby devised the lands to his youngest son and his heirs, and died, the youngest son being in prison makes a letter of attorney to one to be admitted to the land in the lords court in his room, and also after admittance to surrender the same to the use of B. and his heirs, to whom he had sold it for the payment of his debts: and Wray was of opinion, that it was a good surrender by attorney, but Gawdy and Clench contrary: and by Gawdy; If he who ought to surrender cannot come in Court to surrender in person, the lord of the manor may appoint a special steward to go to the prison and take the surrender, &c. and by Clench; lessee for years cannot surrender by attorney, but he may make a deed purporting a surrender, and a letter of attorney to another to deliver it.

3 Cro. 218. 9 Co. 75.

Trin. 28 Eliz. In the Kings Bench.

XLVI. Troublefield and Troublefields Case.

Entry.

The case was, that a copy-holder did surrender to the use of his will and thereby devised the land to his wife for life, the remainder over to his son in tail, and died, the wife entred, and died, a stranger did intrude upon the lands, and thereof made three several feoffments to three several persons, he in the remainder entred upon one of the said three feoffees in the name of all the lands so devised, and made a lease of the whole land: and by Clench and Wray it was a good entry for the whole, and by consequence, a good lease of the whole, Gawdy contrary: note, all the lands were in one county: see 16 Eliz. Dyer 337. 9 H. 7. 25.

Dy. 337. b. Co. 1 Inst. 15. a. b. 52. 245. b. 252. 6. Post. 51.

[37] Trin. 28 Eliz. In the Kings Bench.

XLVII. Parmort and Griffina's Case.

Debt. Proviso taken strictly.

In debt upon an obligation by Parmort against Griffina a merchant-stranger, the defendant pleaded, that the obligation was made upon condition for the performance of certain covenants contained within certain indentures, and shewed what, &c. and alledged further, that in the said indenture there is a proviso, that if aliqua lis, vel controversia oriatur imposterum, by reason of any clause, article, or other agreement in the said indenture contained, that then, before any sute thereupon attempted the parties shall choose four indifferent persons for the ending thereof, which being done, the indenture and obligation shall be void: and in fact saith, that lis & controversia, upon which the action is brought, groweth upon the said indenture, upon which there was a demurrer in law. And because the defendant hath not shewed specially upon what controversie or strife, and upon what article certain: the Court

was clear of opinion, that the bar was not good: and also the Court was of opinion, that the said proviso did not extend to subject and submit the breach of every covenant or article within the said indenture to the arbitrament of the said four persons, but only where strife and controversie doth arise upon the construction of any covenant, &c. within the said indenture; so as the defendant ought to have shewed such matter which fell within the arbitrament, by the meaning of the said indenture; and judgment was given against the defendant.

MICH. 28 & 29. ELIZ. IN THE COMMON PLEAS.

XLVIII. PARTRIDGE AND PARTRIDGES CASE.

Dower. Remitter.

In dower by Partridge against Partridge, the case was, that land was given to the father for life, the reversion to his son and heir for life, the remainder to the right heirs of the body of the father: the father and son joyn in a feoffment to the uncle in fee, scil. to the brother of the father. The uncle takes a wife, the father dieth, the son being his heir in tail, the uncle dieth without issue, so as the land descendeth to the son, as heir to his uncle, against whom the wife of the uncle brought dower: it was moved, if the son being heir in tail to his father, and heir also to his uncle, for the fee descended, be now remitted? for then no dower accrueth to the wife of the uncle, for the estate of which she demands dower is gone: but if the livery in which the son joyned with his father be the livery of the son, the same lies in his way in the impediment and preventing of the remitter, so as during his life he shall be adjudged seised of the lands in fee-simple by descent from his uncle; then dower lyeth, for the same estate is inherited, of which the wife demandeth her dower: and the Court doubted, if it were the livery of the son or not. And note, that the feoffment was without deed. See Dyer 16 Eliz. 339.

MICH. 28 & 29 ELIZ. IN THE EXCHEQUER.

XLIX. THE QUEEN AGAINST THE LORD VAUX AND OTHERS.

Intrusion.

A bill of intrusion was brought for the Queen against the Lord Vaux, Rich. Vaux, & Hen. Vaux, supposing to have intruded into the rectory & parsonage of Ethelborough in the county of Northampton, & shew-[38]-ed that in the time of Hen. the Fourth, the Colledge of Saint Peter of Ethelborough was founded at Westminster, in the County of Midd. by the name of decani & capituli; and shewed further, that the rectory of Ethelborough, was appropriated to the said colledge, and that afterwards by the statute of 1 E. 6. the said colledge was dissolved, and the said rectory, amongst other possessions of the said colledge, came to the hands of the King, and that the defendants, 1 Eliz. intruded into the said rectory, and took one thousand sheep, one thousand calves, and one thousand loads of corn, bona & catalla dictæ Dominæ Reginæ provenientia ex decimis rectoriæ prædict. apud Westm. predict. The defendants pleaded, &c. that the said Colledge of Ethelborough was founded in Ethelborough, &c. per nomen Decani, canonicorum, & fratrum, &c. who leased the said rectory so appropriated to one Clark for forty six years, in Anno 30 H. 8. who assigned the same to the defendants, by force of which they justified the taking at Ethelborough, absque hoc, that the said Colledge of Saint Peter in Ethelborough, was founded, per nomen decani & capituli ecclesiæ sancti Petri de Ethelborough, at Westminster aforesaid, & absque hoc, that they took the said sheep, &c. at Westminster, &c. Upon which the Queens Attorny did demur in law. Manwood chief Baron argued; that judgment ought to be given for the Queen: exception hath been taken to the information, because mention is made in it of a colledge, and it is not

shewed what person was the founder: and also an appropriation is alleadged of the rectory aforesaid to the said colledge, and the appropriation is not shewed certain, who was patron, ordinary, &c. as to that he argued that the alledging of the appropriation and foundation, is but matter of surplusage, and therefore the insufficiency of alledging the same shall not prejudice the Queen, for it had been sufficient to say, that the said Colledge of St. Peter, was seised of the rectory aforesaid, and then to shew the Statute of Chauntries, 1 E. 6. and the same is a good title for the Queen, the possession of the colledge, and the dissolution of it by the statute: for this bill of intrusion is but in the nature of a possessory action, as an action of trespass, in which case it is sufficient to make title to the possession only, without relying upon the right; but as to the curious and exact pleading of an appropriation, or a foundation, it needs not in this case; for admit that the colledge were not well and duly founded, yet such pleading is sufficient, for a colledge in reputation is within the statute of 1 E. 6. and where the party claims by or under such foundation, there the foundation ought to be certainly shewed, not precisely but conveniently, not as we plead a common recovery, but as we plead the creation of a bishop, scil. debito modo præfectus, without shewing the particulars of the creation, so if an abbot will plead in discharge of his house of a corody, he ought to shew the foundation, and convenient certainty, which see L. 5. E. 4. 118. Robert Milam founded the abby of Leicester, and conveyed the right of patronage and foundership to the King by attainder, and the same was good pleading, without shewing the particulars of the foundation specially, so 3. H. 7. 6. in the case of the priory of Norwich, the pleading is, quod prioratus de Norwich est de fundatione episcoporum Norwich, for in such case, refert quis sit fundor, so the King be not founder; but in our case, non refert quis sit fundor, for whosoever be founder, whether the King, or a subject, all is one, the statute in both cases gives the possessions to the King: and as to the case of appropriation, the pleading thereof is well, if it be conveniently shewed, in case where the party who shews it claimes by such appropriation, as 6 H. 7. 14. 11. H. 7. 8. concurrentibus his quæ de jure, &c. without shewing the particulars of the appropriation. Now in our case, the Queen is meerly a stranger to this appropriation, and she doth not claim by it, but the possession of the colledge is the title of the Queen, by the statute of 1. E. 6. and therefore it sufficeth for the Queen to shew that the colledge was seised, &c. **[39]** without making mention of the manner of the appropriation: and as to the traverse of the county, he conceived, that the county is not traversable in this case, for when the tithes are severed from the nine parts, they are presently vested in the party who hath right, and they are things transitory, and also the taking of them, for the party may take them in any place as well as in his own parish, scil. as well at Westminster, where the Queen supposeth the taking, as at Ethelborough where the defendant doth justify, &c. and in such cases the place where is not traversable. See 9 H. 6. 62, 63. by Babbington, 35 H. 6. 5. In trespass of goods taken in the parish of Saint Clements, in the county of Midd. the defendant did justify by buying in open market in the county of Essex, there needs no traverse, for the defendant hath made title by an open market, 34 H. 6. 15, 16. In trespass of battery at D. in the county of Essex, the defendant pleaded, that the plaintiff made an assault upon him at B. in the county of Kent, and the defendant fled, and the plaintiff pursued him continually unto D. aforesaid, at which place the defendant did defend himself, and so the hurt which the plaintiff had was of his own assault; and demanded judgment if action, the same is a good plea without traversing of the county, for a battery may be continued from one county to another. And it was observed by Manwood in citing of that case, that although, prima facie mirum videri potest that a battery may be continued from Essex into Kent, because the river of Thames is betwixt them, and yet, re intellecta, it is plain, for one parcel of land containing thirty acres of lands of the coasts of Essex is within the county of Kent, see also 34 H. 6. 5. by Prisot, in trespass of goods taken at Coventry, the def. doth justify the taking because the plaintiff gave the said goods to the defendant at London, by force of which he took them at London, absque hoc, that he took them at Coventry, and that traverse not holden good, for the defendant by such a gift might justify the taking of the goods in any place as well as in the place where the gift was made; but if in

such case the defendant had pleaded, that the plaintiff delivered the said goods to him at London to deliver them over to A. by force of which he took them at London, and delivered them over accordingly, in such cases the defendant may well traverse the place supposed by the declaration, for by his plea he hath confessed an immediate delivery of the said goods to him by the plaintiff; and the delivery and the taking all at one time and at one place, and it had not been a good plea for the defendant to say, that the plaintiff delivered to him the said goods at London, by force of which he took them at Coventry, for the possession is confessed by the first delivery of the goods at London; and the supposal of the plaintiff of a taking in Coventry, and the justification of the defendant of a taking by reason of a delivery at London, cannot stand together. But if the defendant plead, that the plaintiff gave to him the goods in London, by force of which he took them there, there he may take traverse to the place supposed by the declaration, for by the gift it is lawful to the defendant to take the goods in any place. So see 19 H. 6. 35. In false imprisonment supposed in the county of W. the defendant doth justify as sheriff of the county of B. by force of a writ to him directed to attach the plaintiff, and so he attached him and imprisoned him at C. in the county of B. there the defendant traversed the county supposed by the declaration, for otherwise he doth not meet with the plaintiff, and the authority of the defendant doth not extend to the county supposed by the declaration. See also to the same purpose 22 E. 4. 39. by Hussy, where the difference is taken when justification is by reason of a warrant to take goods in any place whatsoever, and where in a place certain, as to the traverse of the foundation, absq; hoc, quod prædict. collegium fundatum fuit per nomen decani, & capituli ecclesiæ collegiatæ sancti Petri de Ethelborough apud Westm. he hath [40] here traversed that which was not alledged, for the placing of the last words of the traverse, scil. apud Westminst. in the end of the traverse seems by common construction to be intended thereby, that there is no such colledge at Westm. and not that the colledge was not founded at Westm. for then the traverse should be, absque hoc, quod collegium prædictum fundatum fuit at Westminster, per nomen, &c. But the most proper traverse, that the defendant could have taken in this case had been, absque hoc, quod decanus & capitulum ecclesiæ collegiat. de Ethelborough was seised; for the corporation mentioned in the bill, and that which is mentioned in the bar, are not all one, but differ in this manner, scil. in the bill the dean and chapter, &c. in the bar the dean, cannons, and bretheren, and perhaps there are two such corporations, and then both cannot be seised, and therefore upon the seisin of one of them, the traverse shall be taken: and afterward judgment was given for the Queen.

MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

L. THE QUEEN AGAINST THE BISHOP OF LONDON AND SCOT.

Quare Impedit. Office trove. Scire facias.

The Queen brought a quare impedit against the Bishop of London, and Scot, and the case was, that A. seised of an advowson in gross, holden of the Queen in chief, aliened the same by fine without licence; the church became void, the conusee presented; the Queen without office found, brought a quare impedit, the question was, if the Queen without office found, should present; and it was argued by the whole Court, that if the alienation had been by deed only, that there the Queen without office found should not have had the presentment, for upon such an alienation by matter in fact, without licence no scire facias should issue without office found of the alienation, but upon an alienation without licence by matter of record, a scire facias lyeth before office, which was granted by the whole Court: and in the last case the Queen shall have the mean profits from the time of the scire facias returned, but in the first case from the time of the office found, see for that Stamford Prerogative, fol. penult. 8 E. 4. 4. It was also moved, if the Queen intituled to the presentment as above, pardoneth to the conusee all alienations without licence, and

intrusions, if the estate of the incumbent be thereby confirmed, but the Court would not argue that point; but it was adjorned until another day.

3 Len. 175.

MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

LI. BRAYBROOKS CASE.

Fines levyed. Forfeiture.

The case of one Braybrook was moved, which was, land was given to A. for life, the remainder to B. for life, the remainder to the said Braybrook in fee: B. being in possession levyed a fine to a stranger, sur conusans de droit come ceo &c. A. dyed, if now Braybrook might enter for the forfeiture was the question: and it was agreed by the whole Court, that by that fine the remainder in fee is not touched, or discontinued, but because B. had done as much as in him lay for the disposing of fee-simple by the fine, and hath taken that upon him, the same amounts to a forfeiture: and it was also agreed by Anderson and Periam, that if tenant for life in possession leveyeth a fine, &c. if the lessor doth not enter within five years after, he shall be bounden: Windham contrary, for by him it is in the election of the lessor to re-enter immediately for the forfeiture, or to expect the death of the lessee.

Co. 1 Inst. 251, b. 252. a. 9 Co. 104. Post. 211, 212. 1 Cro. 219, 220.

[41] MICH. 28 & 29 ELIZ. IN THE EXCHEQUER CHAMBER.

LII. WILLSHALGE AND DAVIDGES CASE.

Error.

Willshalge brought error in the Exchequer Chamber, upon the statute of 27 Eliz. cap. 8. against Davidge, upon a judgment given in the Kings Bench, Hil. 28. Eliz. and assigned for error, that where Davidge had heretofore brought debt against the now plaintiff, and declared upon diverse contracts, scil. that he had sold to Willshalge such merchandizes for so many portagues, and such merchandizes for so many ducats, which in toto amounted to seven hundred pounds sterling, which sum he demanded. scil. in sterling mony, and not in ducats and portagues, according to the contract; and upon the declaration the said Willshalge had demurred in law, and the Court gave judgment for the plaintiff, for it is in his election to demand his debt in which of those coyns he pleaded, either in the proper coyn of the contract, or of sterling, scil. in currant mony. And afterwards the said judgment was affirmed.

2 Cro. 88. 3 Cro. 536. Yel. 80. 135. 136.

MICH. 28 & 29 ELIZ. IN THE EXCHEQUER.

LIII. HENLY AND BROADS CASE.

Trespass. Counts. Error.

Henly brought trespass against Broad in the Kings Bench, and declared, that the said defendant, simul cum quodam I. S. clausum suum fregit, &c. The defendant pleaded to issue, and it was found for the plaintiff, and it was objected in stay of judgment, that the count was not good, for it appeareth therein, upon the shewing of the plaintiff himself, that the action ought to be brought against another also, not named in the writ, and because the same appears of the plaintiffs own shewing, the declaration was not good, and notwithstanding that said exception, judgment was

given for the plaintiff. Upon which Broad brought a writ of error, and assigned the same matter for error; and there the case of 2 H. 7. 16. 1 7. was cited, where a difference is taken, where the plaintiff declares, that the defendant with one B. did the trespass, him naming in certain, and where the declaration is, that the defendant, cum quibusdam alijs ignotis, &c. See 8 H. 5. 5. And at length all the Justices of the Common Pleas, and Barons of the Exchequer were clear of opinion, that by the common law the declaration was not good, for the reason, and upon the difference aforesaid: but if in trespass against one, who pleads that the trespass was done by himself and one B. to whom the plaintiff hath released, and the plaintiff traverse the release, in that case, for as much as the matter doth not appear upon the plaintiffs own shewing, but comes in on the part of the defendant, and not denied by him, the declaration is good enough: and it was further agreed by them all, that now this defect after verdict is helped by the statute of 18 Eliz. for it doth not concern substance but only form: and afterwards the first judgment was affirmed.

3 Len. 77.

[42] MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

LIV. WOOD AND FOSTERS CASE.

Replevin.

Wood brought a replevin against Humfrey Foster and others, and made his plaint of the taking of one thousand cattle; Foster pleaded, non cepit, and the others, that the property was in another; upon which matters they were at issue. And as unto the first issue, the case upon the evidence was: that the late Lord Windsore was possessed of certain sheep, and by his will devised them unto Eliz. his daughter for her advancement in marriage, and of his will made his wife his executrix, and died, his wife took to her husband one Puttenham, who being thus possessed leased the said sheep with a farm for eleven years by indenture, upon which it was agreed between the said parties, that the lessee should keep so much of the rent reserved upon the said lease, to buy therewith so many cattle over, so as the whole stock of the said sheep upon the said farm should amount to the number of one thousand cattle; and the lessee also covenanted to yield and render to the said Puttenham at the end of the said term one thousand sheep between two years shorne, and four years shorne. Afterwards Puttenham by his deed gave unto one A. who had married the said Eliz. the said one thousand cattle, to have them after the said term; the term expired; Puttenham sold and granted them unto Wood, who brought them away with him. And the said A. pretending that the said sheep passed to him by the said grant of Puttenham during the said term, seised them, and the same was noctanter as they were driven in the high-way, undemagna contentio orta fuit between the said parties, the one charging the other with felony, whereupon the constable of the town where, &c. supposing the said matter would grow to an outrage, seised the said cattle as felons goods, and afterwards went to the house of the said Foster, which was near unto the high-way, and asked his advise upon the matter, but he would not meddle therewith: afterwards one Perkins, who had bought the said cattle of the said A. came to Foster, and shewed to him, that the high-ways there were not sufficient for pasturage of the said cattle until the said controversy be determined, and prayed that the cattle be delivered to him the said Perkins to keep in the mean time; to whom Foster answered, that if the said Perkins would find sufficient sureties to deliver back the cattle to him who had right, that he would be content the said Perkins should take them; whereupon the said Perkins was bound to Foster to that purpose, and took away with him the said cattle; and it was also given in evidence, that the servants of the said Foster had seised the cattle for the use of their master. And by the clear opinion of the Court upon the whole matter shewed, Foster non cepit, and according to such direction of the Court the jury found, that Foster non cepit; and as to the matter of property, the Court was clear of opinion, that the grant made by Puttenham of the said cattle, during

the term, was utterly void, for Puttenham during the same term had not in the said cattle either a general or a special property, nor also after the term; but if after the term expired the lessee will not according to his covenant deliver to Puttenham one thousand sheep, then Puttenham is put to his action of covenant, for here the lessee was bound to deliver to Puttenham at the end of the term, not the same cattle which were leased, but such a number of sheep, and the same ought to be between two years shorne, and four years shorne, which could not be the sheep demised, for they did exceed such degree before the end of the said term, and then the grant of Puttenham during the term is meerly void: and then when after the term, the lessee, according to the covenant, delivered to Wood one thousand sheep, he might well sell them to the plaintiff; [43] and such was the opinion of the whole Court, and it was said by Justice Windham, that if I let certain sheep to one for two years, now upon that lease somewhat remains in me, but that cannot be properly said a property, but rather the possibility of a property which cannot be granted over. See 11 H. 4. 177. 178. 22 E. 4. 10. 11. In the same plea it was also holden, that in a replevin where the plaint is of one thousand beasts, and the defendant justifies by reason of property, upon which the parties are at issue; now upon the evidence the defendant may surmise a lesser number of beasts, and drive the plaintiff to prove a greater number than that which the defendant hath confessed upon the evidence; notwithstanding that the number set down in the plaint be by the plea of the Defendant quodam modo admitted, and the lesser number surmised, and the contrary not proved shall go in mitigation of the damages, and the jury shall conform their verdict in the right of damages, according to the proof of the number, notwithstanding that the number set forth in the plaint be not by the plea denied by the defendant, and so it was put in ure in this case: for the plaint was of the taking of one thousand cattle, but the proof extended but to eight hundred sixty five. Note also in the same plea it was holden, that whereas one Chock was returned upon several juries in two several courts at Westminster, and both the juries are adjourned to one day; now in which of the said two courts the said Chock was sworn, he shall be discharged of his attendance at the other court the same day.

Owen. Rep. 139. Godbolt. 113.

MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

LV. CARTERS CASE.

Assumpsit.

Carter brought an action upon the case against I. S. and declared, that A. was possessed of certain lands for years, the inheritance thereof being in the wife of the plaintiff, upon which lease a rent was reserved: the defendant, in consideration that the plaintiff would procure the said A. to assign the said lease to the defendant promised to pay the said rent to the plaintiff for all the residue of the term: it was objected that upon this matter the action doth not lie, because that the plaintiff hath a higher remedy, scil. an action of debt or distress; but the opinion of the whole Court was that the action did lie, for here upon the promise an action is given to the husband alone in his own right, whereas the rent is due to the husband in the right of his wife in its nature, and the rent is also to be paid for the land. But upon this assumpsit it is payable to the person of the husband. And afterwards judgment was given for the plaintiff.

MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

LVI. KIMPTON AND BELLAMYES CASE.

Replevin. Traverse. Extinguishment.

George Kimpton brought a replevin against Wood and Bellamy, who make conusance as baylies to George Burgain for damage feasance. The plaintiff in bar

of the conusance, sheweth; that he himself, and all those whose estate he hath in one hundred and forty acres of land time out of mind, &c. have had common for all manner of cattle in six acres of lands, whereof the place where, &c. is parcel, and so put in his cattle, &c. against which, the defendants say that the plaintiff, &c. had common in forty acres of land, whereof the said six acres are parcel, all lying in communi campo, and that the plaintiff, a long time before the taking, had purchased two acres parcel of the said forty acres, &c. upon which there was a demurrer in law; **[44]** it was argued by Serjeant Shuttleworth, that the replication to the bar to the avowry is not good, for in the bar to the avowry, the plaintiff hath shewed, that he hath common in six acres, and the same shall be intended common in six acres only, for common in forty acres cannot be the common in six acres; as 35 H. 6. 38. In debt for rent reserved upon a lease for years, the plaintiff declared that he leased to the defendant ten acres of land, rendring the rent in demand, the defendant pleaded, that the plaintiff leased to him the said ten acres, and also such a rectory, rendring the same rent, the same is no plea without traverse, absque hoc, that he leased the ten acres only: see Dyer 29 H. 8. 32. And the whole Court was clear of opinion, that for want of such traverse, the plea is not good; for by Periam the common supposed in the bar to the conusans out of the six acres, cannot be intended the common supposed in the replication, scil. out of the forty acres. And by him if in trespass the defendant justifie by reason of common in six acres of land, upon which the parties are at issue; and the defendant in evidence shews, that he hath common in forty acres, whereof the said six acres are parcel, the same doth not maintain his title, but the issue shall be found against him: but by the Lord Anderson, because that this demurrer is general, the other party shall not take advantage of that defect of pleading, for the want of the traverse, and that by reason of the statute of 27 Eliz. for traverse is but matter of form, and the want of the same shall not prejudice the other party in point of judgment, but the judges ought to judge upon the substance, and not upon the manner and form of the pleading: And as to the matter of the common, the Court was clear of opinion, that by the purchase of the said two acres, the whole common was gone.

Post. 80, 81.

MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

LVII. KNIGHTS CASE.

Debt. Abatement of Writ.

Knight brought debt against three executors, and now surmised by his counsel, that one of the executors is dead, pendant the writ; and prayed the opinion of the Court, if the writ should thereby abate or not; for by some it is not like where a writ is brought against two executors, for there if any of them dieth, pendant the writ, it shall abate, for now the plural number is gone, for there is but one executor, but in our case the plural number continues: but notwithstanding that, the Court was clear of opinion, that the writ should abate: wherefore the plaintiff seeing the opinion of the Court, prayed that upon his surmise aforesaid, he might have a new writ by journeys accounts, which was granted to him.

MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

THE QUEEN AND MIDDLETONS CASE.

Quare Impedit. Where in pleading the party must make title to himself.

The Queen brought a quare impedit against Middleton, and counted, that W. Lord Say was seised of the manor of Bedington in the county of Hertford, to which manor the avowson of the church was appendant, & ad ecclesiam prædict. præsentavit

coo clericum suum, and afterwards died seised, having issue two daughters, Mary married to the Earl of Essex and Ann to the Lord Mountjoy, who make partition, and the said manor of Bedington, inter alia, was allotted to the said Mary for her part; and afterwards the said earl and Mary died, having issue Ann, who took to husband the Marquess of Northampton, and afterwards 33 H. 8. a fine was levyed of the said manor inter &c. Querent. and the said marquess and Ann defor-[45]-ceants, by which fine the said manor was granted and rendred to the said marquess for term of his life, the remainder to the said Ann his wife in tail, the remainder over to Hen. the eighth in fee; the marquess is attainted of high treason, by which the King seised, and afterwards Ann died without issue, after which in the seisin of the Queen that now is the church voided, by which it belonged to the Queen to present; The defendant did confess the seisin of the Lord Say, and the whole matter contained in the count until the attainder; and pleaded further, that after the said attainder Queen Mary leased the said manor, with the advowson to Rochester and Walgrave for forty years, if the said marquess should so long live, who were possessed accordingly, and in their possession the church became void, to which avoidance one Twiniko did present the defendant, who upon his presentment was instituted and inducted: upon which plea the Queens Serjeant did demur in law. It was argued by Serjeant Shuttleworth for the Queen, that the counter-pleading of the title of the Queen by the incumbent, without shewing title in his own patron could not be good, notwithstanding the statute of 25 E. 3. cap. 7. before which statute, the incumbent could not plead any matter which went to the right of the patronage, but only in discharge or excuse of the disturbance, and therefore we ought to observe the words of the said statute, sc. the possessor shall be received to counter-plead the Kings title, and to have his answer, and to defend his right upon the matter, although he claim nothing in the patronage; upon all which words taken together it appeareth, that the incumbent ought not only to counter-plead the title of the King, but also to shew and defend his own right, and that hath not the defendant done here; For Twiniko, of whose presentment he is in the church, doth not claim under the lease made by Queen Mary to Rochester and Walgrave, but during their said lease and their possession of it, by usurpation presented the defendant, 46 E. 3. 13. by Finchden, the King brought a scire fac. upon a recovery in a quare impedit, the defendant being incumbent pleaded, that after the said judgment the King had presented to the said church I. S. his clerk, who was admitted accordingly; and exception was taken because the defendant did not shew a title in himself to maintain his possession, but it was not allowed; for a difference is taken betwixt a plea in a quare impedit, and a plea in a scire facias, for in a scire facias it is sufficient to extort the plaintiff of execution without any title, contrary in a quare impedit: and it is a general rule, that in all cases where an office is to be traversed, none shall be received to traverse the title of the King, without making a title to himself, which see 38 E. 3. 18. So in the case of the Lady Wingfield, 3 H. 7. 14. and Stamford 63, 64. And it is true in actions real it is sufficient to traverse the title of the demandant, without making title to the tenant himself: as in a formedon, ne dona pas; but in actions personal it is otherwise, as 2 H. 4, 14. In ravishment of ward, it is not sufficient to traverse the title of the plaintiff, but the defendant ought also to make title to himself. Fenner Serjeant contrary: who took exception to the writ, because it is brought against the incumbent only without naming the patron or ordinary: for here the defendant hath pleaded, that he is parson impersonee of the church aforesaid of the presentment of the said Twiniko, and that he is admitted, instituted and inducted, and hath continued in his church so many days and years, in which case the writ ought to have been brought as well against the patron and ordinary, as against him the incumbent: but in some cases it is sufficient against the incumbent only, as upon a collation by lapse, 9 H. 6. 32. by Babbington: so where the defendant is disturber without any presentment, 7 H. 4. 93. so where the defendant was deprived, and kept himself in 4 E. 4. 18. So where the pope makes provision, 11 H. 4. Quare impedit 120. So a scire facias upon a reco-[46]-very in a quare imped. shall be brought against the incumbent only 1 H. 5. 8. for by the judgment in the quare impedit, the right of the patronage is bound; and the scire facias is only for the possession, which concerns the defendant only, and no other. And to prove that by the common

law, a quare impedit lay not (but upon such special matter) against the incumbent alone, it is clear upon the said statute of 25 E. 3. For before the said statute the incumbent could not plead any matter which did trench to the right of the patronage, and therefore we ought not to presume that the common law was so unreasonable to give an action against a singular person, who could not by the law shew and defend his own right, nor traverse the right of the other party: and as to the plea here, he conceived that the same plea which the patron might have now after the statute of 25 E. 3. the incumbent shall have; but he who is only a disturber not in by presentment, &c. he shall not plead any matter but in discharge or excuse of the disturbance, 47 E. 3. 8. The King in a quare impedit counted, that King H. was seised, and presented one A. King H. died, and the advowson descended to King E. 3. A. died, the now King presented B. and now B. is dead, so it belongs to the King to present; that the defendant being incumbent traversed the institution and induction of B. without making title to himself. So 44 E. 3. 19. in a quare impedit the King declared that he himself was seised and presented one B. who at his presentment was received, &c. B. died, by which it belonged to the King to present; to which the defendant being incumbent pleaded, that the said B. is yet alive, and that plea was allowed without other title made to himself. Note, that at the first argument of this case, that the Court was of opinion against the defendant, because he had not in his plea any interest in the advowson; and by Periam the patron himself could not have had such plea if he had been party to the writ, therefore not the incumbent; and it is no good pleading any in action, to discover in pleading any wrong, as force, disseisin, usurpation. But at length, mutata opinione, all the justices were agreed, that judgment should be given against the Queen: and the Lord Anderson shewed openly, the reason of their judgment, for here is not bare usurpation pleaded against the Queen, but also an estate, scil. a lease for years in the said advowson derived from Queen Mary, and that the avoidance upon which the action is brought falleth within the said term, so as the Queen who is plaintiff is encountred with the lease of her ancestor, against which she cannot make title to present, without special matter; wherefore judgment was given against the Queen.

2 Len. 58.

Mich. 28 & 29. Eliz. In the Common Pleas.

LIX. Kynters Case.

Debt.

Kynter brought debt upon an obligation, the condition was, that whereas the plaintiff had bought of the defendant a ship, if then the defendant shall enjoy the said ship, with all the furniture belonging to the same without being disturbed for the said ship or any furniture appertaining to it; that then, &c. and the case was, that after the sale of the said ship a stranger sued the plaintiff for certain monies due for certain ballast bought by the defendant for the same ship and put into the said ship before the sale of it, and in the said suit the plaintiff obtained a judgment and execution, and thereupon the said ship was seised, and all the matter was, if ballast be furniture of a ship or not; and it was moved by Serjeant Gawdy, that it was; for ballast is as necessary to a ship as a sail; but the Court was against him, for somtimes a ship may sail without ballast, for it may be laden with such merchandizes which are convenient ballast in themselves, as coals, **[47]** wheat, &c. Periam at the first doubted of it: and by him, if I be bound upon condition, ut supra, I am bound to deliver the guns being in it at the time of the sale, but yet he conceived, that the plaintiff should be barred because he had not specially shewed, that at the time of the sale the ballast was in the ship.

MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

LX. PENDLETON AND GUNSTONS CASE.

Pendleton informed against Gunston upon the statute of 13 Eliz. cap. 5. for that, where the said Pendleton had before brought a plaint of debt against I. S. in the Guild-Hall of Norwich; upon which issued out of the said Court an attachment against the said I. S. by which the Sheriff of Norw. being ready by virtue of the said process to attach the said I. S. by his goods, there, the now defendant in disturbance of the said process and the execution of it, did publish and shew to the sheriff a conveyance, by which he claimed the said goods as conveyed to him by the said I. S., &c. and averred the fraud, &c. and it was moved by Serjeant Snagg, that the matter of which the defendant is charged is not within the said statute, because the avowing of the said conveyance doth not go in delay of the execution, for no judgment is given but only in delay of process; but the Court was clear of opinion to the contrary, and that by reason of the statute and the words of it, scil. delay, hinder, or defraud creditors of their just and lawful actions, sutes, &c. for here is a delay; for want of serving the said attachment, the appearance of I. S. to the sute of the plaintiff is delayed, which mischief is within the remedy of the said statute. And Periam and Rhodes Justices conceived, that such avowing of such conveyance, where no sute is depending is within the said statute, which Anderson doubted. See the pleading of this case reported in the second Book of Entries, 207, 208. 30 Eliz. per quod secta impedita fuit, &c.

MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

LXI. MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

Alien, Purchasor. Confirmation.

Fenner Serjeant moved this case. An alien purchaseth lands in fee; the Queen confirms it to the alien, office is found, if the confirmation shall bind the Queen, and it seemed to some that it should, for by the Lord Anderson, when an alien is enfeoffed he receiveth by the livery the fee-simple, of which he shall be seised, until office be found; and a præcipe quod reddat lyeth against him. And by Fenner an alien and denizen joynt-tenants are disseised, they both shall joyn in assize, vide 11 H. 4. 26. and by him, the Kings fief being an inheritrix takes a husband, and hath issue, office is found, the husband shall be tenant by the curtesy, which see 33 E. 3. Traverse 36. It was argued of the other side, that the estate of the alien is so feeble that a confirmation cannot enure upon it; for an alien cannot take but to the use of the King, and cannot be enfeoffed to another use; and if he be, such use is void, for there is not a sufficient seisin in the alien to carry an use. And it hath been adjudged in the case of one Forcet, that where an alien and the said Forcet were joynt-purchasors, and the alien died, Forcet had not the whole by the survivor, but that upon an office found, the Queen should have the moyety: see Dyer 11 Eliz. 283.

4 Len.

[48] MICH. 28 & 29 ELIZ. IN THE COMMON PLEAS.

LXII. SIR ROGER LEWKNOR AND FORDS CASE.

Sir Roger Lewknor seised of the manor of Wallingford, leased the same to A. for years, and died, after which it was enacted by Parliament, that the said manor should from henceforth be deemed and reputed in the heirs of the body of the said Sir Roger, begotten upon Eliz. his wife, the said Sir Roger having three daughters only, without any other issue: the daughters married husbands and had issue: A. assigned his enterest in the said manor to B. C. and D. and also to one Shelley; B. C. and D. assigned their interest to one Sponer, one of the defendants, and Shelly assigned his

fourth part to Ford another of the defendants, excepting the woods and underwoods. Wast is committed; one of the daughters having issue dieth, living her husband, the two surviving sisters and their husbands, the term being expired, brought a writ of wast, leaving out the husband of the third sister, who was tenant by the curtesy, against Shelley and Sponer, who tenuerunt, Shuttleworth, Serjeant took exception to the writ: scil. prædictus Rogerus cujus hæredes ipsæ sunt, which shall be intended heirs general, and by the declaration it appeareth, that the daughters have to them by Act of Parliament an especial inheritance as heirs in special tail, and that by a special conveyance: and therefore the plaintiffs ought to have brought a special writ, according to their case, as where cestuy que use, maketh a lease for years by the statute of 1 R. 3. and the lessee committeth wast, now the feoffees ought to have a special writ of wast, according to their case, 26 H. 8. 6. but that exception was disallowed, and the case cited out of 6 H. 8. is upon another reason, for in such case the estate of the lessee for years is created by the said statute. Another exception was taken to the writ, for the writ is tenuerunt, which shall be intended prima facie, conjunctim tenuerunt, and in the declaration it appeareth, that one of the defendants is assignee of three parts of the lands demised, and the other defendant of the fourth part, and so separatim tenuerunt, but that exception was also disallowed, because originally it was one and intirely demised interest and estate, and so it remaineth as to the plaintiffs, although it be devised by the lessee himself. Another exception was taken to the writ, because here it appears upon the plaintiffs shewing, that Sir Roger Lewknor had three daughters, and that they have all taken husbands, and that they have issue, and that one of the said daughters is dead, living her husband, who is not named in the writ, for which cause the writ shall abate: see 22 H. 6. 24. 25. But that exception was also disallowed; for as this case is, there is not any reason, that the tenant by the curtesy should joyn in this action, for no judgment shall be given here, that the plaintiffs shall recover the place wasted, for the term is expired, as it appeareth by the words of the writ, scil. quas tenuerunt, and the tenant by the curtesy is in possession, and where tenant by the curtesie and the heir joyn in an action of wast, tenant for life shall have locum vastatum, and the heir the damages, which see 27 H. 8. 13. As unto the matter of law, upon the exceptions of woods and underwoods, it was argued by Shuttleworth, that the action of wast was not well brought against Ford, &c. for the assignment made by Shelley to Ford was with an exception of all woods and underwoods, and therefore Shelley remained tenant, and he ought to answer for the wood and the underwood in the action of wast, for upon every demise of lands the woods there growing are as well demised as the land itself, for so it appeareth by the writ of wast in domibus & boscis dimissis ad terminum annorum, &c. which proves, that the trees are parcel of [49] the demise, and so may be excepted: see Dyer 28 H. 8. 19. by Shelley and Baldwin. A man leaseth a manor, except woods and underwoods, the lessee cuts the trees, an action of wast doth not lie against him for the same, for the thing in which the wast is supposed to be committed was not demised, &c. and therefore the lessee shall be punished as a trespassor and not as farmer: Fenner Serjeant contrary, and that the exception of the woods and underwoods is merely void; for Shelley who assigns his interest with the said exception, hath not any such interest in the woods and underwoods, so as he can make such exception, for he had but an ordinary interest in them as farmer, viz. house-boot, hedge-boot, &c. which interest cannot by any means upon an assignment be reserved to the assignor, in gross of the estate, no more than if one hath common appendant to his land, and he will make a feoffment of the land, reserving, or excepting the common. And he who hath the inheritance of the land, hath an absolute property in the trees, but the lessee hath but a qualified interest, and therefore 21 H. 6. 46. the lessor during the term for years may command the trees to be cut down: and 10 H. 7. 3. lessee for years hath not any interest in the trees, but for the loppings, and for the shadow for his cattle: and in the case cited, where lessee for life and he in the reversion make a lease for life unto a stranger, and wast is committed, and they bring an action of wast, the lessee for life shall have the place wasted, and he in the reversion the treble damages, for in him was the true and very property of the trees, and therefore the treble damages do belong unto him, and not to the lessee for life, who joyneth with him;

and the reason wherefore the lessee for life or years shall recover treble damages against a stranger who cuts down any trees growing upon the land to him demised, is not in respect of any property that the lessee hath in the trees cut down, but because he is chargable over to his lessor in an action of wast, in which he shall render damages in such proportion. So see 27 H. 6. Wast. 8. A lease for life is made without impeachment of wast, a stranger of his own wrong cuts down trees, against whom the lessee brings an action of trespass; in such case he shall not recover treble damages, not for the trees, but only for the breaking of the close, and the loppings, for he is not chargeable over to his lessor for the same, because that his lease was made without impeachment of wast; and if the lessee hath such a slender interest in the trees where his lease is without impeachment of wast, his interest is less, where it is an ordinary lease without any such priviledge: and the property which the lessee for years hath in the trees in such case, is so appropriated to the possession, that it cannot be severed from it. Windham and Anderson Justices were of opinion, that the exception above is meerly void: for Ford the assignee of Shelly is now termer and farmer, who alone can challenge interest in the trees against all but the lessor, and Shelley after his assignment, is meerly a stranger. The interest of the lessee, and also of his assignee in the trees is of necessity, and follows the farm and the land as the shadow doth the body; and by him, where lessee for years by reason of his lease is to have wind-fals, yet he cannot imploy them but to the benefit and profit of his farm, for if he sell them or spend them elsewhere he shall be punished. Rhodes and Periam Justices, that the exception is good, as the fruits of the trees, shovelers, &c. And afterwards the case was adjudged upon another point in the pleading, so as the matter in law did not come to judgment: see Saunders case. 41 Eliz. Where lessee doth assign, excepting the timber trees, it is a void exception.

1 Cro. 17. Co. 5 Rep. 12 b. Co. 1 Inst. 42 a.

[50] PASCH. 29 ELIZ. IN THE KINGS BENCH.

LXIII. GRAY AND JEFFES CASE.

Action of Assault and Battery.

In an action upon the case by Gray against Jeffe, the plaintiff declared, that where he had placed his son and heir apparent with the defendant, to be his apprentice, and to learn of him the art of a tailor: that the defendant had so beaten his son with a spade, that he thereupon became lame, by reason of which he could not have so much with his son in marriage of him as otherwise he might have, because the same lameness is a disparagement to his said son: and further shewed, that he himself might spend twenty pounds per annum in lands. Haulton argued for the plaintiff. The action quare filium & hæredem cepit & abduxit, is given to the father in consideration that the marriage of his son and heir doth appertain to him by the law, and here by the battery the son is become so lame, that he is not so commendable to a marriage as before; and if the father had lost the whole marriage, then the father should have had the action quare filium & hæredem, &c. but here he hath not lost the whole marriage, but the marriage is lessened by it, and therefore he shall have this action. Tanfield contrary; I confess, that the father ought to have the marriage of his son and heir so long as he is sub potestate patris; but here the father hath committed all his interest, power and authority in his son to the defendant his master, with whom he hath bound his son apprentice for seven years, during which term the father hath not any thing to do with his son or his marriage. Wray: The action quare filium & hæredem, &c. is not given to the father, because his marriage belongs to him, but because of the education; and such was the opinion of Clench Justice, and the marriage doth not belong properly to the father: for if the son marrieth himself without the leave of the father there is not any remedy for the father. And afterwards judgment was given against the plaintiff.

1. Cro. 55.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXIV. BULLERS CASE.

[See *Durant & Co.* v. *Roberts & Keighley, Maxted & Co.* [1900], 1 Q. B. 649.]

Replevin.

Edmund Buller brought a replevin against two, who make conusans as baylies to A. for rent arrear reserved upon a lease for life, to which the plaintiff in bar of the conusans pleaded, that two strangers had right of entry in the place where, &c. and that the said two defendants by their commandment entred, &c. and took the cattle of which the replevin is brought, damage feasant, absque hoc, that they took them as baylies to the said A. and upon that traverse the defendants did demur in law. Shuttleworth Serjeant; the traverse is not good, for by that means the intent of the party shall be put in issue, which no jury can try, but only in case of recaption. See 7 H. 4. 10i. by Gascoign. If the bayly upon the distress shews the cause and reason of it, he cannot afterwards vary from it, but the other party may trice him by traverse; but if he distrain generally without shewing cause, then he is at large to shew what cause he will, and the other party shall answer to it. And it was said by the Court, that when a bayly distreins, he ought, if he be required, to shew the cause of his distress, but if he be not required, then he is not tied to do it. Anderson, We were all agreed in the case betwixt Lowin and Hordin, that the traverse, as it is here, was well taken. *The number roll of that case is* M. 28, & 29 Eliz. 2494.

2 Len. 196. 2 Len. 216. Post. 327. 5 Co. 77.

[51] PASCH. 29 ELIZ. IN THE KINGS BENCH.

LXV. HUDSON AND LEIGHS CASE.

Process. Return of the Sheriff. Escape. Execution.

Hudson recovered against Leigh in an action of battery, for which a capias pro fine issued against Leigh; and also a capias ad satisfaciendum, returnable the same term at one and the same return: as to the capias pro fine the sheriff returned cepi, and as to the capias ad satisfaciendum, non est inventus: and for this contrariety of the return, the court was of opinion, that the sheriff should be amerced; but it was moved by the council of the sheriff, that the awarding of the capias pro fine was meerly void, for the fine is pardoned by the Parliament. And it is also enacted, that all process awarded upon such fines shall be void; and then the capias pro fine being void, it matters not how or in what manner it be returned, for the Court shall not respect such process, nor any return of it, and then the Court not having respect to that return, there is not any contrariety, for the capias ad satisfaciendum only is returned, and not the capias pro fine. And at another day it was moved again; the battery was supposed 1 Junij 1586. and judgment given the thirteenth of February the same year, upon which issued capias pro fine, and before the return thereof the Parliament ended, which pardoned such fines and made all process thereupon void: and it was said by the Court, that if the sheriff in such case takes the party by a capias pro fine, now upon that taking he is in execution for the party, and if the sheriff let him go at large, he shall answer for the escape: and in that case the capias pro fine was well awarded, and the Court ought to regard it, and the defendant lawfully taken by virtue of it, and also in execution for the party in judgment of law; and afterward, when the Parliament came and enacted ut supra, although the process be made void thereby, the same ought to be meant as to the interest of the King in the fine, and the vexation of the subject by it, but not as to the execution of the party, but the sheriff shall answer for that. And it was also holden by the Court, that if the plaintiff sueth an elegit,

then upon the capias pro fine executed, the defendant shall not be adjudged in execution for the party, for he hath made his election of another manner of execution, scil. of the land, and he shall never resort to an execution of the body, 13 H. 7. 12. And as our case is there was an elegit obtained, but it was not on record, nor any record made of it, and therefore the election of the execution remained to the plaintiff. And as to the point aforesaid, that such process shall be void, as to the King only, not as to the party: see now 5 Ja. C. 6. part. 79. Sir Edward Phittons case.

5 Co. 82.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXVI. POTTER AND STEDALS CASE.

Trespass.

In trespass by Samuel Potter against Stedal the case was, tenant for life of land leased parcel thereof to hold at will, and being in possession of the residue, levyed a fine of the whole, the lessor entered into the land which was let at will in point of forfeiture, in the name of the whole; it was holden the same is a good entry for the whole: but if the disseisor leaseth for years part of the land, whereof the disseisin was committed, and the disseisee afterwards entereth into the land which continueth in the possession of the disseisor in the name of the whole, the same entry shall not extend to the land leased; for here the lessee is in by title, but in the other case not, for when tenant for life leaseth it at will, and afterwards levies a fine, the same is a determina-**[52]**-tion of the will. 16 Eliz. Dyer 377. 1. In the same plea it was holden, that if there be lessee for life, the remainder for life, the remainder in fee, lessee for life in possession levyeth a fine sur conusans de droit, &c. to his own use, upon that fine a fee-simple accrues.

Ante 36. 1 Inst. 252.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXVII. LEIGH AND HANMERS CASE.

Debt upon a Recognizance.

Thomas Leigh Esquire brought an action of debt upon a recognizance in the nature of a statute staple against John Hanmer Esquire, before the Mayor and Aldermen of Lond. in camera Guild-hall civitatis præd. and demanded 1500 pounds, upon such recognizance acknowledged 20 November 20 Eliz. and upon default of the said Hanmer, according to the custom of London used in course of attachment, attached six hundred pounds in the hands of one W. Bolton of Grays-Inn, in part of satisfaction of the said debt of one thousand five hundred pounds; and now within the year came the said Hanmer, & ad disonerandum debitum prædict. had a precept of scire facias against the said Thomas Leigh, and after pleaded, and demanded oyer of the said recognizance, and had it, & quod ipse restitutionem of the said 600 pounds, in manibus dict. W. Bolton attachiat. habere debet: and upon the whole record the case was thus: Rowland Leigh Esquire, being seised of certain manors and other lands in the county of Glocest. had issue Eliz. his daughter and heir inheritable to the said lands, and by indent. dated 20 Maii 19 Eliz. granted custodiam, regulam, gubernationem, educationem, maritagium dict. Eliz. to the said Thomas Leigh, after which the said Thomas Leigh by indenture 14 Martii 29 Eliz. granted and assigned the said custody, rule, government, education, and marriage, and all his interest therein, and the said indenture, to Sir John Spencer, after which the said Sir John Spencer and Thomas Leigh, by their indenture the 26. of August 20 Eliz. granted and assigned to the said John Hanmer the said custody, rule, government, education and marriage of the said Eliz. and all their interest in the same, and

all the recited indentures; by which last recited indenture 29 August, the said John Hanmer covenanted with the said Leigh, that Thomas Hanmer son and heir apparent of the said John Hanmer, maritaret & in uxorem duceret dictam Elizabetham ad vel antequam dicta Eliz. & dictus Tho. Hanmer perimplerint suas separales ætates 14 annorum, si dicta Eliz. ad id condescendere & agreare vellet; and afterwards before the said Tho. Hanmer and the said Elizabeth, suas separales ætates 14 annorum, perimplevissent, sc. 8 die Sept. 20 Eliz. the said Tho. Hanmer took to wife the said Eliz. the said Tho. Hanmer then being ætatis 13 annorum and no more, and the said Eliz. then being of the age of nine years and no more, and Tho. Hanmer aforesaid over-lived, &c. And pleaded further, that the said Tho. Hanmer after he attained his full age of fourteen years, and before any agreement or assent by the said Tho. Hanmer to the marriage aforesaid betwixt the said Tho. Hanmer and the said Eliz. had, at or after, idem Thomas Hanmer came to his age of fourteen years, scil. 10 die Sept. Anno 22 Eliz. ad dictum maritagium disagreavit, & maritagium illud renunciavit; and all this matter was pleaded in bar, as performance of the covenant contained in the indenture of defeazance made upon the recognizance, whereupon the action is brought. And concluded his plea, unde petit judicium si dictus Tho. Leigh actionem suam prædict. &c. Et quod ipse idem Johannes Hanmer restitutionem dict. 600 li. sc. ut præfert attachiat. habere valeat. And all the question here was, if this marriage had by this manner, and afterwards renounced as is aforesaid, be such a marriage as is intended in the covenant, so as the said covenant be satisfied by it. And it was argued before the Mayor Recorder, and Aldermen of **[53]** London, in their Guild-Hall by Angier of Grays-Inn, on the part of Leigh the plaintiff; and he in his argument did much rely upon the definition of marriage, by Justinian in his Institutions. Nuptiæ maris & fæminæ conjunctio individua continens viæ societatemu; and the marriage here in question is not according to the said definition, for the persons, parties to this contract, are not persons able by law to make such contract, because that non attigerunt annos nubiles, ergo nuptiæ esse non possunt, but only sponsalia, a step unto marriage; and there is also rendred one reason of the said definition upon the word individua, individuam dico, quia non nisi morte aut divortio separandum, but the marriage now in question might be dissolved without death or divorce, as it is in our case by disagreement: and see Jurisprudentiæ Romanæ, Lib. 1. cap. 33. Societas & consortium omni vita inter marem & fæminam ad concubitum, which is societatis hujus consummatio: and as every act doth consist upon three things, 1. Inceptio, 2. Progressio, 3. Continuatio, so is it in the case of marriage; but in this case when Thomas Hanmer took the said Eliz. to wife, that is but an inception, but the progression and consummation of it is cut off by the disagreement; and he much relyed upon the words of the covenant, si dicta Eliz. ad id condescendere & agreare vellet, so as there is not any liberty left to the defendant for the agreement or disagreement of the son, but he ought to agree at the peril of his father; but if Eliz. will not agree, then the defendant is not at any mischief, for in such case the covenant doth not extend to him; and also here the father is bound that his son, a stranger to the obligation should marry the said Elizabeth, which he ought to procure at his peril, or otherwise he shall forfeit his bond. Egerton Solicitor of the Queen argued to the contrary; this marriage as much as concerns this covenant, is to be considered according to the reason of the common law, and not according to the rules and grounds of the canon or civil law, not as a marriage in right but as a marriage in possession, and marriage in possession is sufficient always in personal things and causes, especially where the possession of the wife is in question, but where the possession of the husband is in question, there marriage in right ought to be, and where marriage in possession fals in averment, there it shall not be tried by the bishop, as in the case of a marriage of right, where, never accoupled in loyal matrimony, is pleaded, but by the country, for in case of wife in possession, never accoupled in matrimony, is no plea, but not his wife, which see 12 E. 3. br. 481. A. brought an action of trespass against B. and C. B. pleaded that C. is wife of the plaintiff, and demanded judgment of the writ; the plaintiff by replication said, never accoupled in lawful matrimony, but it was not allowed, but was driven to say, not his wife, for if C. was the wife of the plaintiff in possession or by reputation, it is sufficient to abate the writ: see also 49 E. 3. 18. by Belknap, the right of the

espousal is always to be tried by the bishop, but the possession of the marriage; not as in assize by A. and K. his wife, the tenant demanded judgment of the writ upon special matter, and concluded, so is the said K. our wife, and not the wife of A. So in a cui invita by B. and C. his wife, the tenant pleaded, never accoupled in loyal matrimony, the same is no answer to the wife, for she demanded in her own right, and if he who aliened was her husband in possession, the wife could not have other action, for assize doth not lie, because he was her husband in fact at the said time in possession. And see also 50 E. 3. 20. adjudged according to the opinion of Belknap: and see also 39 E. 3. As to the marriage in right, as the case in question is; for upon such marriage, if the husband be murdred before disagreement, the wife shall have an appeal of murder, and a writ of dower: so where appeal is brought of the rape of his wife, although she be his wife but in possession, and not in right, 11 H. 4. 13. by Hulls 168. and by Littleton; if the wife be of the age but of nine years, she **[54]** shall have dower, which see also 35 H. 6. and yet dower shall never accrue but in case of marriage in right, for there, never coupled in marriage, is a good plea, see 12 R. 2. Dower 54. In dower the tenant pleaded, that the husband at the time of his death was but at the age of 10 years, and the demandant now but 11 years, and yet judgment was given for the demandant, for by Charleton the same was a marriage in right until disagreement, see 22 Eliz. Dyer 369. A woman at full age marrieth a husband of 12 years, who dieth before the age of consent, the same is a good marriage, and so ought to be certified by the bishop; and 7 H. 6. 11. by Newton, a woman married within age of consent may bring an action as a feme sole, and the writ did abate. Stamford Prerogat. 27. 19 E. 3. Judgment 123. In a writ of ward, the jury found, that the infant was of the age of 10 years, and no more, but they did not know whether she was married or not, but de bene esse, if she be married assess damages one hundred pounds, and if not, five pounds; upon which it appeareth that marriage at such an age is such a marriage upon which the lord shall recover damages; see 13 H. 3. gard 148. such marriage in the life of the ancestor, infra annos nubiles, if there be no disagreement shall bind the King: and after the death of the ancestor, the heir shall remain in custodia Domini Regis usq; ad ætatem ut consentiat, vel dissentiat, 45 E. 3. 16. In a writ of ward, the infant was found of the age of 12 years, and the jurors gave damages 300 marks, if he were married, and 27 H. 6. gard. 118. & 47 E. 3. Br. Trespass 420. and Fitz. Action upon the statute 37. Trespass de muliere abducta cum bonis viri, where the wife is within the age of consent: and if I be bounden unto another in an obligation, upon condition to pay a sum of mony upon the marriage day of I. S. now, if I. S. be married within the age of consent, I am bound to pay the mony the same day, although afterwards the parties do dissent, and the wife after such marriage shall be received in a plea real upon the default of her husband; and the words, si dicta Eliz. ad id condescendere & agreare vellet, are to be understood of an agreement at the time of the marriage, and here the time is limited for the solemnization of the marriage, scil. at or before they shall have accomplished their several ages of 21 years, makes the matter clear; for it is in the election of Hanmer the father, to procure this marriage, scil. that his son shall take to wife the said Elizabeth, at which of the two times he will, scil. at or before, &c. to the marriage before &c. is as effectual in respect of the performance of this condition, as if the marriage had been had after; and as the case is, the condition could not be better performed, for if the marriage had been stayed till after 14 years, &c. although the marriage doth not ensue, yet the obligation had been forfeited, and that the marriage be solemnized just at the age of both of 14 years, was impossible, for Thomas Hanmer was the elder by 2 years than the said Elizabeth, and therefore they ought to be married at such time which might stand with the condition, and the same is done accordingly: and as to that which hath been objected, that now by disagreement the marriage is determined, we ought to observe that Hanmer was bounden for the performance of the covenant, and that his son and heir apparent maritaret, & in uxorem duceret dictam Eliz. ad vel ante, &c. which is executed accordingly, and he is not bounden for the continuance of the said marriage, but the continuance of the same ought to be left to the law, which giveth to the parties liberty to continue the marriage by agreement, or to dissolve it by disagreement: and therefore if I am bounden to you, that I. S. (who in truth is an infant)

shall levy a fine before such a day, which is done accordingly, and afterwards the same is reversed by error, yet notwithstanding the condition is performed, &c. and afterwards judgment was given against the plaintiff.

Owen 25. Dyer 190, 191. 2 Roll. 585. Postea. 181. 2 Len. 170. 171. 3 Len. 129.

[55] PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXVIII. THE EARL OF WARWICK AND THE LORD BARKLEYS CASE.

Partition. Challenge.

Ambrose Earl of Warwick and Robert Earl of Leicester brought a writ of partition against the Lord Barkley, in which the parties pleaded to issue. And now at the day of the enquest the defendant did challenge, that in the whole pannel there were but two hundreders; and at the first it was doubted by the Court, if upon the statute of 27 Eliz. cap. 6. by which it is enacted; that no further challenge for the hundred shall be admitted if two sufficient hundreders do appear, the enquest shall be taken: but at length the whole Court was clear of opinion, that the said statute did extend but to personal actions; but this action of partition is a real action; and summons, and severance lieth in it, but not process of outlawry, and therefore here four hundreders ought to be returned; so in an action of wast, although it be in the personalty: and therefore the council of the plaintiffs prayed a tales.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXIX. THE ARCHBISHOP OF YORK AND MORTONS CASE.

Error upon recovery in Assize.

The Archbishop of York recovered in an assize of novel disseisin against one Morton before the Justices of Assize; upon which judgment Morton brought a writ of error before the Justices of the Common Pleas, and after many motions at the bar, it was adjudged that a writ of error upon the said judgment did not lie in the said Court. 18 Eliz. Dyer 250. F. B. 22. That upon erroneous judgment given in the Kings Bench in Ireland, error shall be brought in the Kings Bench in England, 15 E. 3. Error 72. Fenner who was of council with the archbishop demanded of the Court how, and in what manner the record shall be remanded to the Justices of Assize, so as the archbishop might have execution; to which the Court said, that the surest way is to have a certiorare out of the Chancery into the Common Pleas directed to the judges there; and then out of the Chancery by mittimus to the Justices of Assize. But Fenner made a difficulty of it to take such course for the remanding of it, for doubt they would not allow it to be a record where it is not a record, for upon the matter the record is not removed, but remains with the Justices of Assize. Then Anderson said, Sue execution out of the said record; but because the record came before us by writ of error, it shall be also removed and remanded by writ: and so it was.

3 Len. 159.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXX. KEMPE AND CARTERS CASE.

Copyhold. Evidence of Customs.

Thomas Kempe brought trespass, for breaking of his close against Carter: and upon pleading they were at issue, if the lord of the manor aforesaid granted the said

lands per copiam rotulorum curiæ manerii prædict. secundum consuetudinem manerii prædict. and it was given in evidence, that within the said manor were divers customary lands, and that the lord now of late at his court of the said manor granted the land, &c. per co-[56]-piam rotulorum curiæ, where it was never granted by copy before: it was now holden by the whole Court, that the jury are bound to find, dominus non concessit, for notwithstanding that de facto dominus concessit per copiam rotulorum curiæ, yet non concessit secundum consuetudinem manerii prædict. for the said land was not customary, nor was it demisable, for the custom had not taken hold of it. In the same case it was also shewed, that within the said manor some customary lands are demiseable for life only, and some in fee; and it was said by the Lord Anderson, that he who will give in evidence these several customs, ought to shew the several limits in which the several customs are severally running, as that the manor extends into two towns, and that the lands in one of the said towns are grantable for lives only, and the lands in the other in fee, and he ought not to shew the several customs promiscue valere through the whole manor: and he remembered a case of his own experience: scil. the manor of Wadhurst in the county of Sussex consisted of two sorts of copy-hold, scil. sook-land and bond-land, and by several customs disseverable in several manners: as if a man be first admitted to sook-land and afterwards to bond-land, and dieth seised of both, his heir shall inherit both; but if he be first admitted to bond-land, and afterwards to sook-land, and of them dieth seised, his youngest son shall inherit, and if of both simul & semel, his eldest son shall inherit; but if he dieth seised of bond-land only, it shall descend to the youngest: and if customary land hath been of ancient time grantable in fee, and now of late time for the space of forty years hath granted the same for life only; yet the lord may if he please resort to his ancient custom and grant it in fee. It was also moved in this case, if customary land within a manor hath been grantable in fee, if now the same escheat to the lord, and he grant the same to another for life; the same was holden a good grant and warrantable by the custom, and should bind the lord, for the custom which enables him to grant in fee shall enable him to grant for life: and after the death of the tenant for life, the lord may grant the same again in fee, for the grant for life was not any interruption of the custom, &c. which was granted by the whole Court.

Pasch. 29 Eliz. In the Common Pleas.

LXXI. Walker and Nevils Case.

Dower. Damages.

Walker and his wife brought a writ of dower against Jervice Nevil, and judgment was given upon nihil dicit, and because the first husband of the wife died seised, a writ of enquiry of damages was awarded, by which it was found, that the land which she ought to have in dower, the third part was of the value of eight pound per annum, and that eight years elapserunt a die mortis viri sui proxime ante inquisitionem & assident damna to eight pounds; and it appeared upon the record, that after judgment in the writ of dower aforesaid the demandants had execution upon habere facias seisinam, so as it appeareth upon the whole record put together, that damages are assessed for eight years, where the demandants have been seised for part of the said eight years, upon which the tenant brought a writ of error, and assigned for error, because damages are assessed until the time of the inquisition, where they ought to be, but to the time of the judgment; but the exception was not allowed; another error was assigned, because that where it is found, that the land was of the value of eight pounds per annum, they have assessed damages for eight years, to eighty pounds beyond the revenue; for according to the rate, and value found by verdict it did amount but to sixty four pounds: but that error was not also allowed; for it may be, that by the long detaining of the dower, the demandants have sustained more damages than the [57] bare revenue, &c. Another error was assigned, because damages are assessed for the whole eight years after the death of the husband, where it appeareth,

that for part of the said years the demandants were seised of the lands by force of the judgment and execution in the writ of dower; and upon that matter the writ of error was allowed.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXXII. ARCHPOOL AGAINST THE INHABITANTS OF EVERINGHAM.

In an action upon the statute of Winchester of huy and cry by Archpool against the inhabitants of the hundred of Everingham, the jury found, that the plaintiff was robbed 2 Januarii post occasum solis, sed per lucem diurnam, and that after the robbery committed, the plaintiff went to the town of Andover, and advertised the baylies of the said town of the said robbery; and further found, that the said town of Andover is not within the said hundred of Everingham, and that there is another town nearer to the place where, &c. the robbery was done, than the said town of Andover within the said hundred, but the said town of Andover was the nearest place where, &c. by the Kings high-way: it was moved that upon this matter, the plaintiff should not have judgment, for that he hath not made his fresh sute according to the law, for he ought to have begun his fresh sute within the hundred where the robbery was done: and it was also objected, that the robbery was done post occasum solis, in which case the hundreders are not to pursue the malefactors. And Walmsley Serjeant cited a case out of Bracton: si appellatus se defenderit contra appellantem tota die usque ad horam in qua stellæ incipiunt apparere, recedat quietus de appello, and it is not reason to drive the hundreders to follow felons at such a time, when for want of light they cannot see them. And all the justices were clear of opinion, that if the robbery was done in the night time, the inhabitants are not bound to make the pursute: and by Rhodes, if in a præcipe quod reddat of lands, the sheriff summons the demandant upon the land in the time of night, such a summons is meerly void.

1 Cro. 270.

PASCH. 29 ELIZ. IN THE COMMON PLEAS. INTRAT. TRIN. 28. ROT. 1458.

LXXIII. WISEMAN AND WISEMANS CASE.

Debt. Devises. Extent of an Habendum.

In an action of debt by Wiseman against Wiseman, the case was, that one Wiseman was seised of the lands, and by his will devised, 1. I will and bequeath unto my wife B. acre for the term of her life, the remainder to my son Thomas in tail: item I will and bequeath unto my son Thomas, all my lands in D. and also my lands in S. and also my lands in V. Also I give and bequeath unto the said Thomas my son all that my island or land enclosed with water which I purchased of the Earl of Essex: to have and to hold all the said last before devised premisses unto the said Thomas my son, and the heirs of his body: the only matter was, if the habendum shall extend to the island only, in which case Thomas shall have but for life in the lands in D. S. and V. or unto the island, and also to the lands in D. S. and V; in which case he shall have fee-tail in the whole. And it was argued by Fenner, that the habendum should extend to the island only; as he said, the opinion of the justices of this Court was in 4 Eliz. in another case. I devise my manor to D. my eldest son, and also my land in S. in tail, in that case the entail limited for the land in S. shall not extend to the **[58]** said manor, and of such opinion was Weston, Welsh, and Dyer; Brown contra, that the son hath tail in both. But if the words of the devise had been, I devise my manor of D. and my lands in S. to my son in tail, here the son had an estate tail in both. So it hath been adjudged, that if I devise lands to A. B. and C. successively as they be named, the same is good by way of remainder. Walmesley contrary, and he relied much upon this, that the words

of the habendum are in the plural number, all the last before devised premisses, whereas the thing lately devised by the will was an island in the singular number, which cannot satisfie the habendum, which is in the plural number, and therefore to verifie the plural number in the habendum, the habendum by fit construction shall extend to all the lands in D. S. and V. and so upon his motion made at another day, it was resolved by all the justices, that the habendum should extend to all the said lands, and the habendum should not streighten the devise to the island only.

1 And. 160. Owen, 140. 2 Roll. 60. Roph. 126. 1 Roll. 844. 2 Bulst. 180. 181.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXXIV. FULLWOOD AND FULLWOODS CASE.

Bail renders himself in Court.

In an action upon the case, the defendant put in bail to the Court to answer to the action; and now judgment being given against him, he came into Court and rendred himself, and prayed, that in discharge of his sureties, that the Court would record the rendring of himself, which was granted: and the Court demanded of the plaintiff, if he would pray execution for the body against the defendant, who said, he would not, whereupon the Court awarded, that the sureties should be discharged; and the rule was entred, that the defendant offered himself in discharge of his sureties, and attornatus querentis allocatus per curiam, &c. dixit se nolle, &c. Ideo consideratum fuit per curiam, quod tam prædict. defend. quam prædict. Manucaptores de recognitione prædict. & denariis in eadem contentis exonerentur.

LXXV. PASCH. 29 ELIZ. IN THE COMMON PLEAS.

Feoffments. Attornment.

The case was, he in the reversion upon a lease for years, makes a charter of feoffment to divers persons to the use of himself for life, and after to the use of his eldest son in tail; and the words of the charter were, dedi, concessi, barganizavi, & feoffavi, and he sealed and delivered the deed, but no livery of seisin was made; and afterwards he came to his lessee for years, and said to him, that he had made a feoffment, and shewed also the uses, but did not shew to whom the feoffment was made; to whom the lessee said, you have done very well, I am glad of it: and if that were a good attornment was the question: it was said, that that was the case of one Arden. And Gent, and Manwood were of opinion, that the same was no attornment, because it was not made to the feoffee, scil. to the grantee of the reversion; and so it was ruled in this case, for attornment ought to be to the grantee himself, and not to cestuy que use.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXXVI. THE PARSON OF FACKNAMS CASE.

Tythes, and where the Spiritual Court shall have jurisdiction of them.

The parson of great Facknam brought an action of trespass against the parson of Hannington, and the case was, if the parson of one parish claim by prescription a portion of tythes out of the parish of **[59]** another, if the Spiritual Court shall have the jurisdiction, for the tryal of it: and the opinion of the whole Court was clear, that it should, because that the matter is betwixt two spiritual persons, and concerning the right of tithes. As 35 H. 6. 39. I. Vicar of B. brought trespass for taking away of forty loads of beans, &c. The defendant pleaded, that he is parson of the said

church of B. and the plaintiff is vicar, &c. and before the trespass, &c. the beans were growing in the same town, and severed from the nine parts, and he took them as belonging to his said church, and demanded judgment of the Court, &c. The plaintiff said, that he and all his predecessors vicars, &c. time out of mind, &c. have used to have the tithes of such a close, &c. belonging to his vicaridge, and within the said close the beans were growing and were parcel of his endowment; and that at the time of the taking they were severed from the nine parts, whereupon he took them. And it was holden by Ashton and Danby, because it is confessed on both sides that the beans whereof, &c. were tithes, the right of which would come in debate betwixt the parson and the vicar, and both are spiritual persons, that the tryal thereof doth belong to the Spiritual Court. See 6 E. 4. 3. 22 E. 4. 23. 24. in such a matter betwixt the parson and vicar there the Temporal Court was ousted of the jurisdiction. See also 31 H. 6. 11. betwixt the parson and the servant of another parson. 7 H. 4. 102. In trespass by a parson against a lay-man, who said, that one A. is parson of a church in a town adjoyning to a town where the plaintiff is parson, and that A. let to him the tithe, and demanded judgment, &c. and pleaded to the jurisdiction, and by Gascoigne, the plaintiff may recover his tithes in the Spiritual Court.

1 Cro. 251.

Pasch. 29 Eliz. In the Kings Bench.

LXXVII. Bunny against Wright and Stafford.

Leases within 1 *Eliz. and* 32. 7, 8. *made by Bishops.*

In trespass the case was this: Grindal Bishop of Lond. leased parcel of the possessions of his bishoprick for one and twenty years, and afterwards ousted the lessee and leased unto another for three lives, rendring the antient and accustomed rent, which was confirmed by the dean and chapter. And afterwards Grindal is translated: Cook argued, that the lease is warranted by the statute of 1 Eliz. At the common law a bishop might make an alienation in fee-simple being confirmed by the dean and chapter: but by 32 H. 8. cap. 28. bishops without dean and chapter, or their confirmation may make a lease for one and twenty years, but with the confirmation of the dean and chapter may make a lease for one thousand years. But by the statute of 1 Eliz. the power of bishops in that right is much abridged, for now with confirmation or without confirmation they cannot dispose of their possessions but for one and twenty years or three lives; and this lease is in all points according to the statute of 1 Eliz. for first it begins presently upon the making of it: secondly, the antient rent is reserved payable yearly during the term; for although here be an old lease in esse, yet the rent reserved upon the second lease is payable during the second term, for payable is a word of power and not of action, as 1 H. 4. 1. 2. 3. lord, mesne, and tenant, the mesne gives the mesnalty in tail, rendring rent, it is a good rent, and well reserved, although here be not a present distress; yet it may be the tenancy will escheat, and then the donor shall distrein for all the arrearages: and so the rent is payable by possibility. And 10 E. 4. 4. A. leaseth for years, and afterwards grants the reversion to a stranger, if the beasts of the stranger come upon the lands during the term; A. may distrein for the arrearages incurred, and if he happen seisin, he shall have an **[60]** assise during the continuance of the first term. And he cited a case lately adjudged in the Exchequer. A lessor entred upon lessee for years, and made a feoffment rendring rent with clause of re-entry, the lessee re-entred, claiming his term, and afterwards during the said term for years, the rent reserved upon the feoffment upon demand of it is behind: now hath the lessor regained the reversion: and so a rent may be demanded although not distreinable. And all that was affirmed by Egerton Solicitor General: and see the words of the statute of 32 H. 8. cap. 28. Rent reserved yearly during the said lease due and payable to the lessor, &c. such rent, &c. and yet by the said statute, such leases may be good, although there be a former interest for years in being, if the same shall be expired, surrendred, or ended within one year after

the making such new lease, and so not expressly payable in rei veritate, annually during the term.

Co. 1. Inst. 45. a. More 107. 1 Anderson 65.

PASCH. 29 ELIZ. IN THE KINGS BENCH.

LXXVIII. BONEFANT AND SIR RICH. GREENFIELDS CASE.

Sale of Lands by the Executors of the Devisor.

Bonefant brought trespass against Sir Rich. Greenfield, and upon the general issue, this special matter was found: Tremagrie was seised of a manor, whereof the place where, &c. was parcel, in his demesne as of fee, and by his will devised the same to his four executors, and further willed, that his said executors should sell the same to Sir John Saintleger for the payment of his debts, if the said Sir John would pay for it one thousand one hundred pounds at such a day, and died, Sir John did not pay the mony at the day; one of the executors refused administration of the will, the other three entred into the land and sold it to the defendant for so much as it could be sold, and in convenient time. It was moved, that the sale was not good, for they have not their authority as executors, but as devisees, and then when one refuseth, the other cannot sell by 21 H. 3. cestuy que use wills, that is executors shall alien his land, and dieth, although the executors refuse the administration, yet they may alien the land. 19 H. 8. 11. 15 H. 7. 12 Egerton Solicitor argued, that the sale is good by the common law, and also by the statute 49 E. 3. 16, 17. Devise, that his executors shall sell his land, and dieth, and one of the executors dieth, another refuseth, the third may sell well enough, and the sale is good. See Br. Devise 31. 30 H. 8. 39 E. 3. Br. Assise 356. And he put a difference where an authority is given to many by one deed, there all ought to joyn; contrary, where the authority is given by will; and if all the executors severally sell the lands to several persons, such sale which is most beneficial for the testator shall stand, and take effect: and here it is found by verdict, that one of the executors, recusavit onus testamenti, ergo, he refused to take by the devise, for it was devised unto him to the intent to sell, therefore if he refuseth to sell, he doth refuse to take, and so it is not necessary that he who refuseth joyn in the sale, and although we are not within the express words of the statute, yet we are within the sense and meaning of it. And afterwards it was adjudged, that the condition, for the manner of it, was good.

Post. 260. 1 And. 145.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXXIX. GAMOCK AND CLIFFS CASE.

Ejectione firmæ. Conditions. Where the Tenant in Dower shall take advantage of a condition.

Ejectione firmæ was brought by Gamock against Cliff of the manor of Hockly, in the county of Essex, and upon the evidence the case was: **[61]** that the King and Queen, Philip and Mary, seised of the said manor of Hockley, leased the same to Edmund Terrel for years, exceptis & reservat. grossis arboribus super præmissis crescentibus & existentibus; proviso, that if the said lessee his executors, or assigns shall do any voluntary wast in any of the premisses before demised, that then the said demise shall be void and accounted none in law; the said King and Queen after that lease grant the reversion to the Lord Rich and his heirs, the lessee cuts down certain great trees, which at the time of the demise were not great, but little trees, but after, tractu temporis became great, and at the time of the cutting down were great, upon whom the Lady Rich, wife and widow of the said Lord Rich, being tenant in dower, the said manor (inter alia) being assigned to her in dower, did enter, for the

condition broken: it was moved; if the exception did extend to the trees which at the time of the demise were but little trees, but afterwards at the time of their cutting down were become great; for if the exception do extend to such trees, then upon the matter they were not demised, and if so, then wast cannot be assigned in the cutting down of them, and then by the cutting of them, the condition is not broken: but if the exception shall be construed to extend to such trees only which were great tempore dimissionis, then those trees in which, &c. are demised, and by the cutting down of them, the condition is broken. And the Lord Anderson was of opinion, that the exception did extend to trees, which at any time dimissionis prædict. became great, although at the time of the demise they were but little, so as upon the matter, such trees were never demised, and so the condition doth not extend to them; otherwise it should be if the words had been modo crescentibus & existentibus. Another matter was moved, because if the Lady Rich, being tenant in dower, and so in by the law, not by the party, and so not privy, nor as assignee, could enter for the condition broken: and the Court was clear of opinion, that because, that the words of the condition are, Quando dimissio prædict. erit vacua, &c. and no clause of reentry is reserved, so that privity is not requisite, the Lady Rich shall take advantage of the condition, 11 H. 17. Where the words of a lease are, that upon the not going to Rome, that the lease shall cease; it was holden that the grantee of the reversion by the common law should take advantage of such a condition; contrary where the condition is conceived in words of re-entry, 21 H. 7. 12. It was moved further, that here is not any voluntary wast in the lessee as to the condition, because done by a stranger, and not by the lessee himself, and for that the condition is not broken, only the lessee is subject unto an action of wast; otherwise, if the lessee had expressly commanded the vendee to cut them down, or had given to him express authority. The sale was, all his woods growing, &c.

Dyer 281. Owen 93.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

LXXX. GILL AND HAREWOODS CASE.

Assumpsit.

Gill brought an action upon the case against Harewood, and declared, that where the defendant was endebted to the plaintiff in such a sum, and shewed how; the defendant in consideration that the plaintiff, per parvum tempus deferret diem solutionis, &c. did promise to pay, &. And, upon non assumpsit pleaded, it was found for the plaintiff, and it was moved in arrest of judgment, that here is not any consideration, for no time is limited for the forbearance, but generally, parvum tempus, which cannot be any commodity to the defendant, for the same may be, but punctum temporis, &c. But the exception was not allowed, for the debt in it self is a sufficient consideration.

[62] LXXXI. PASCH. 29 ELIZ. IN THE COMMON PLEAS.

Fenner Serjeant would have drawn a fine which was by dedimus potestatem, and the fine was to two, and their heirs, but the Court would not receive such fine for the incertainty of the inheritance, which always in case of fine ought to be reposed in a person certain, and not left to uncertainty of the survivor, and the said serjeant prayed presently, that the said fine be received at the peril of the conusees, but the same was denied him by the whole Court.

2 Co. 74. 5 Co. 38. 8 Co. 155.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

LXXXII. MASCALS CASE.

Covenant.

Mascal leased a house to A. for years by indenture, by which A. covenanted with Mascal to repair the house leased, and that it should be lawful for Mascal his heirs and assigns to enter into the house to see in what plight for matter of reparation the said house stood, and if upon any such view, any default should be found in the not repairing of it, and thereof warning be given to A. his executors, &c. then within four months after such warning, such default should be amended: the House in the default of the lessee became ruinous: Mascal granted the reversion over in fee to one Carre, who upon view of the house gave warning to A. of the default, &c. which is not repayred, upon which Carre, as assignee of Mascal, brought an action of covenant against A. It was moved by Fenner Serjeant, that the action did not lye, because the house became ruinous before his interest in the reversion; But the opinion of the whole Court was against him, for that the action is not conceived upon the ruinous estate of the house, or for the committing of waste, but for the not repayring of it within the time appointed by the covenant, after the warning, so as it is not material within what time the house became ruinous, but within what time the warning was given, and the default of the reparation did happen.

2 Cro. 644.

LXXXIII. MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

Dower.

In a writ of dower, brought by a woman of the third part of certain lands, &c. the tenant pleaded; that the lands of which dower is demanded, are of the nature of gavel-kind, and that the custom of such land is, that dower ought to be demanded of the moity of it, and not of the third part, upon which the demandant did demur: And the opinion of Windham and Anderson Justices was; that such a woman of such land might at her pleasure demand her dower either according to the custom, or according to the common law; for by Anderson, the common law was before the custom, quod quære. And by Windham, if the demandant here recover her dower according to the common law, yet if she taketh another husband, she shall lose her dower as if she had been endowed according to the custom. Coke, an apprentice of the Inner Temple being at the Bar, when this case was moved, said unto Serjeant Shuttleworth, that the case had been adjudged against the demandant, and Scot Prothonotary did affirm, that the Lord Dyer was of opinion, that the woman ought to be endowed according to the custom, and not otherwise. And Sayer one of the clarks of Nelson, **[63]** chief Prothonotary said, that it was adjudged accordingly, 16 Eliz. and that the case was betwixt Gelbrand demandant, and Hunt tenant.

1 Cro. 825. Poph. 133.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

LXXXIV. BEVERLIE AND CORNWALS CASE.

Quare Imped. Out-lawry pleaded.

Beverlie brought a quare impedit against Cornwal, and had judgment to recover upon a demurrer in law: which see Mich. 28 & 29 Eliz. And now the Queen brought a scire facias upon the matter, that the said Beverly after the said judg-

ment was out-lawed in an action of trespass at the sute of I. S. and upon that a scire facias issued, ad respondendum quare dicta domina Regina, should not have execution of the judgment aforesaid, by reason of the out-lawry aforesaid; and declared in all as aforesaid: and further, that the said Cornwal had resigned. Upon which Beverlie did demur in law. And this term it was argued by Puckering Serjeant for the Queen, that by that out-lawry the interest to present is transferred to the Queen. Which see 5 H. 5. 3. Tenant at will of a manor, to which an advowson is appendant, is out-lawed in an action of trespass; the church voided; by award of the Court it belongs to the King to present: and see 8 R. 2. scil. Quare Imped. 200. A. seised of an advowson, the church becomes void. A. is out-lawed in a personal action; the King shall have a quare impedit in that case. And as to the exception taken, because the out-lawry is not sufficiently layed in the writ, but only generally, viz. utlagatus in Com. Lincoln, ad sectam. J. S. in placito transgressionis, without shewing the out-lawry at large. There is a difference where an out-lawry is pleaded by way of bar, and disability of the person, &c. and where it is set down in a writ, for a writ ought shortly and compendiously to comprehend the cause of the action, especially judicial writs which are not tied to any form certain, especially because that the out-lawry set forth in the writ is a record of the same Court: for the perclose of the scire facias is, prout per recordum hic in curia plenius apparet: and that record being in the Court the party cannot plead nul tiel record, as if the record had been in any other Court: but he ought to demand oyer of the record: Which vide 5 H. 7. 24. Walmesly Serjeant contrary. By out-lawry in an action personal, the King cannot seise land, but only take the profits of it, 9 H. 6. 20. 21 H. 7. 7. And as our case is, nothing doth accrew to the Queen by this out-lawry, for the Queen her self is seised of the advowson, because she, usurpando presentavit, and her clerk admitted; and although Beverlie hath recovered in a quare impedit against the presentee of the Queen, yet because he is not removed by a writ to the bishop, the Queen continues patron, and nothing remains in Beverlie that may be forfeited. But Rhodes and Periam contrary, for by Periam if after such recovery the incumbent dieth, the patron shall present, for by the judgment in the quare impedit for Beverlie, the patronage is revested in him without any other execution: And by Rhodes, if after such judgment the patron dieth, his executors shall have a writ to the bishop. And by Walmesley, the scire facias doth not lie for the Queen, for that writ always runs in privity of the record upon which it is grounded, to which record the Queen is a stranger, and by out-lawry in an action personal no action real shall escheat, and therefore this scire facias being in the nature of a quare impedit upon which it is grounded, which is a real action, or at at least a mixt, shall not be forfeited; and also it shall be absurd to grant now a writ to the bishop for the Queen; whereas judgment was given against the Queen, as in our case it hath been. And in no case the judges shall respect the title of the Queen, being a stranger to the writ: But where a title for the Queen doth appear **[64]** upon the pleading or otherwise within the record, 11 H. 4. 224. by Hankford. If a clear title for the King be confessed by the parties upon pleading, a writ to the bishop shall issue for the King; so if such matter appear in evidence, &c. the land in question is seisable into the Kings hands. See 9 H. 7. 9. 16 H. 7. 12. so 21 E. 4. 3. by Choke and F. N. B. 38. e. In a quare impedit betwixt two strangers if title doth appear to the Court for the King, a writ to the bishop shall issue forth for the King; but in our case nothing is within the record to intitle the Queen, but all the matter upon which a writ to the bishop is prayed for the Queen is out of the record, and a foreign thing. And as to the out-lawry, he conceived it is not sufficiently alledged; for he ought to have made mention of the exigent and of all the proceeding upon it, and the judgment of the coroners, and for defect of that no title is given to the Queen; and of that opinion was the Lord Anderson, and that it ought to be set forth in the writ in what term the said Beverly was out-lawed, and the number roll also, so that if Beverly had demanded oyer of the record, the Court might know it: and by Nelson chief Prothonotary, the term in which the out-lawry was, ought to be comprised in the scire facias. Vide Book of Entries 485 where in a quare impedit for the King upon such a title, the King shewed in his count, that A. was seised of such an advowson, and granted the next avoidance to B. and that

afterwards one C. impleaded the said B. in a writ of account in such a court, where nihil was returned upon the summons, upon which issued forth a capias, upon which is returned, non est inventus, &c. upon which an exigent, upon which the sheriff did return, quod ad com. tent. &c. & ad v. comitat. tunc. prox. præcedent. the said B. exactus fuit, & non comparuit, & quia ad nullum eorundem comitat. apparuit, utlagatus fuit, and after the church voided, and that by reason thereof it did belong to the King to present: vide ibid. 196. accordingly. And as to the scire facias all the judges agreed, that upon the matter the writ lay well enough: and it is good discretion in the Court to grant such a writ: and by Rhodes, if two coparceners of an advowson make composition to present by turns, and afterwards one of them dieth, her heir within age, and in ward to the King; the church voideth, and the King is disturbed in his presentment, he shall have a scire facias upon such composition, notwithstanding that he be a stranger to it: see F. N. B. 34 H. And by all the justices, if one recover in debt upon a simple contract, and before execution the plaintiff is out-lawed in an action personal, the King shall sue execution: and see 37 H. 6. 26. where in debt upon an obligation it was surmised to the Court, that the plaintiff was out-lawed: and the Kings Attorney prayed delivery of the obligation, &c.

2 Roll. 805. 3 Cro. 427.

Mich. 29 & 30 Eliz. In Communi Banco.

LXXXV. Moile and The Earl of Warwicks Case.

Quare Impedit. Office trove. A Record not to be brought into Court without a Writ. 63.

A quære impedit was brought by Walter Moile against Ambrose Earl of Warwick and the Archbishop of Canterbury. And now came the serjeants of the Queen, and shewed an office, to entitle the Queen to have a writ to the bishop, containing such matter, viz. that one Guilford was seised of the manor of D. to which the advowson of the church was appendant, and that manor was holden in chief by knights service, and that Guilford and his wife levied a fine thereof to the use of themselves for their lives, the remainder over in tail to their eldest son, and that Guilford is dead, but who is his next heir, ignorant: and it was shewed by the council of the other side, that the truth of the case was, that the said Guilford was seised of the said manor in the right of his wife, and so levied the fine, in which case the said conveyance is not within the sta-**[65]**-tute of 32 H. 8. for it was for the advancement of the husband, not of the wife, which Anderson granted. Vide Dyer 19 Eliz. 354. Caverlies case, but that is not in the office: and it was moved at the Bar, that the office is imperfect, because no heir is found. But Anderson, the office is sufficient for the King to seise, although it be insufficient for the heir, &c. And it was agreed by the whole Court, that the Court ought not to receive the office, although one would affirm upon oath, that it is the very Office, but it ought to be brought in under the Great Seal of England; and also the Court shall not receive it without a writ; and yet Nelson Prothonotary said, that the statute of Huy and Cry of Winchester was brought into the Court without a writ under the Great Seal, and that was out of the Tower: and in that case also the justices held, that if a record be pleaded in the same court where it abides, the other party against whom it is pleaded may plead nul tiel record, as if the said record had bin remaining in another court, which all the prothonotaries denied, & that always it had been used to the contrary. At another day the case was moved again. The plaintiff in the quare impedit counted, that Richard Guilford was seised of the said manor, &c. in the right of Bennet his wife, and so seised, they both levied a fine thereof to a stranger, sur conusans de droit come ceo, who rendred it to the husband and wife for their lives, the remainder to the heirs of the body of the husband, the remainder to the right heirs of the husband; and they so being seised, the husband alone levied a fine to a stranger, sur conusans de droit come ceo, &c. and by the same fine the conusee rendred to the husband and wife in tail, the remainder to the heirs of the

body of the husband, the remainder to the right heirs of the husband, the husband died seised, the wife entred and leased the said manor to the plaintiff, and then the church did become void: and now the Queens serjeants came and shewed unto the Court an office, which came in by mittimus: in which writ the perclose is, mandamus vobis quod inspectis, &c. pro nobis sieri faciatis quod secundum leges & consuetudinem Regni nostri Angliæ faciend. statuetis; and the office did purport, that the said Richard was seised of the said manor, and held the same of the Queen, as of her Castle of Dover, by knights service in chief, and levied the fine, ut supra, and that the said Richard died, sed quis fit propinquior hæres dict. Ric. penitus ignorant; and upon that office prayed a writ to the bishop for the Queen: and two exceptions were taken to the office, first because it is not found by the said office that the said Richard died seised, in which case it may be for any thing that appeareth in the office, that the said Richard after the said fine had conveyed his estate in the said lands unto others, or that he was disseised, &c. See 3 H. 6. 5. If it be not found of what estate the tenant of the King died seised, the office is insufficient. But see there by Martin, that such an office is good enough for the King, but not for the heir to sue his livery upon it. And by Anderson, Periam, and Rhodes, that defect in the office is supplyed by the count, for there it is expressly alledged, that the said Richard died seised. Secondly, because no heir is found by the said office. To which it was said by the Lord Anderson, that peradventure at the common law the same had been material exception. But we ought to respect the statutes of 32 and 34 H. 8. of wills. And therefore as to the wife the Queen is entitled to primer seisin, because the conveyance was made for her advancement. And by Windham, the Queen in this case shall not have primer seisin, for by the statute the Queen shall not have primer seisin, but in such case, where, if no conveyance had been made, the Queen should have had primer seisin; but in this case for any thing that appears before us, if this conveyance had not been made the Queen should not have had primer seisin, forasmuch as no heir is found, and if he died without heir there is no primer seisin, because there is not any in rerum natura to sue livery. Rhodes, Periam, and Anderson contrary; admit-[66]-ting that Richard died without heir, the Queen shall have primer seisin against the wife of Richard, notwithstanding the escheat. Walmesley Serjeant, if the tenant of the King by knights service in chief dieth seised of other lands holden of a common person by knights service, without heirs, the King shall not have primer seisin of such lands holden of a subject, which Windham granted: but by Anderson the lord is put to sue an ouster le mayne of the land holden of him. And afterward exception was taken to the count, because the plaintiff hath not averred the life of the tenant in tail, that is, of Bennet the wife of Richard, to whom the land was entailed by the second fine: but that exception was disallowed by the whole Court, and a difference put by Anderson, where a man pleads the grant of an advowson in gross by tenant in tail, in such case the life of the tenant in tail ought to be averred, for by his death the grant ceaseth. But where a man pleads the lease of tenant in tail of a manor with an advowson appendant, in such case such averment is not necessary: so accordingly Smith & Stapletons case, 15 Eliz. 431. And here it was moved, if, in as much as by the first fine an estate for life was rendred to the wife, and by the second fine, in which she did not join, an estate tail was limited unto her, and now when the husband dieth if he shall be remitted to her estate for life; which Windham granted; for that was her lawful estate, and the second estate tortious. But by Rhodes, Periam, and Anderson the wife is at liberty to make her election which of the two estates she will have. And as to the writ to the bishop for the Queen, the Court was clear of opinion, that it ought not to be granted upon this matter: but all the question was, if Regina inconsulta, the Court would or ought to proceed: and it was holden clearly by the whole Court, that the tenure alledged modo & forma, could not be a tenure in chief, for it is said, that the land was holden of the King, as of the Castle of Dover, in capite.

1 Cro. 895. Co. 1 Inst. 357. 2 Cro. 489.

LXXXVI. Mich. 29 & 30 Eliz. In Communi Banco.

Intr. Pasc. 28 Eliz. Rot. 602.

Wast. No advantage of impunity for Wast shall be taken, where the same is not pleaded though found by verdict.

Wast was brought by F. and his wife against Pepy, and counted, that the said Pepy was seised, and enfeoffed certain persons to the use of himself for life, and afterwards to the use of the wife of the plaintiff and her heirs. The defendant pleaded, that the said feoffment was unto the use of himself and his heirs in fee, &c. without that, that it was to the uses in the count; upon which they were at issue: and it was found by verdict, that the said feoffment was unto the uses contained in the count: but the jury further found, that the estate of the defendant by the limitation of the use was priviledged with the impunity for wast, that is to say, without impeachment of wast. And it was moved, if upon this verdict the plaintiff shall have judgment: and Anderson and Rhodes Justices, he shall, for the matter in issue is found for the plaintiff, and that is the feoffment to the uses contained in the count; and this impunity of wast is a foreign matter not within the charge of the jury, and therefore the traverse of it but matter of surplusage. As if I plead the feoffment of I. S. to which the other pleads, that he did not enfeoff, and the jury find a conditional feoffment, the Court shall not respect the finding of the condition, for it was not in issue, and no advantage shall ever be had of such a livery if it be not pleaded. 30 H. 8. Dyer 41. In dower the tenant pleaded, ne unques seisi que dower; the tenant pleaded, that before the coverture of the demandant, one A. was seised of the lands, of which dower is demanded in tail, who made a feoffment to a stranger, and took the demandant to wife, and took back an estate in fee, and died seised, having issue inheritable: now although upon the truth of the matter she is **[67]** not dowable de jure, yet when the parties are at issue upon a point certain, no foreign or strange matter not in question betwixt the parties shall be respected in the point of the judgment. But if the defendant had pleaded it in bar, he might have foreclosed the demandant of her dower: vide 38 H. 6. 27. 47 E. 3. 19. In a præcipe quod reddat in the default of the tenant one came and shewed how the tenant who made default was but tenant for life of the lands in demand, the reversion in fee to himself, and prayed to be received. The demandant did counter-plead the receit, saying, the defendant had fee, upon which issue was joyned. And it was found, that neither the tenant, nor he which prayed to be received, had any thing in the land; in that case the Court did not regard the matter which was superfluous in the verdict, for they were at issue upon a point certain, that is, whether the tenant was seised in fee, for it was confessed of both sides, that he had an estate for life; and with that matter the jury was not charged, and they are not to enquire of it, and so it was found against the demandant, for which cause the receit was granted. 7 H. 6. 20. The parties were at issue upon a dying seised, which is found by verdict, but the jury further find, that the other party made continual claim; this continual claim shall not be regarded in the point of judgment, because it was pleaded in avoidance of the descent. Windh. Justice contrary, forasmuch as it appeareth unto us upon the verdict, that the plaintiff hath not cause of action, and therefore he shall not have judgment; as in detinue, the plaintiff counteth of a bailment by his own hand; the defendant pleadeth, that he doth not detain, &c. the jury find the detinue, but upon a bailment by another hand: in this case, notwithstanding that the detinue be found, yet the plaintiff shall not have judgment: but Rhodes, Periam, and Anderson in the principal case were of opinion, judgment should be given for the plaintiff, for in no case the party shall have advantage of such a liberty of impunity of wast, if he do not plead it; and the jurors are not to meddle with any matter which is not in issue: and if it be but matter of surplusage it is to no purpose. And afterwards judgment was given for the plaintiff.

1 Cro. 40. 41. Hob. 53. Owen. 91. Hob. 53. Owen. 91.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

LXXXVII. BRACEBRIDGE AND BASKERVILES CASE.

Debt against Executors. Scire facias, to have Execution of Assets come to Executors hands, after riens enter maynes pleaded.

An action of debt is brought against three executors, one of them pleads in bar a recovery against himself in the Kings Bench: the other two plead plene administr. Against the first plea the plaintiff did aver covin; and upon the second plea they are at issue: the first issue is found for the plaintiff, and as to the other plea, it was found, that the defendants have in their hands thirty pounds of the goods of their testator not administred. Note, the debt in demand was one hundred pounds, upon which the plaintiff had judgment to recover the goods of the testator, and thereupon had execution. Now the plaintiff brought a scire facias against the said executors, supposing that many other goods of the testator have come unto their hands after the judgment, and prayed execution thereof: upon which the defendant did demurr in law. Vide 21 H. 6. 40. 41. In debt against executors of forty marks, the defendant pleaded, that he had fully administred, and it was found, that the defendant, at the day of the writ brought, had of the goods of the dead twenty marks and no more, and gave damages five marks. There the plaintiff had judgment for the twenty marks of the goods of the dead, and the five marks of their own goods: and as to the other twenty marks, that the plaintiff should be amerced: 33 H. 6. 24. where executors plead that they have nothing in their hands, which is found accordingly: after-[68]-wards goods of the testator came to the hands of the executors: now the plaintiff upon a surmise shall have out of the same record a scire facias to have execution of the said goods: but see 4. H. 6. 4. contrary, for there it is said, that upon the matter the original is determined, and so no record, upon which a scire facias can be grounded: and see Fitzh. abridging the case scire facias, 25. by the verdict and the judgment the original is abated: vide 7 E. 4. 9. by Moile, according to 33 H. 6. and so 46 E. 3. 9. by Belknap. And the Lord Anderson demanded of the prothonotaries the manner of the entry of the judgments given in such cases, who said, that their entry is in this manner: (i.e.) quod querens recuperet, that which is expressly found by the verdict, but nothing of the residue, for of that no mention is made at all. And the Court seemed to be of opinion, that where, upon nothing remaining in their hands, pleaded, it is found that some part of the sum in demand is in the hands of the executors, there the plaintiff upon a surmise of goods come to the hands of the executors shall have a scire facias; contrary, where upon such issue, it is found fully for the defendants, that they have nothing in their hands.

3 Cro. 272. Hob. 199. 1 Cro. 318. 319. 592. 8 Co. 134.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

LXXXVIII. FORDLEYS CASE.

Tender pleaded.

Fordley brought debt upon an obligation, the condition was, that if the defendant, viz. the obliger deliver unto the plaintiff the obligee, at such a day and place, twenty pounds or ten kine, at the then choice of the obligee, &c. that then, &c. The Court was clear of opinion, that the defendant in pleading the performance thereof ought to tender to the plaintiff as well the twenty pounds as the ten kine, and for default thereof judgment was given against the defendant. See the Number Roll T. 29 Eliz. 1. part. 324. vide 14 E. 4. 4. b.

9 Co. 79. Dy. 25. a. 1 Inst 207. Post. 69. 70. a.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

LXXXIX. BARKER AND PIGOTS CASE.

Debt. Execution must follow the nature of the Action.

Edward Barker brought debt against Rich. Pigot executor of the will of E. executrix of the will of R. The defendant pleaded, that he had fully administred the goods of his testator E. upon which they were at issue, which was found for the plaintiff. And it was moved in arrest of judgment, that here is not any issue joyned, which answers to the action, for the action is brought against the defendant in the quality of the executor of an executor, and the verdict extends to the defendant, but is executor of the said E. for it is found by it, that the defendant hath fully administred the goods of his testatrix, without any enquiry of the administration of the goods of the first testator R. in which capacity the defendant is charged. So as here the writ charges the defendant in the quality of an executor of an executor and in respect of the first testator, and the issue and verdict doth concern the last testator: and the whole Court was clear of opinion, that although that now after verdict fee-tail be saved, and no judgment shall be given upon it, yet here the Court shall give judgment as upon a nihil dicit, in which case the execution of the judgment, shall not fall upon the goods of the last testator according to the verdict, but shall follow the nature of the action which was brought against the defendant as executor of an executor.

[69] MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

XC. THACKER AND ELMERS CASE.

Re-disseisin, and the Judgment in it.

Thacker recovered in an assize of novel disseisin against Elmer certain lands in Hackney, and had execution: Elmer entred upon Thacker and ousted him, and redisseised him. Thacker re-entred, and afterwards brought a redisseisin; and it was moved, whether Thacker against his entry might have a redisseisin: and the opinion of the whole Court was, that he might well maintain the writ, for he is not thereby to recover any land; but the defendant of that redisseisin being convicted, shall be fined and imprisoned, and render double damages: vide Book of Entries 502. the judgment in a redisseisin is, quod recuperet seisinam suam of the land.

1 Cro. 323.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

XCI. BLAUNCHFLOWER AND FRYES CASE.

Debt. Administration granted, pendant the Writ.

Blaunchflower brought debt upon a bond against Elinor Frye, as executrix of one Andrew Frye her late husband, who pleaded, that this writ was brought 9 July, 27 Eliz. whereof she had notice the first of October after, within which time one Lawrence had brought an original writ against the said Elinor as administratix of the said Andrew: and after the bringing of the writ, the Bishop of Bath and Wels committed administration of the goods of the said Andrew to the said Elinor, which Elinor confessed the action, upon which judgment was given for the said Lawrence, beyond which she had not goods, upon which the now plaintiff did demur in law. And by Anderson, the recovery pleaded in bar shall not bind the plaintiff, because it appeareth upon the plea of the defendant, that the administration was committed

after the writ purchased, which matter if the defendant had pleaded, Lawrence could not have had judgment to recover. As where there are three executors, and debt is brought against two of them, if they do not plead that matter in abatment of the writ, but plead, &c. or confess the action, so that the plaintiff hath judgment to recover, that recovery shall not bind a stranger who hath cause of action against them, but that he may well falsify it; and yet it was said that in such case, the defendant by the obtaining of the letters of administration had made the writ good against her, vid. 13 H. 4. Fitz. Executors, 118. administration committed before the writ purchased shall abate the writ brought against the defendant as executor, but such administration obtained, depending the writ shall not abate it, vid. 21 H. 6. 8. 2 R. 3. 20. Another matter was moved by Anderson, because the defendant had pleaded a recovery by confession had against her without averment that it was a true debt, in which case covin is presumed. Windham and Periam were of opinion, that the matter of covin ought to come in on the part of the plaintiff, which Anderson denyed, vid. 9 E. 4. 13, 14. 33. the Cardinalls Case.

IN COMMUNI BANCO INTRAT. MICH. 26 & 27 ELIZ. ROT. 12.

XCII. BASSET AND KERNS CASE.

Debt by Executors. Election.

Basset the executor of Moris Sheppheard brought debt upon a bond against Kerne, the case was; that Kerne was bound to Moris in a obligation **[70]** upon condition, that the said Kerne should pay to the said Morris his executors, &c. at the choice and election of the said Morris, within a month after the death of the Lady Kerne, thirty pounds, or twenty kine, to which the defendant pleaded that the plaintiff within the month after the death, &c. did not make any choice or election, upon which the plaintiff did demurr in law: and the Court was clear of opinion, that it was a good plea in bar, for the obligee is not bounden to make a tender of both, viz. of the mony and the kine, but the obligee himself is bounden at his peril to make election within the time limited; as if I be bounden to you, to make unto you such further assurance within such a time by fine or feoffment as you shall chuse, it behoveth you to make election of your assurance, fine, or feoffment, and in the principal case, the election of the plaintiff ought to precede the tender of the defendant: vid. the Lord Lisles Case, 18 E. 4. 15. 17. 20. 21. Where the defendant was bound to the said lord to shew his evidences touching such a house to the said lord or his council, the election was to the defendant to whom he would shew them; and there by Brian, if I be bound to you to marry your daughter, or to go to York on your businesses upon request, before you require me to marry your daughter I may do it, or go to York, which Coke granted, vid. 13 E. 4. 4. Where the condition is in the disjunctive, before the day of performance the election is to the defendant, but if at the day he make default, the election is to the obligee; vid. 9 E. 4. 36, 37. And by Windham, if I be bound unto you in an obligation of ten pounds, to pay to you such a day ten pounds in gold, or silver, if you do not make your election before the day, yet the duty remains payable, for the thing to be paid is parcel of the penalty, quod fuit concessum; and as to the principal case, the Court was clear of opinion, that upon this matter the plaintiff should be barred. See before this term, Forteleyes Case.

Rolls. Tit. Election. 1 Cro. 819. 1. Roll. 446. Tit. Condition.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

XCIII. SEARCHES CASE.

Habeas Corpus.

A habeas corpus issued forth out of the Court of Common Pleas, to the steward and marshal of the house, &c. for one Wil. Search, which was returned in this

manner, viz. quod domina regina per litteras suas patentes suscepit, in protectionem suam regiam, Johannem Mabbe, and his sureties, and of her further grace by the said letters, voluit, that if any person should arrest, or cause to be arrested the said John Mabbe or any of his sureties, that then the marshal of her house, or his lawful deputy might arrest every such person, and detain them in prison until such person should answer before the Privy Council for the contempt; and that the said William Search caused one John Preston one of the said sureties of the said John Mabbe to be arrested, &c. And upon that return, the said William Search was discharged; and also because that after the said discharge the parties caused the said William Search to be arrested again for the same cause, that is, by colour of the said protection; an attachment was granted against them.

Habeas Corpus.

Note, that the same term, Mich. 29 & 30 Eliz. another habeas corpus was directed to the steward and marshal of the Marshalsey, for one Howel, who made return, that the said Howel was committed to his custody, per mandatum Francisci Walsingham Militis Principalis Secretarij, & unius de privato concilio dominæ reginæ, and that return was by the Court holden insufficient, because the cause upon which he was committed, was not set down in the return; and therefore day was given to **[71]** amend the return, and now they returned the writ in this manner, ss. infra nominatus Johannes Howel commissus fuit, &c. ex sententia & mandato totisus concilii privati dominæ reginæ; ita quod corpus ejus habere non possumus, &c. And that return was also holden by the Court to be insufficient, for (by whatsoever person, or by what means soever he was committed) the conclusion of the return ought to be, corpus tamen ejus paratum habeo, and if it shall seem good to the Court, that the prisoner shall have his priviledge, and shall be dismis't, he shall be discharged, but if not, then he shall be remanded. And the Court took a difference, where one is committed by one of the Privy Council, for in such case the cause of the committing ought to be set down in the return; but contrary where the party is committed by the whole Council, there no cause need to be alleadged.

Antea 68.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

XCV. BRET AND AUDARS CASE.

Debt upon a Bond to perform Award. Tender. Non damnificatus, generally, where no Plea.

Bret brought debt upon an obligation against Audar, the condition of which obligation was, that the defendant should stand to the award, &c. And the arbitrator awarded, that the defendant should pay unto the plaintiff ten pounds, without naming day or place; and as to that the defendant pleaded, that he was always ready, and yet is, &c. without shewing any tender: and it was moved, that although that would have been a good plea in debt upon an arbitrament, as the case is, 7 H. 4. 97. see 21 E. 4. 40, 41, 42. yet now by the obligation and the condition of it, the sum is payable in another manner than it was before, see the pleading of the case, 21 E. 4. In debt upon an obligation to perform the award; that the award was made between the terms of Pasch. and Trinity, and he, the eighth of September after, tendred the twenty pounds, and the plaintiff refused it. And the Lord Anderson put a difference between the case, in 22 H. 6. 57. and the case at the Bar, for in our case the obligation doth precede the duty which accrueth by the award subsequent, but in the former case the duty did precede the obligation which was made for the further assurance of the duty: and here the defendant ought to have pleaded the tender, and see 14 E. 4. 4. A. is bound unto B. that, where he hath granted to the said B. a rent-charge out of such land, now if the said B. shall enjoy the said rent according to the form and effect of the said grant, that then, &c. there he needs not to plead any tender, for the rent is not payable in other manner than it was before; contrary if the condition had been for the payment of the annuity: and of that opinion was the whole Court,

that he ought to have pleaded a tender. Another matter of the award was, that the said Audar should yield up, surrender and relinquish to the plaintiff all such houses and tenements which he had in his possession by reason of the custody of the said plaintiff: as to that the defendant pleaded, that he had yielded up, &c. all such houses, &c. generally without shewing which in certain; and for that cause the Court was clear of opinion, that the plea was not good; which see 9 E. 4. 16. If I be bounden upon condition to enfeoff the obligee of all lands, and tenements, which were to I. S. in pleading the performance of that condition, I ought to shew what lands and tenements in certain, for they pass out of me by the feoffment; see also 12 H. 8. 7. 13 H. 8. 19. Another point of the award was, that the said Audar should acquit and discharge, and save harmless the plaintiff of such an obligation, to which the defendant pleaded, that querens non suit damnificatus, and that plea was holden insufficient, for he ought to have shewed, how he had discharged him, and it is not sufficient to answer only to the damnification, as if I be bounden to convey unto you the manor **[72]** of B. in pleading the performance of the condition, it is not sufficient to shew, that I have conveyed the said manor, but to shew by what manner of conveyance, viz. by fine, or feoffment, &c. 22 E. 4. 43. If the condition be to discharge the plaintiff, &c. then the manner of the discharge ought to be shewed, but if it be to save harmless only, then non damnificatus generally is good enough, 40 E. 3. 20. 38 H. 6. 39. The condition of an obligation was, that the obligor should keep without damage the obligee, of such a sum of mony against B. to whom he was bounden for the payment of it, and the said obligor pleaded that at such a day, &c. the said B. at his request delivered the obligation to the plaintiff in liew of an acquittance, without that, that the plaintiff was damnified by the said obligation, before the delivery of it; and it was holden by the Court, that if the defendant had pleaded, that he had kept the plaintiff without damage, and had not shewed how, that the plea had not been good. See 22 E. 4. 40. The Lord Lisles Case. And afterwards judgment was given for the plaintiff.

Owen 7.

MICH. 29 & 30 ELIZ.

XCVI. HEYDONS CASE.

Ralph Heydon pretending title to certain land, entred into it, and made a lease of it to try the title: upon which his lessee brought an ejectione firmæ, in which the parties were at issue; and now at the day of the enquest, the jurors were called, and but five of them appeared, whereupon, the defendant came and shewed to the Court, that the said Heydon by his friends and servants, had laboured the jury, not to appear, and that for the further vexation of the defendant who had four verdicts in affirmance of his title, that the said Heydon to procure the jury not to appear, had surmised to them, that he and the defendant were in course of an agreement, whereas in truth no such communication of agreement had any time passed betwixt them: and all this was openly deposed in Court, as well upon the oath of the defendant himself as upon the oath of one of the jurors, upon which the Court awarded an attachment against the said Heydon, to answer the contempt; and also granted to the defendant, that he might sue a decem tales with proviso, for his own expedition.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

XCVII. SMITH AND KIRFOOTS CASE.

Debt upon Arbitrament.

Smith brought debt upon an arbitrament against Kirfoot, and declared that the defendant and he, imposuerunt se in arbitrium, ordinationem, & judicium Johannis Popham ar. arbitratoris indifferenter electi, de jure, titulo, & interesse in equibusdam messuagijs, &c. Who taking upon him the burthen of the arbitration, ordinavit, that

the said defendant should pay unto the plaintiff ten pounds, in plenam satisfactionem, &c. and thereupon he brought his action; it was moved by Walmesley Serjeant, that the declaration is not sufficient, for it appeareth that the arbitrament set forth in the declaration is utterly void; because whereas ten pounds is awarded to the plaintiff, nothing is awarded to the defendant, and so the award unequal, and so void. But the Court was clear of opinion, that notwithstanding that such an arbitrament be void in law, yet it may be for any thing that appeareth, that the award is good enough: for the plaintiff is not to shew in his declaration all the award, but such part only of it which doth entitle him to the **[73]** thing, &c. and if the defendant will impeach the award for any thing, that is to come on his part, vide. ac. Book of Entries, 152. 123. vide. For the arbitrament, 39 H. 6. 12. by Moile, 7 H. 6. 41.

1 Cro. 904. 2 Cro. 354. 355.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

XCVIII. ARUNDEL AGAINST MORRIS.

Audita Querela.

Richard Arundel sued an audita querela against Morris, and it was comprehended in the writ; that Morris had recovered against him a certain debt, and that he was taken by a capias ad satisfaciendum, at the suit of the said Morris, by Hickford Sheriff of the county of Gloucester; who let him go at large, &c. And they were at issue, upon the voluntary escape, and it was found for the plaintiff. It was objected in arrest of judgment, that the writ of audita querela is not good, for the words are, that the plaintiff, captus fuit virtute brevis nostri judicialis, whereas this word (judicialis) is not in the register; but only brevis nostri de capiendo. But by the whole Court, the writ is good, for the word (judicialis) is but a word of surplusage, and shall not make void the writ: and afterwards judgment was given for the plaintiff.

MICH. 29 & 30 ELIZ.

XCIX. BROOK AGAINST KING.

Debt. Conditions against Law.

In debt upon an obligation by Brook against King, the defendant pleaded that the bond was endorced, with such condition, viz. that if the said defendant King shall procure one I. S. to make reasonable recompence to the plaintiff for certain beasts which he wrongfully took from the plaintiff, that then, &c. And he said in facto, that the said I. S. had stolen the said beasts from the plaintiff, and thereof he was endicted, &c. and so the condition being against the law, the obligation was void, upon which the plaintiff did demurr in law. And it was argued by the whole Court: that where the condition of an obligation shall be said against the law, and therefore the obligation void, the same ought to be intended where the condition is expressly against the law in express words, and in terminis terminantibus, and not for matter out of the condition, as it is in this case; and judgment was given for the plaintiff.

Post. 103.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

C. HAWKS AGAINST MOLLINEUX.

Replevin. Prescription.

In a replevin by Hawks against Mollineux who avowed for damage-fesant; the plaintiff in bar of the avowry, pleaded that Sir Gervase Paston Knight, was seised

of a messuage and twenty acres of land; and that always those whose estate, &c. have used to have common in the place where, &c. for all their cattel commonable in this manner, viz. if the said land be sowed by assent of the commoner, then no common, until the corn be mowed, and when the corn is mowed, then common until the land shall be sowed again by assent of the commoners: and this prescription was found by verdict, and exception was taken to this prescription because against common right, so as a man cannot sow his land without the leave of another. But the exception was disallowed by the Court; for the prescription was holden to be good by the whole Court, for by the law of the land, the owner of the land cannot plow the land where another hath common; but here is a benefit to each party, as well for the owner of the land against the commoner, as for the commoner against the tenant of the land, for each of them hath a qualified interest in the land.

Yelv. 185.

[74] INTR. PASCH. 29 ELIZ. ROT. 1410. IN COMMUNI BANCO.

CI. BALDWIN AND COCKS CASE.

Replevin.

Baldwin was plaintiff in a replevin against Cocks, and upon the pleading the case appeared to be this, that Sir Richard Wayneman was seised of the place where, &c. and leased the same to one Truepeny and one Eliz. Reade for term of 21 years, if the said Truepeny and Eliz. or any child or children betwixt them begotten should live so long; Eliz. within the term died without issue; if now the term for 21 years be determined was the question. And the Lord Anderson conceived, that the estate for years is not determined by the death of Elizabeth. And it was argued by Shuttleworth Serjeant, that upon the matter the term is determined: and he put the case of the Lord Bray, 3 Eliz. Dyer 190. where the Lord Bray sold unto four great lords the marriage of his son and heir, to the intent to be married at the appointment and nomination of the said lords, the Lord Bray died, one of the said lords before any marriage, or appointment, or nomination, died, the son is married by the appointment, &c. of the surviving lords; that marriage is not within the intent of the covenant, and adjudged that upon that marriage no use shall accrue. And also he cited this case adjudged in the Kings Bench. The administration is committed to one durante minore ætate of two infants, one of them becomes of full age, the power of the administration is determined, which Walmesley Serjeant granted, for it is but an authority; but here in the case at bar is a matter of interest. And by Anderson all the construction of this lease and grant rests upon this point, if this word (*or*) either shall be taken as disjunctive as it is in its nature, or as a conjunctive; and if it be taken as a disjunctive, if it make the whole sentence in the disjunctive as if the limitation had been, if the husband or wife or any child, &c. And Fenner, put this case out of 17 E. 3. as he cited it. Land is given to I. S. in fee so long as A. B. hath issue of his body. A. B. dieth without issue, his wife priviment ensient, now the estate is determined, and upon birth of the issue after shall not revive, which Rhodes and Anderson denied, for in many cases the law shall respect the existency of the child in the mothers belly: and see 7 Eliz. Plow. 289. where a copulative shall be taken in the disjunctive, as a covenant with B. to make a lease for years of such lands to the said B. and his assigns, the same shall be construed, or his assigns. And it was clearly agreed by the other parties, that if the words had been, if Truepeny, Elizabeth, or any child or children, &c. so long, &c. upon the death of any of them the interest is determined: and by Rhodes, Periam and Windham in the principal case, the lease shall endure as long as any of the persons named in the proviso shall live, and so seemed to be the meaning of the parties. And Anderson hæsitavit in the words of the limitation, i. the habendum to the said Truepeny and Eliz. for 21 years a festo sancti Johannis Baptist. post terminum annorum (the expiration of a former term) if the said Truepeny and Elizabeth, or any child, &c. And he conceived, that the limitation did go to the commencement of the lease only, and not to the expiration

or determination, as if the lease should not begin if they all were not alive at the commencement of the lease: and all the other justices were clear of the contrary opinion, for by them this limitation shall go, and shall be referred to the determination of the lease, and not to the commencement of it.

Anderson, if any cause should be, for which the lease should endure until the years be encurred, notwithstanding the death of the husband or wife, it was because the lease was intended a common advancement to both, **[75]** for it should be in vain to name the wife in the lease, if the lease should cease by the death of the husband. And afterwards after many arguments on both sides, it was adjudged, that by the death of Elizabeth, the lease was not determined, for the disjunctive before (child) makes all the limitation in the disjunctive.

Owen 52. Post. 225. 1 Inst. 225. a. 5 Co. 9. 1 Brown. 31. 46, 47. 80. 101. 2 Br. 83. 148. Post. 251. 1 Roll. 444.

Mich. 29 & 30 Eliz. In Communi Banco.

CII. Zouch and Bamfields Case.

The case between the Lord Zouch and Bamfield was now argued by the justices. And Rhodes the puisne Justice argued, that the Lord Zouch the demandant should be barred. Four exceptions have been taken to the bar: first, because it is not shewed in the bar that the moyety of those sixty messuages, &c. of which he pleads the fine, was parcel of the manor at the time of the fine levyed; for the pleading is, that the grandfather of the demandant was seised of the said manor, unde medietas prædictorum 60. messuagiorum, &c. a tempore cujus contrar. memoria, &c. was parcel, and so seised de manerio prædict. unde, &c. finis se levavit; and he conceived that the pleading, notwithstanding that was good enough; for he hath said as much in effect, contrar. cujus memoria hominum non existit, in the present tense, which amounts to this, that men cannot remember, &c. but that this moyety was parcel of the said manor: as 10 H. 7 12. In an assise of common, the plaintiff makes his title, that he was seised of a messuage and carve of land in D. to which the said common is appendant, and that he and all his ancestors, and all those whose estate he hath, &c. have used to have common, &c. Exception was taken to the title, because the plaintiff doth not shew in his title, that he is seised of a messuage, &c. for if he hath aliened the messuage the common passeth, so if he be disseised, &c. but the exception was not allowed, for it appeareth upon the words of the title, that the plaintiff is seised: i. all those whose estate he hath in the present tense, which words do shew and declare possession and seisin in the plaintiff, the time of the plea pleaded; so in this case, the substance of the words, in which the defect is assigned, is ut supra; that men cannot remember, but that this moyety was parcel of the manor, and then the words after, unde, &c. reddidit manerium prædict. unde, &c. shall have the same construction as before. Periam conceived, that the bar is nought for the cause aforesaid, for it is not so pleaded, that we can adjudge upon it, that the said moyety was parcel of the manor at the time of the fine levyed, and then the fine cannot extend unto it. And the reason alledged by my brother Rhodes shall not help that matter, for the said words cannot be construed otherwise, but that no man can remember but the said moyety was parcel, but not that it is parcel, or at the time of the fine levyed was parcel. Vide 32 H. 6. 24. In trespass the defendant pleaded, that A. was seised of the manor of D. whereof the place, &c. is parcel, he ought to say expresly, that the place where was parcel of the manor at the time of the trespass supposed. Windham conceived, that the plea was good, and that it appeareth well upon this plea, that the said moyety was parcel of the said manor at the time of the fine levyed, for he pleads, that the grandfather of the demandant was seised of the manor of N. Unde medietas prædictorum, &c. a tempore cujus contrar. memoria hominum non existit, & sic seisitus existens, finis se levavit; sic seisitus; i. e. seised of the manor in such sort, as the manor is set forth before, and that is good pleading, especially by

way of bar, which if it be good to a common intent, is well enough; and the word (unde, &c.) so often repeated after shall be idle and to no purpose if the law shall not give such a construction. Anderson to the same purpose. And he much [76] relyed upon the reason of Windham, and so seised. Another exception was taken to the bar, because in pleading of the fine, it is not averred, that the conusor at the time of the fine levyed was of full age, out of prison, &c. And as to that Rhodes took the difference between the pleading upon the statute of 1 H. 3. where these disabilities are within the purview of the said statute, and upon the statute of 4 H. 7. where in the body of the statute no mention is made of them, but afterwards in an especial exception by it self; and he cited the opinion of the justices, especially of the Lord Dyer in the case reported by Plowd. 5 Eliz. 365. betwixt Stowel and the Lord Zouch. Periam to the same intent, and upon the same reason, and further he said that although the statute of 32 H. 8. contains in its purview the same disabilities; yet this fine is pleaded upon the statute of 4 H. 7. and therefore the pleading of the same shall not be directed nor waged by the statute of 32 H. 8. which doth not alter the pleading of a fine which was before, nor the reason of it; for it is not properly a statute, nor do fines receive any strength or virtue by it, but is but a construction of the said former statute. And he put the case betwixt Hide and Umpton; where Umpton mean betwixt the statutes of 32 and 34 H. 8. declared his will of all his lands, which devise if it be good for two parts of the land devised it was doubted, or that the devise should be void for the whole; afterwards came the stat. of 34 H. 8. and cleared the doubt, for to that intent it was made; and in the said statute there is a proviso, that the said statute shall not extend to the will or the devise of Tho. Umpton, or shall be prejudicial or hurtful to any person or persons for any lands &c. contained or specified in the said will or devise, but that the said will and devise shall stand, remain and be in the same case, in force and effect in the law, as the same was before the making of this act. Now, notwithstanding that proviso, the will of Umpton was holden good but for two parts, for so the statute of 34 H. 8. construed the statute of 32 H. 8. So in our case, the statute of 32 H. 8. of fines construes the statute of 4 H. 7. to extend to fines levyed by tenant in tail, therefore the estate tail shall be adjudged in law to be bound by the statute of 4 H. 7. and not by 32 H. 8. which is rather a judgment upon the said statute of 4 H. 7. than any new statute. Windham to the same intent, and he relyed upon the reason aforesaid. And further said, if one will plead a lease made by tenant in tail upon the statute of 32 H. 8. he need not to aver the full age of the lessor, and yet that quality of full age is within the purview of the said statute. First all leases to be made, &c. by any person being of full age, &c. and so is the common use of pleadings. And of the same opinion was the Lord Anderson for the said exception, for the reasons, and upon the difference aforesaid. Another exception was taken to the bar, because it is not alledged, that the said fine was engrossed in the same term in which it was levyed. And as to that, it was holden by Rhodes, that in pleading of a fine it needs not to shew any engrossing of it; and so are many presidents, vide Plowd. Com. Smith and Stapletons case, 15 Eliz. 428. Where a fine was pleaded, quædam finalis concordia facta fuit in octav. Sancti Hillarii 35 H. 8. & postea a die Pasch. in quindecem dies 36 H. 8. concessa & recordata, &c. super quem finem proclam. secundum formam statuti factæ fuer. viz. prima proclam. 7. Maii. term. Pasch. 36. H. 8. without any mention of the engrossing of it: and see the case betwixt Stowel and the Lord Zouch, where the fine is pleaded as it is pleaded in the case at bar, qui quidem finis in forma prædict. levatus (and that fine was levyed Pasch. 30 H. 8.) ingrossatus fuit, & postea in curia prædict. secundum formam statui, &c. lectus, & proclamatus fuit, viz. prim. proclam. term. Pasch. 30 H. 8. And so upon the matter it is sufficient to shew, that the fine was engrossed the same term in which it was levyed, for the fine is pleaded to be levyed term. Pasch. qui quidem finis ingrossatus fuit, & postea proclam. viz. prim. proclam. termino Pasch. which was the same term it was [77] levyed: and so, admit, that in pleading it ought to be shewed that the fine was ingrossed in the same term in which it was levyed, &c. Now it appears here to us by necessary consequence, that the fine was ingrossed accordingly. And also the ingrossment is pleaded as the statute is penned, for the words of the statute of 4 H. 7. are, after the engrossing of every fine, the same fine to be openly

read and proclaimed in the same court, the same term, and so the words of our plea here pursue the words of the statute; for the said statute doth not require by express words, that the fine be engrossed the same term, but the same is to be conceived by matter of construction and implication, and according to such manner of speech this plea is pleaded. And of the same opinion was Windham, and upon the same reason Anderson conceived, that the tenant in pleading of the fine ought to shew in express words, that the fine was engrossed the same term in which it was levyed; for whosoever in pleading a plea will take the benefit of the statute ought precisely to follow the statute in all points; and it is clear, that if the fine be not engrossed, according to the statute, that then it is not any bar by the statute, and therefore it ought to be expressly alledged according to the statute, and not by implication only.

Another exception was taken to the bar (as was remembred by Windham) i. pro ut per finem hic in curia de recordo remanen. plenius apparet; without saying, & per proclamation. inde, &c. But that exception was disallowed by Periam and Windham, for the fine had been good and well pleaded, without any such conclusion, pro ut, &c. And also the proclamations are endorsed upon the fine, and then they appear upon the fine, according to the words of the said conclusion. And so by Windham are many presidents, and so in the said case between Stowel and the Lord Zouch cited before, pro ut per finem illum hic de record. remanen. plane liquet. And see 1 Eliz. Plowden 224. between Willion and Barkly, a fine pleaded without any pro ut. &c. Anderson took an exception to the bar at the beginning of it, i. quod medietas 60 messuagiorum, &c. parcel. medietatis 70 messuag. prædict. that that is no good pleading; for one moyety cannot be parcel of another moyety, for every moyety is entire.

Rhodes took exception to the replication, because the demandant in avoidance of the fine, that at the time of the fine levyed Bamfield was seised, & semper postea, & hucusque, &c. of the moyety in demesn, and doth not traverse the seisin of the conusor at the time of the fine levyed, for here two contrary pleas stand before us in equity of truth; æque vera, æque dubia, and a traverse would have made an end of all, and reduced the matter to certainty: and by Periam, the bar is not answered, for every bar ought to be traversed, confessed, or avoided, see 6 H. 7. 5, and 6. where it is said by Hussey and Fairfax, where matter in fact is alleged by way of bar it ought to be traversed, if it be not for the mischief of tryal, as in case of Basterdy, where a thing is alledged to be done beyond the sea; or to leave the matter in law to the Court, without putting the same to the judgment of the lay-people, &c. See also 5 H. 7. 12. where it is holden, that a thing material alledged in the Bar ought to be directly traversed, or confessed, or avoided in fact or in law, or conclude the other party by matter of estoppel: and that two affirmatives cannot make a good issue; but the matter alledged in the replication scil. that Bamfield was seised at the time of the fine levyed shall be holden for void, and the matter alledged in the bar, scil. that the conusor was seised, as not answered; for it shall be taken true, until it shall be avoided and destroyed by matter in law, traverse, &c. vide librum. So he in default of traverse, the bar is not answered but argumentative, scil. Bamfield was seised, ergo, the conusor was not seised: and it is a common learning that in every replication there ought to be certainty as to that: see the case betwixt Fulmerston and Steward 2 Ma. 103. that a bar ought not to be answered by **[78]** argument: and as to the certainty which is requisite in a replication. See the case betwixt Wimbish and Talboies, Plow. Com. 4 E. 6. 42. where the plaintiff shewed in his replication his title as heir, but because he did not shew, how heir, for want of such certainty in the replication, the plaintiff could never have judgment, although the justices for the matter in law then in question were clearly resolved for the plaintiff; and here in this replication the incertainty is such, that the Court doth not know to which to give credit, to the plaintiff, or to the def. and the bare matter of the replication is not sufficient; for in avoidance of a fine, to say, that a stranger to the fine, at the time of the fine levyed, was seised, was never received, but that, partes finis nihil habuerunt, that was the ordinary plea. Windham to the same intent; that which the demandant hath alledged in avoydance of the fine, is but matter of argument and implication. And we ought in this case first to be insured of the matter of fact; scil.

whether Zouch or Bamfield were seised, and the Court doth not know to which to give credit, 39 H. 6. 49. in debt by an executor, the defendant pleaded, that the testator made the plaintiff and one A. his executor, which A. is living, and the plaintiff pleaded, that the said A. died within such a ward before the writ brought, &c. and adjudged no plea, without traverse, without that, he was dead, for here are 2 affirmatives, whereon a good issue cannot rise, which see 32 H. 6. 23. The def. in a replevin avows for a rent service, the plaint. pleads, out of his fee, the avowant saith, within his fee, he ought to traverse, without that it is out of his fee, and for default of the traverse the pleading of both parties; as to the several allegations of the seisin in Bamfield and Zouch may be true, for they both might be joynt-tenants of the said moyety at the time of the fine levyed, in which case, as to the moyety of the moyety it is good enough. And yet when in pleading it is alledged, that A. was seised, &c. If the other party plead, that A. had nothing but joyntly with B. he ought to take a traverse, without that, that A. was sole seised, and yet sole seisin is not expresly alledged; but when the other party pleads, that A. was seised, it ought to be intended a sole seisin. Which see 1 E. 4. 9. 37 H. 6. 31. And it was never a plea admittable against a fine, to say, that the conusor had nothing at the time of the fine levyed, which see 41 E. 3. 14. and also 38 E. 3. 13. 8 H. 6. 27. In trespass the defendant pleaded the fine of the ancestor of the plaintiff, who said, at the time of the fine levyed he himself was seised, without that that partes ad finem aliquid habuerunt, which see 46 E. 3. 14. and a fine ought to be avoided by not seisin of the parties to the fine, and not by the seisin of a stranger to the fine; and there is not any book in the law that alloweth such an averment of seisin in a stranger to the fine, without answering to the seisin of the parties to the fine, but 13 H. 8. In assise, the tenant pleaded a fine upon render of the ancestor of the plaintiff, to which the plaintiff said, that before the fine, at the time of the fine, and afterwards continually, he himself was seised, and the same was held no plea against such a fine upon a render, notwithstanding the privity of blood; contrary, against a fine, which proves a gift precedent.

Anderson to the same intent. The replication for want of traverse is incurable, for we as judges do not know what to do, because that the truth of the matter in fact doth not appear unto us, and so neither the matter in law; for every plea ought to be traversed, or confessed, and avoided, otherwise nothing appears to us, and we cannot know whether the conusor or Bamfield were seised at the time of the fine levyed, for otherwise the matter in law cannot rise; and yet I well know, that although a traverse may be spared in respect of a matter in law which should be choaked and put out of the book by the traverse, or for the mischief of the tryal as aforesaid, where a thing is alledged to be done beyond sea. 19 E. 4. 6. In debt the defendant pleaded, that the plaintiff was born at Denmark, under the obedience of the King of Denmark, [79] the plaintiff by replication said, that he himself was born at D. in England in the county of York, there he shall not take a traverse without that, that he was born at Denmark, for there such tryal cannot be, but in such case the defendant by way of rejoynder shall say, that the plaint. was born at Denmark, without that that he was born at D. in the county of York: and it is true, a supposal of a writ or count may be answered to an affirmative; but a matter alledged by express words cannot.

Rhodes, admitting now that the bar be naught, and the replication faulty, as it is, then I conceive, that if the point of the action be confessed by the bar, the Court shall give judgment upon the bar, and shall not meddle with the replication, but if it be not confessed by the bar, that then there shall be a repleader. And I do conceive, that a repleader may be awarded upon a demurrer in law: which see Plowd. 1. Ma. in the case betwixt Browning and Beston 138. In trespass the plaintiff doth suppose the trespass in two places, scil. in Bermestreet and in Southwark in the county of Surrey; as to the trespass in Southwark the defendant doth justifie by special matter of a lease, without answering any thing to the trespass in Bermestreet. The plaintiff doth reply, and makes his title by a lease more ancient than the lease to the defendant; upon which the defendant doth demurr in law. Now the defect in the bar appearing, the Court awarded a repleader. And 9 H. 6. 35. in a replevin the defendant avowed for damage fesant. The plaintiff made title by common. The defendant pleaded a release of the common by deed, which was not

a perfect deed, upon which the plaintiff did demurr in law: and the replication, in which the imperfect release was, was holden naught, but because there was a defect in the bar to the avowry by the title of common, the Court awarded, that the parties should replead, not in respect of the vitious plea upon which it was demurred, but in respect of the defect in bar: and so in this case Periam said, that nothing should be awarded in this case but where an issue is joyned, for an issue is always joyned upon a point certain. But upon a demurrer all the parts of the pleading, the count, the bar, &c. are referred to the Court, as well for the form as for the matter. The book which hath been vouched to the contrary out of 9. H. 6. I have procured search to be made for the roll, but it cannot be found; and it is inconvenient, that after a demurrer a repleader should be granted, for then causes should never have an end: and as to the case betwixt Browning and Beston, the repleader there was permitted by the assent of the parties, rather then awarded by the rule of the Court. Windham to the same intent, that no repleader shall be in this case, and he said, that in the time of the Lord Dyer the opinion of the Court was so: and as this case is, the plea in bar being good, and the demurrer being upon the replication, no repleader should be, for a repleader shall never be granted, where the plea upon a demurrer is not good; but if the bar be not good, and the defendant doth demurr upon the replication, there a repleader may be. And as to Browning and Bestons case he conceived, that the parties did plead de novo, but not replead, for if it had been a repleader, then the parties should begin to plead where the first defect was, as if the defect be in the bar, there the repleader shall begin, but the declaration shall stand: but in the said case of Browning and Beston, the plaintiff pleaded all de novo, as a new count, &c. and yet the first defect was in the bar, and therefore he conceived, that there it was not a repleader, but that the parties by assent did plead de novo.

Anderson was of opinion, that as this case is, no repleader shall be, and yet he held the repleader might be upon a demurrer as well as upon an issue joyned; for a demurrer joyned is an issue to be tryed by the judges, &c. and such was the opinion of Manwood chief Baron. And the judgment in the case betwixt Browning and Beston is not that the parties **[80]** shall plead de novo, but that they shall replead. See there folio 138. a. and in that case there might well be a repleader, for there the truth of the matter in fact is confessed in the pleading, but in the case at bar it is otherwise, for the pleading is so obscure, that we do not know the truth of the matter, and the right of the matter doth not appear unto us.

And by Periam, as to that which hath been said, that upon the demurrer upon the replication, the seisin of Bamfield at the time of the fine is confessed. Sir, its not so, for no more shall be holden confessed by a demurrer, but that which is duly and sufficiently pleaded, and because the seisin of Bamfield is not sufficiently pleaded, therefore not confessed; and for proof of that learning, see the case betwixt Wimbish and Talboies; and the case betwixt Hill and Graunge: 1 Mar. Plowd. 171. and see the case betwixt Partridge and Croker; and so was opinion of the Lord Anderson, who relyed much upon the case, where it is said, that in pleading a plea, all matters in fact well and materially alledged by a general demurrer are confessed to be true.

Rhodes. Now we are to see, if by the statute of 27 Eliz. cap. 5. this defect in the replication may be salved, and I conceive, that this statute doth extend to all imperfections which happen by the act; misprision, or negligence of the clarks or counsel; for the clyent propounds his cause to the clark and his counsel to manage in the course of his suit, and if the clark or counsel err therein, or in that which to them belongeth, the clyent as to that shall be releived by the statute; but if there be any defect in the matter, so as the matter will not serve, it is otherwise. As 5 H. 7. 1. In the roll of a plea there were divers spaces (for the year and day) void and blank, in another term, the judges could not amend them, but now by the said statute they may. So colour in assise wanting is helped by this statute, so the usual averment, & hoc paratus est verificare, &c. left out, the Court hath power to amend it, and so by him the Court by this statute hath power to amend that defect in trespass.

Periam to the contrary. And that this default of traverse is not amendable by the said statute, for it is enacted by the said statute, that upon a demurrer the

judges shall give judgment as the right of the cause and matter in law shall require; but in our case, as the pleading now is, no right of the cause or matter in law appeareth according to which we can judge, for we upon this pleading cannot tell whether the conusor or Bamfield was seised at the time of the fine levyed, for upon the demurrer upon the replication the seisin of Bamfield is not confessed, because it is not well alledged: and if it had been well alledged, yet it had not been confessed, because that the tenant who demurrs upon the replication, hath in his bar expresly alledged, that the conusor was seised: an original writ of debt against one as executor in the debet and detinet could not be amended by 8 H. 6. but now by the statute of 27 Eliz. it may. See 22 E. 4. 21, 22. So nominare for præsentare in a quare impedit shall be now amended by this statute; and in a writ of formedon, discendere for remanere shall be amended by the said statute of 8 H. 6. 44 E. 3. 13. vide. 11 H. 7. 1, 23. In assise, upon whom the plaintiff, where it should be upon whom the defendant entred; and if the averment usual as above was miss-set down, it was amendable, but if it were utterly left out, not, but now in both cases it is amendable, so, defendit vim & injuriam quando, &c. if it be left out, it is amendable, for all these matters lie in the conusance of the clark, but in our case, the right of the cause and matter doth not appear unto us, for if Bamfield was seised at the time of the fine levyed, then as the demandant and his counsel pretend, the law is with the demandant, and if the conusor and not the demandant, then the aw is with the tenant, as his counsel hath argued, so as the right of the cause consists and depends upon the truth of the seisin, which matter doth not appear unto us: and if we enter in course of amend-**[81]**-ment, we do not know if the demandant would have traversed, without that that the conusor was seised, which shall not be a good traverse, or absque hoc, quod partes ad finem aliquid habuerunt, &c. which although it be a good traverse in law, yet we do not know if the truth of the cause will serve to maintain such matter, and because without altering matter we cannot amend the plea. Windham to the same purpose; for by the statute of 27 Eliz. we ought to judge in this case, as the right of the cause and matter in law shall appear; but in this case neither the right of the cause nor the matter in law appeareth unto us, according to which we can judge, for we know not to which of the parties to give credit, touching the seisin of the conusor, or Bamfield at the time of the fine levyed, for as to our judicial knowledge, both pleas are to us equally dubious; and he agreed the cases put before touching amendment of matters upon default of the clark, scil. de hoc ponit se super patriam, left out, so colour in assize, and trespass wanting, so, & hoc paratus est verificare, all which matters are amendable by the statute of 27. Eliz. But he said, that if in trespass the defendant doth justify by a lease for years, without shewing the place where the lease is made, it is not amendable, for it is matter which lyeth in the notice of the party only, and not in our judicial knowledge: and as to the case of 5 H. 7. 1. of the places left, he conceived it is not amendable in another term by this statute, for that is material, and the filling of those spaces the parties themselves shall supply and not the Court, for the Court shall never amend, where their amendment makes alteration of the substance of the pleading, or of the verdict, as 20 H. 6. 15. In trespass, the plaintiff declared of a continuando usque diem impetrationis, brevis, viz. 18. die Martii, where the teste of the writ was, 2 die Januarij, the defendant pleaded to issue, which was found for the plaintiff, and that misprision of the teste or date of the writ could not be amended. And no amendment upon the stat. of 27 Eliz. two things are to be considered.

First, that the judges, in such amendment, medle not with matter, nor alter the substance.

Secondly, that they do not amend but according to their judicial knowledge.

Anderson, to the same intent, for as it hath been said before, the truth of the case doth not appear unto us according to which we can judge, and I conceive that upon any amendment upon this statute, we cannot take out one roll and put in another, and as our case is we cannot amend this defect without taking out the whole roll, and therefore in the case of Leonard, which was late custos brevium here, where in a replevin he avowed for a rent-service, and upon especial verdict the case was, that Sir Henry Isley held of the said Leonard by fealty, and the rent

mentioned in the avowry, and was attainted of high treason, and the King seised and granted the land to the plaintiff, upon whom Leonard avowed for the rent-service, and I and my companions were agreed, that the rent, notwithstanding the seisure and grant of the King remained distrainable of common right, but Leonard could not have return of the cattel, because he had avowed for a rent-service, & now it appeareth to us upon the verdict, that he had right to so much rent, but not to such a rent, but a rent-seck distrainable of common right, so a rent in another degree; and we also agreed, that the avowry was not amendable, for then upon such amendment, we ought to take out a whole roll, which was not intended by this statute: and he conceived also, that in debt against executors in the debet & detinet, such a writ shall not be amended by this statute, and he conceived, that his exception to the bar, quod ad medietatem, 60. messuag. &c. parcel. medietatis, &c. is relieved by this statute, for the meaning appeareth: and also the exception, that it is not expressly shewed that the fine was engrossed in the same term in which it was levied. And Periam moved **[82]** another matter, if now the parties demurring in law as to part of the land in demand, and being at issue upon the residue, if the Court shall adjudge the matter in law, before the issue be tried, or not, 32 H. 6. 5. & 6. In trespass for taking of his cattel, the defendant as to parcel pleaded not guilty, and as to the remnant pleaded another plea, upon which the parties did demur, and there they proceeded to trial before the matter in law determined, and found for the plaintiff, and he had judgment thereupon for the damages, but the costs were suspended until, &c. And the defendant brought his writ of error. 48 E. 3. 15. In an action of wast, as to parcel the defendant pleads, no wast, and as to the rest pleaded matter in law, upon which there was a demurer joyned; it was holden, that the issue should not be tried until the matter in law be determined; but it was said by Fulthorpe in trespass, if the defendant to parcel plead the enquest, and to other parcel matter in law, in such case he should proceed to trial presently, and damages should be taxed of the whole, as well of that upon which there was a demurrer in law, as of that of which the issue was joyned, ad quod non fuit responsum. See also 11 H. 4. 228. In trespass, the defendant pleaded to issue for part, and for the residue did demur in law, process for the trial issued before the matter in law determined; and Periam conceived that the Court might proceed in such case, the one way or the other: as to the matter in law, whether the issue in tail upon this fine should have the averment, he conceived, that he should not have the said averment, for that it should be very perilous to the inheritances of the subjects. And he argued much upon the dignity of fines out of Bracton and Glanvil, whom he called actores, non authores legis; & that fines at the common law were of great authority until the statute of West. 2. And afterwards by the statute of 34 E. 3. of non-claim, from whence they became to be of so little value in law, that they were accounted no other than feoffments upon record, so as thereby no assurance was of inheritances but a general incertainty until the statute of 4 H. 7. by which statute they were restored to their ancient power and virtue: after which statute many shifts were devised, to creep out of it: so as the statute of 32 H. 8. was made to take away all questions and ambiguities which were conceived upon the said statute of 4 H. 7. And therefore we who are judges ought to frame our judgments for the maintaining of the authority of fines, for so the possessions and inheritances of the subjects shall be preserved; and that is the reason, that if a stranger levy a fine of my land in my name, that I have not any remedy but a writ of deceit against him who levyes the fine, so if a feme-covert levyeth a fine of her land as a feme-sole, the same shall bind her after the coverture, if the husband do not enter upon the conusee during the coverture and interrupt the possession gained by the fine: and 17 E. 3. and our books are very plentiful to this purpose that the law doth ærge admit of such allegations against such fines: a fine was pleaded in bar of land in A. B. and C. he against whom it was pleaded was not received to aver against the supposal of the fine, that there was no such town or hamlet as A. 46 E. 3. 5. A woman tenant in tail, had issue a daughter, who was inheritable to the tail, the daughter took a husband, & they both living the mother, and during her seisin, levied a fine of the land entailed to a stranger, sur conusans de droit, come ceo, &c. who rendred the land to the husband and wife in speci

tail, the husband died having issue, the wife took another husband, had issue, and died, the husband to entitle himself to the land as tenant by the curtesy, would in pleading have averred the seisin of the mother at the time of the fine levyed, and he could not, and yet he was a stranger to the fine, but he was privy to the estate, and his claim was by her who levyed the fine, 6 E. 3. 46. Fitz. Averment 40. In a writ of entry, sur disseisin, the fine of the **[83]** ancestor of the demandant was pleaded in bar by the name of W. the demandant in avoidance of it would have said that the name of his father was R. to have avoided the fine, but to that he was not received. And 3 E. 3. 32. scil. Averment, 42. in a formedon, the tenant pleaded ne dona pas, the demandant by replication said, that a fine was levied of the same lands, between the father of the demandant, and one T. by which fine the father of the demandant did acknowledge to T. the lands come ceo, &c. and the said T. gave by the said fine to the father of the demandant the land in tail. Where it is said by Stone, that since the gift is proved by as high a record, a man shall not aver against such matter in avoidance of the said fine, &c. and yet the party against whom it was was a stranger to the fine: and see 38 E. 3. 7. The lord shall not be received against a fine levied by his tenant to aver the dying seised of his tenant in his homage. And as to the issue in tail, he conceived, that the averment doth not lie for him, for the issue in tail is as much privy, as the heir of a tenant in fee-simple. And see 33 E. 3. scil. Estoppel 280. In a formedon, the tenant voucheth, the demandant counter-pleaded, that the vouchee nor any of his ancestors had any thing in the land in demand after the seisin, &c. to which the tenant said, that to that the demandant should not be received, for the father of the demandant after the gift levied a fine to the ancestor of the vouchee of the said land in demand, sur conusans de droit come ceo, &c. and the same was holden a good bar to the counter-plea.

And it was said by the justices, that although the statute of West. 2. of donis conditionalibus, doth not avoid the fine as to the fore-closing of the issue in tail of his formedon, yet it remaineth in force as to the restraining of the heir in tail to aver a thing against the fine as well as against the heir in fee-simple; and in all cases, where he against whom a fine is pleaded claims by him who levieth the fine, he shall not have the same averment, but where he claims by a stranger to the fine, there he shall have it well enough; see 33 H. 6. 18. If my father tenant in tail, or in fee, grant the land by fine, and afterwards I make title to the same land by the same ancestor, and the fine is pleaded against me, I shall not be received to say that those who were parties to the fine had not any thing at the time of the fine levied, but such a one an estranger whose estate, &c. but it is a good plea for me to say, that after the fine such a one was seised in fee, and did enfeoff me, vid. 22 E. 3. 17. before 33 E. 3. Estoppel 280. And Dyer 16 Eliz. 334. The father is tenant for life, the remainder in fee to his son and heir, levieth a fine to a stranger, sur conusans de droit come ceo, &c. with warranty, and takes back an estate by the same fine, in that case it was holden that the heir should not be received to aver continuance of the possession and seisin, either ante finem, tempore finis, or post finem, in the tenant for life, for it is a feoffment upon record, and makes a discontinuance of the remainder and reversion. The only book in our law to maintain the averment is 12 E. 4. 15. by Brian, who although he was a reverend judge in his time, yet he erred in this, that if tenant in tail be disseised, and levieth a fine unto a stranger, sur conusans de droit, come ceo, &c. that the issue in tail may well say, that partes ad finem nihil habuerunt, but Coke and Lit. were clear of a contrary opinion; and see in the same year, fol. 12. by Fairfax and Littleton, that if tenant in tail, where the remainder is over to a stranger, levieth a fine sur conusans dodroit, come ceo, &c. he in the remainder may aver continuance of seisin against that fine, for he is not party, nor heir to the party, &c. And the stat. of 4 H. 7. goes strongly to extort such averment out of the mouth of the issue in tail, for the words concerning the same point are, saving to every person or persons, not party, nor privy to the said fine, their exception to avoid the said fine, by that, that those which were parties to the said fine nor any of them had ought in the land at the time of the **[84]** said fine levied: and it is clear, that the issue in tail is privy to his ancestor whose heir to the tail he is, which see agreed, 19 H. 8. 6. 7. And he vouched the case of one Stamford late adjudged, land

was given to the eldest son in tail, the remainder to the father in tail, the eldest son levied a fine, sur conusans de droit come ceo, &c. and died without issue in the life of his father, and afterwards the father died; the second son shall inherit; but if the eldest son had survived the father, and afterwards died without issue, the second son should have been barred.

Periam to the same intent: It should be very dangerous to the inheritances of the subjects to admit of such averments, and by such means fines which should be of great force and effect should be much weakened, and he put many cases to the same purpose as were put before by Rhodes Justice, and he shewed how that fines, and the power of them were much weakened by the statute of non-claim, whereof followed (as the preface of the statute of 4 H. 7. observeth) the universal trouble of the Kings subjects and therefore by the said statute of 4 H. 7. Fines, for the good and safety of the subjects were restored to their former grandure and authority, which should be construed by us who are judges, strongly and liberally for the quiet and establishment of present possessions, and for the barring and extinguishing of former rights, and so did the judges our predecessors; which see in the argument of the said case between Stowel and the Lord Zouch: so see such liberal construction, 19 Eliz. Dyer. 351. Where if land be given to husband and wife in special tail, and the husband alone levieth a fine and dieth having issue, the issue is barred: and it hath lately been adjudged by the advice of all the judges of England, upon the statute of 1 Ma. viz. all fines levied, whereupon proclamations shall not be dayly made by reason of adjournment of any term, shall be of as good force and strength to all intents and purposes, as if such term had been holden and kept from the beginning to the end thereof, and not adjourned, and the proclamations shall be made in the following term, which reason in construction of the said statute, the judges in the case of the Cooks of London, 20. Eliz. have observed, which see Plowden 538. For although successors are not mentioned in the said statute of 4 H. 7. but only heirs, yet the judges did construe the said statute to extend to them that they should be bounden as well as the heirs; for it is in the like mischief, and the said statute was made for the publick good, and for the repose of the inheritances of the subjects of this realm, and therefore the same ought to be largely extended in the meaning and sense of it, and for the benefit of the possessors of the lands, and to the destroying of former rights which were not claimed. It hath been said, that this fine is but a fine by conclusion, and not in verity; and therefore not within the statute. But without question, fines by conclusion are within the statute. And that is clear by the saving, scil. to all persons other than parties to the said fines, &c. And Periam was against the opinion in Stowells case by Sanders 356. A disseisor maks a feoffment in fee upon condition, the feoffee levies a fine with proclamation, five years pass, the condition is broken, the disseisor re-entreth, and Periam conceived that in such case the disseisee is bounden, for by the fine, and five years non-claim, the right of every stranger is barred, and when the disseissor entreth for the condition broken, the fine is not annoyed, but rather confirmed, and former rights shall not be revived. Windham to the same intent, and vouched the books before remembred, and that the meaning of the statute of 32 H. 8. made upon the statute of 4 H. 7. was to bind the issue in tail as strongly as the heir of tenant in fee-simple was bound at the common law, and that fines by conclusion are as fully within the purview of that statute as fines in verity, for fines by conclusion are assurances; and as to the objection against our fine, that it **[85]** is not rite levatus because that partes ad finem nihil habuerunt, &c. the same is no reason, wherefore this fine should not be rite levatus, for these words rite levatus, to the external form of a fine are to be taken as to a fine levied, coram Edmundo Anderson & socijs suis, where all the Justices ought to be named, and so it seemed also to Periam and Anderson. Our case had little resemblance to the case where tenant in tail maks a lease according to the statute of 32 H. 8. if he be not seised at the time of the demise, it is void: for the stat. speaks seised in tail: but so are not penned the statutes of 4 H. 7. & 32 H. 8. as 4 H. 7. a fine levied shall bind privies, & strangers, &c. & 32 H. 8. fines levied of any lands entailed to the conusor or any of his ancestors, and it is not a fine in respect of the possession which passeth by the fine, but in respect of the concord and agreement.

And tenant in tail by these statutes hath as great power to bind the right of the

entail, although he cannot meddle with the possession, as the tenant in fee-simple at the common law.

Anderson to the same intent, all the matter rests upon this point, if the issue in tail be privy or not, for if he be privy, then clearly he is bounden. And as to that, the issue in tail before the statute of 32 H. 8. hath been always accounted privy. See 29 H. 8. Dyer 32. Tenant in tail of the gift of the King levieth a fine, the same shall bind his issue, for they are privy. And he argued much upon the cases cited by the other justices before, and especially upon the said case of Stowel and the Lord Zouch; how that the issue in tail is there holden privy; and that the Statute of Fines ought to be taken and construed to enforce the operation of fines against former rights, and for the establishment of the present possessions and estates. And by him divers rights and persons are excepted by the said statute, but this right in gross of possession, nor the issue in tail, whose ancestor being out of possession levieth the fine is not excepted, therefore both of them comprehended in the statute. And in his argument he stood much upon it, how dangerous a matter it should be, to receive such averments and allegations which go meerly in avoidance of fines, for so every fine might fall in the mouth of the lay-gens, which would be very inconvenient. And he concluded his argument with this case. Tenant in tail doth discontinue, and disseiseth his discontinuee, and levieth a fine, the discontinuee before the proclamations reentreth, the proclamations are made, tenant in tail doth re-enter, and dieth seised; against this fine his issue shall not be remitted. See as to the averment 3 H. 627. 33 H. 6. 18. 42 E. 3. 20. 8 H. 4. 8. 12 E. 4. 19. by Fairfax and Needham, and fol 15. by Brian and Choke. And afterwards judgment was given, that the demandant should be barred.

1 And. 165. 3 Co. 88. Antea 43, 44. Co. 1 Inst. 71. b. 72. a.

INTR. PASCH. 24 ELIZ. ROT. 2112. IN COMMUNI BANCO.

CIII. GUNERSTON AND HATCHERS CASE.

Avowry.

Charles Duke of Suffolk was seised of three parts of the manor of D. and Poole was seised of the fourth part of the said manor, and afterwards the duke granted out of the said three parts a rent-charge of five marks to Gunerston; and afterwards the said duke of the said three parts did enfeoffe Hatcher in fee, after which Poole conveyed his said fourth part of the said manor to the said Hatcher in fee, and afterwards Hatcher being seised, ut supra, reciting the said several purchases, especially the said fourth part devised to Katherin Hatcher at will, and Gunerston distreined the cattel of Katherin Hatcher for the arrearages of the said rent, and in a replevin avowed the distress: and by the opinion of the whole Court the avowry was not maintainable, for the fourth part of the said manor, which was in the possession of **[86]** Poole, was not charged with the rent; and although all the manor be now in the possession of Hatcher, yet the mannor is not so consolidated nor united by this unity of possession, but that the owner might well enough single out eandem quartam partem, and grant it, and the grantee shall hold the same discharged, as the said Poole held it; and the beasts of the said Katherin shall not be distreined; and so judgment was given against the avowant.

CIV. MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

Voucher.

It was moved by Serjeant Walmesley, if a common recovery be to pass at the bar, and the tenant is ready at the bar and voucheth to warr. A. for whom one is ready at the bar to appear for the vouchee by his warrant of attorny; it was holden, that this appearance is meerly void, for in such case the vouchee ought to appear in

person, because without summons; but where summons issueth, and the same is entred upon the roll, there may the vouchee at the return appear in person, or by attorny, at his election. And that was the clear opinion of all the Justices, and also of the Prothonotaries.

Post 291.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

CV. KEYS AND STEDS CASE.

Formedon. Falsifier of Recovery.

In a formedon by Keys against Sted, the case was, that Sted and his wife were tenants for life, the remainder over to a stranger in fee; and the writ of formedon brought against Sted only, who made default after default, whereupon came his wife and prayed to be received to defend her right; which was denied her by the Court, for this recovery doth not bind her, and it is to no purpose for her to defend her right in that action which cannot here be impeached; whereupon he in the remainder came and prayed to be received, and the Court at first doubted of the receit, forasmuch as if the demandant shall have judgment to recover, he in the remainder might falsify the recovery, because his estate, upon which he prayeth to be received, doth not depend upon the estate impleaded, scil. a sole estate, whereas his remainder doth depend upon a joynt estate in the husband and wife, not named in the writ; but at the last, notwithstanding the said exception, the receit was granted. See 40 E. 3. 12.

2 Len. 9.

MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

CVI. LIVESEYS CASE.

Writ of Right. View.

In a writ of right against Thomas Livesey of the mannor of D. & de duabus partibus custodiæ forrestæ de C. the tenant did demand the view and he had it, and return was made, and now the writ of habere facias visum, was viewed by the Court, and it was, visum manerii & duarum partium custodiæ, &c. And it was holden by the Court not to be a sufficient view, for the forrest it self ought to be put in view; scil. the whole forrest, and not duæ partes tantum, as where a rent or common is demanded, the land out of which the rent or common is going ought to be put in view; and there a writ of habere facias visum de novo issued forth.

[87] MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

CVII. GERMYS CASE.

Debt. Assets.

Germy brought debt upon a bond against A. as executor, and the case was, that the testator of A. by his will did appoint certain lands, and named which, should be sold by his executors, and the moneys thereof arising distributed amongst his daughters when they have accomplished their ages of one and twenty years; the lands are sold, if the moneys thereof being in the hands of the executors until the full age of the daughters shall be assets to pay the debts of the testator? And by the clear opinion of the whole Court, the same shall not be assets, for that this money is limited to a special use.

2 Len. 119. Post. 224.

CVIII. MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

In an action of debt upon an obligation, the defendant saith, that the plaintiff shall not be answered, for he is out-lawed, and shewed the outlawry in certain by the name of I. S. of D. in the county of, &c. The plaintiff shewed, that at the time of the sute begun against I. S. upon whom the out-lawry was pronounced, the said I. S. now plaintiff, was dwelling at S. absque hoc, that he was dwelling at D. Vide 21 H. 7. 13. And it was holden a good replication, to avoid the out-lawry without a writ of error, by Anderson. 10 E. 4. 12. for if he were not dwelling at D. then he cannot be intended the same person: see 39 H. 6. 1.

CIX. MICH. 29 & 30 ELIZ. IN COMMUNI BANCO.

It was agreed by the whole Court, and affirmed by the prothonotaries, that if in account the defendant be adjudged to account, and be taken by a capias ad computandum, and set to mainprize, pendent the account before the auditors, and doth not keep his day before them, that now a capias ad computandum de novo shall issue forth against him.

MICH. 29 & 30 ELIZ. IN THE COMMON PLEAS.

CX. GLOSSE AND HAYMANS CASE.

Trespass, vi & armis, against a Servant for carrying away his Masters Goods.

Joan Glosse brought an action of trespass, vi & armis, against John Hayman, who pleaded the general issue, and the jury found this special matter, that the plaintiff was a grocer in Ipswich, and there held a shop of grocery, & quod illa reposuit fiduciam in the defendant, to sell the grocery wares of the plaintiff in the said shop: and further found, that the said defendant being in the said shop in form aforesaid, cepit & asportavit, the said wares, and did convert them, &c. It was moved in arrest of judgment, that this action, vi & armis, upon this matter doth not lie, but rather an action upon the case. But the Court was clear of opinion, that the action doth well lie, for when the defendant was in the shop aforesaid, the goods and wares did remain in the custody and possession of the plaintiff her self. And the defendant hath not any interest, possession or other thing in them, and therefore if he entermeddle with them in any other manner, than by uttering of **[88]** them by sale, according to the authority to him committed, he is a trespassor; for he hath not any authority to carry the wares out of the shop not sold, but all his authority is within the shop. And Rodes put the case of Littleton 25. If I deliver my sheep to another to manure his land, or my oxen to plow his land, and afterwards he kills them, I shall have an action of trespass against him: and afterwards judgment was given for the plaintiff.

Owen 52. More 248.

MICH. 29 & 30 ELIZ.

CXI. MARTIN AND STEDDS CASE.

Richard Martin, alderman of London, brought an action upon the case against Stedd, and declared, that whereas the Queen by her letters patents dated, the 27. of August, anno 24. of her reign, had granted to the plaintiff the office of Master of the Mint, through all England, to exercise the said office, secundum formam quarundam indent. betwixt the said Queen and the said plaintiff conficiendam, and that in January following the said indenture was made, by which it was agreed betwixt the said Queen and the plaintiff, that the money, in posterum, should be made in such

manner, &c. according to the true standard; and declared, that he had duly and lawfully made all the money according to the said standard: yet the defendant, machinans, &c. had slanderously spoken and given out speeches in these words, Mr. Martin hath not made the money as good and fine as the standard, by an half penny in the ounce, and so he hath saved four thousand pounds. It was objected against this declaration by Walmesley Serjeant, that here the plaintiff hath declared upon the letters patents, and the office given by the letters patents ought to be exercised according to the indenture, &c. And here appears upon the declaration no indenture, for no enrolment of such indenture is shewed, and if it be not enrolled, then there cannot be any indenture betwixt the Queen, &c. and then the Queen cannot have an action upon it for want of enrolment. See 21 H. 7. 21. 1 H. 7. 28. and 31. 5 E. 4. 7. and also if there be not a sufficient indenture, then the plaintiff is not Master of the Mint, and then also there is not any new indenture: and then the plaintiff ought to make the money according to the old standard, and then might the defendant well justify the words.

Another exception was taken, because the plaintiff is not at any damage, for the Queen cannot have against him but an action of covenant upon the said indenture, because the defendant hath not made the money accordingly, which matter is not actionable, no more than if the farmer of the Queen had brought this action against one, for speaking that he had broken the condition or covenants of his lease. And as unto these words, so that the defendant hath saved four thousand pounds, those words are not actionable, for it may be he hath saved this four thousand pounds to the Queen; and such construction the Judges ought to make of such ambiguous words in such cases, scil. in optimam partem. It was adjorned.

MICH. 29 & 30 ELIZ. IN THE COMMON PLEAS.

CXII. MOUNSON AND WESTS CASE.

Challenge.

In an action of trespass between Mounson and West, the parties were at issue, and now at the return of the pannel the defendant challenged the array, because it was made by Bartholomew Armin, [89] who took to wife the cosin german of the plaintiff, & ex ea had issue living, the mother being dead; and upon this challenge the plaintiff did demur in law; and it seemed to the Lord Anderson, that it is not a principal challenge, but only to favour. For the matter of the challenge is not consanguinity, but only affinity: and so it seemed to Periam. And Rhodes cited a case adjudged in the Kings Bench. Markham brought an action upon the case against Lee, who at the Nisi Prius challenged the array, because the sheriffs wife was sister to the plaintiffs wife, and that was before the Lord Dyer at Nottingham, and that challenge was holden there, not to be a principal challenge, upon which error was brought in the Kings Bench: and error assigned in that, and for that cause the judgment was reversed: and by Windham the writ of venire facias is, quia nulla affinitate, &c. so as affinity is presumed in law not indifferent. And by Anderson that is to be intended of the jurors, and not of the sheriff, 22 E. 4. 2. The array was challenged, because that the sheriff, &c. had married A. daughter of Eliz. sister of the mother of the plaintiff, and that was holden a principal challenge 10 H. 7. 7. 26 E. 3. 21. And afterwards at another term the case being moved, Anderson, Rhodes and Windham were clear of opinion, that it is a principal challenge; but Periam hæsitavit, and put a difference betwixt consanguinity and affinity, for affinity is not a principal challenge, unless it be averred, that the issue, &c. is inheritable to the land. And Anderson put the case in 14 H. 7. 2. where one challenged, because one of the jurors had married the mother of the defendant, it was holden a principal challenge. And 15 H. 7. 9. where the challenge was for that the brother of the wife of the defendant had married the daughter of the sheriff.

Dy. 37. 191. 319.

MICH. 29 & 30 ELIZ. IN THE EXCHEQUER.

CXIII. SIR THOMAS GRESHAMS CASE.

Revocation of Uses. Fine for Alienation.

Sir Tho. Gresham being seised of the manors of Walsingham and Milcham in the county of Norfolk, 12 Eliz. enfeoffed B. and C. to certain uses, and that was with clause of revocation upon the tender of forty shillings, and that after such revocation he might limit new uses; and afterwards the year following, Sir Tho. Gresham made the like conveyance of his lands in the county of Suffolk to the said persons, to the like uses, upon like clause of revocation upon the tender of forty shillings, Sir Thomas tendered to the said feoffees one sum of forty shillings, to revoke the uses raised upon both the feoffments; & afterwards raised divers uses of divers of the said manors holden in capite, and afterwards Sir Thomas died: and afterwards it was resolved by the opinion of the justices, that by that tender the uses were not revoked, but that the revocation was utterly void, for two several sums of forty shillings ought to have been tendered, for they were several indentures and could not be satisfied by one sum. After which by a private Act of Parliament, 23 Eliz. the said revocation was enacted and adjudged to be good and sufficient in law. And now the Lady Gresham was called by process into the Exchequer for a fine due to the Queen for the said alienation, because that now the said uses newly raised were good, and the said manor possessed according to the limitation of them, for now the revocation is good, because done by the said statute which recited the whole special matter, and that for want of a sufficient tender, the revocation was void in law; and also reciting the new uses which were declared for the payment of his debts, and many honorable legacies, & also for the security of those who had purchased underneath the said new uses: for remedy whereof it was enacted, & quod prædict. revocationes bonæ & sufficientes in lege habeantur, reputentur, & recognoscantur. And **[90]** it was argued by Coke, that upon the matter, no fine is due, for all those new uses took their essence and effect by that Act of Parliament, to which the Queen herself is a party, and the principal agent, and therefore against her own act she shall not claim a fine, &c. And also the alienation without licence is a wrong and trespass; and an Act of Parliament cannot do wrong, and if partition be made betwixt parceners by Act of Parliament, no fine is due to the Queen, which was in ure 23 Eliz. for by Parliament then a partition was made betwixt the co-heirs of the Lord Latimer, and I do not know that any fine hath been demanded for it.

Dyer 372.

MICH. 29 & 30 ELIZ. IN THE COMMON PLEAS.

CXIV. BRET AND SHEPPARDS CASE.

Debt.

Bret brought debt upon a bond against Sheppard, the bond was endorced, upon condition, that where the defendant was arrested at the suit of one A. if now the defendant shall appear in the Kings Bench, where the process is returnable, that then, &c. And the defendant said in fact, that he had appeared, secundum formam & effectum conditionis supradict. & hoc petit quod inquiratur per patriam & prædict. Brett similiter: it was moved, that the parties should replead for this matter, upon which they are at issue, scil. the appearance is not triable by jury, but by the record: and the Court was clear of opinion, that the parties should replead for the cause aforesaid: and it was moved by the Lord Anderson, that if A. be bound to appear in the Kings Bench at such a day, and C. at the said days goe to the Court, but there no process is returned, then the party may go to one of the Chief Clerks of the Court, and pray him to take a note of his appearance: and by Nelson, we have an ancient form of entry of such appearance in such cases, ad hunc diem venit I. S. & propter

indemnitatem suam & manucaptorum suorum petit quod comparentia sua in curia hic recordetur. And see for the same 38 H. 6. 17. And afterwards the Lord Anderson, inspecto rotulo, ex assensu sociorum awarded a repleader: and so by Nelson, it hath been done oftentimes here before, and put in ure: the same law is, where at the day of appearance no Court is holden, or the justices do not come, &c. he who was bound to appear, ought to have an appearance recorded in such manner as it may be; and if the other party pleadeth nul tiel record, it behoveth that the defendant have the record ready at his peril, for this Court cannot write to the justices of the Kings Bench, for to certifie a record hither.

MICH. 29 & 30 ELIZ. IN THE COMMON PLEAS.

CXV. BAXTER AND BALES CASE.

Debt not extinct by Administration.

Baxter brought debt upon a bond as executor of I. against Bale; who pleaded that the plaintiff after the death of the testator was cited to appear before the Ordinary or his commissary to prove the will of the said I. and at the day of his appearance he made default, upon which the Ordinary committed letters of administration to the defendant, by force of which he did administer, so the debt is extinct, &c. but the whole Court was clear of opinion, that the debt was not extinct, for now by the probate of the will the administration is defeated, and although the executor made default at the day which he had by the citation before the Ordinary, yet thereby he is not absolutely debarred, but that he may resort to the proving of the will whensoever he pleaseth; but if he had appeared and renounced the exe-[91]-cutorship it had been otherwise; and the debt is not extinct by the administration in the mean time.

CXVI. MICH. 29 & 30 ELIZ. IN THE COMMON PLEAS.

In a franchise the parties are at issue upon a matter triable out of the franchise. And it was moved, if now the record should be sent into the Common Pleas, and there tryed, and after trial sent back into the franchise: which Periam and Anderson utterly denied; and by Periam, there is no reason that we should be their ministers to try issues joyned before them: and it is not like, where in a liberty or franchise a forreign voucher is to warrant lands, in such cases we shall determine the warranty; but that is by a special statute of Glocester cap. 12. And Nelson Prothonotary said, that such an issue was tryed here of late. Quod nota.

2 Len. 37.

MICH. 29 & 30 ELIZ. AT SERJEANTS INNE.

CXVII. THE EARL OF ARUNDEL AND THE LORD DACRES CASE.

Philip Earl of Arundel, and the Lord William Howard his brother marryed the daughters and co-heirs of the late Lord Dacres: and now came Francis Lord Dacres as heir male of the said family, and claimed the inheritance, &c. And after long sute betwixt both parties, they submitted themselves to the award of Gilbert Lord Talbot, and of Arthur Lord Gray of Wilton, and Windham and Periam Justices; and before them at Serjeants Inne, the matter was well debated by the council learned on both sides; and as unto Greistock lands, parcel of the lands in question, the case was. that tenant in tail makes a feoffment in fee unto the use of himself for his life, the remainder in tail to his eldest son, with divers remainders over, with a proviso, that if any of the entailees do any act to interrupt the course of any entail limited by the

said conveyance, that then the use limited to such person should cease, and go to him who is next inheritable; and afterwards tenant in tail dieth, his eldest son to whom the use in tail was first limited entreth, and doth an act against the said proviso, and yet held himself in and made leases, the lessees enter, the lessor dieth seised, his heir being within age, and in ward to the Queen; it was holden by Shutleworth Serjeant, Yelverton, Godfrey, Owen, and Coke, who were of council with the heirs general of the Lord Dacres, that here is a remitter, for by this act against the proviso, the use, and so the possession doth accrue to the enfant son of him, to whom the use in tail was limited by the tenant in tail: then when the tenant in tail after his said feoffment holds himself in, this is a disseisin; for a tenancy by sufferance cannot be after the cesser of an estate of inheritance; but admit that he be but a tenant at sufferance, yet when he makes leases for years, the same is clearly a disseisin, and then upon the whole matter a remitter, and although the enfant taketh by the statute, yet the right of the tail descending to him afterwards by the death of his father doth remit him, as if tenant in tail maketh a feoffment in fee to the use of himself for life, the remainder in tail to his eldest son inheritable to the first intail, notwithstanding that the eldest son takes his remainder by the statute, and so be in by force thereof, yet when by the death of his father, the right of the entail descends to him, he is remitted.

Hob. 255. Dy. 54.

[92] MICH. 29 & 30 ELIZ. IN THE COMMON PLEAS.

CXVIII. BUTLER AND AYRES CASE.

Dower.

Butler and his wife brought a writ of dower against Thomas Ayre, son and heir of Bartholomew Ayre, first husband of the said Margaret wife of the plaintiff, and demanded dower of the lands in A. and B.; the tenant pleaded, never seised que dower, and the jury found that the said Bartholomew was seised during the coverture, de omnibus tenementis infra script. preterquam, the tenements in (sic ut dicta Margareta dotari potuit) exception was taken to this verdict; because that this preterquam, &c. doth confound the verdict. To which it was said by the Court, that the preterquam is idle, and surplusage, for it is of another thing than that which is in demand, and the seisin of the first husband of lands in A. and B. is confessed, and the (preterquam) works nothing: another matter was objected, because here the jury have assessed damages, as in case where the husband died seised, the which dying seised is not found by the verdict: in which case it was said by the Court, the demandant might pray judgment of the lands, and release damages; or the demandant may aver that the husband died seised, and have a writ to enquire of the damages, quod omnes pregnotarrii concesserunt.

Dy. 370.

MICH. 29 & 30 ELIZ. IN THE COMMON PLEAS.

CXIX. MICHEL AND HYDES CASE.

Dower.

Dower by Michel and his wife against Lawrence Hyde, who appeared upon the grand cape; and it was because that the said Hyde in truth was but lessee for years of the land of which, &c. in which case he might plead non-tenure, if now he might wage his law of non-summons, so as the writ be abated: for by the wager of law he hath taken upon him the tenancy, and affirmed himself to be tenant, 33 H. 6. 2. by Prisoit, to which it was said by Rhodes, and Windham Justices, that here the tenant being but lessee for years is not at any mischief, for if judgment and execution be

had against him, he notwithstanding might afterwards enter upon the demandant. Another matter was moved, that where the writ of dower was, de tertia parte Rectoriæ de D. and upon that the grand cape issued, cape in manum nostram tertiam partem rectoriæ, and the sheriff by colour of this writ took the tythes severed from the nine parts, and carried them away with him: and it was agreed by the said justices, that the same is not such a seisure as is intended by the said writ, but the sheriff by virtue of such writ ought generally to seize, but leave them there where he found them. And the Court was of opinion to commit the sheriff to prison for such his misdemeanor.

MICH. 29 & 30 ELIZ. IN THE COMMON PLEAS.

CXX. HAMINGTON AND RYDERS CASE.

Debt. Devises. Covenant.

Richard Haming. executor of Isabel Haming. brought debt upon an obligation against Ryder, the case was, that Kidwelly was seised, and leased for years to John Hamington husband of Isabel, and afterwards John Hamington being so possessed, by his will devised, that the said Isabel should have the use and occupation of the said land for all the years of the said term as she should live and remain sole, and if she died or married, **[93]** that then his son should have the residue of the said term not expired: John died, Isabel entred, to whom the said lawr. coveyed by feoffment the said land in fee, and in the indenture of the said conveyance lawr. covenanted that the said land from thence should be clearly exonerated, de omnibus prioribus barganijs, titulis, juribus & omnibus alijs oneribus quibuscunque, Isabel took to husband, the son entreth: if now the covenant be broken was the question. It seemed to Anderson at the first motion that this possibility which was in the son at the time of the feoffment, was not any of the things mentioned in the covenant, scil. former bargain, title, right, or charge; but yet it was conceived by him that the word bargain did extend to it, for every lease for years is a contract, and although that the land at the time of the feoffment was not charged, yet it was not discharged of the former contract: and by Windham, if I be bounden in a statute-staple, and afterwards I bargain and sell my lands, and covenant (ut supra) here the land is not charged, but if after the condition contained in the defeazance be broken, so as the conusee extends, now the covenant is broken; and by him, the word (charge) doth extend to a possibility, and this possibility might be extinct by livery as all agreed; but not translated by grant, or extinguished by release, as it was lately adjudged in the case of one Carter. At another day, it was argued by Walmesley, and he much relied upon the words (clearly exonerated) utterly discharged, or altogether exonerated, and without doubt it is a charge which may happen, and if it may happen, then the land is not clare exonerated: and also former bargains do extend to it, and the term is not extinct by the acceptance of the feoffment aforesaid of Kidwelly, and although, that at the time of the feoffment it was but a possibility, and no certain interest, yet now upon the marriage of Isabel, it is become an actual burthen and charge upon the land, and he cited a case adjudged, 8 Eliz. A man seised of lands grants a rent-charge to begin at a day to come before which day he bargains and sells the lands, and covenants that the said lands are discharged of all charges, in that case when the day when the rent ought to begin is incurred, the covenant is clearly broken, for the lands were not clearly exonerated, &c. At another day the case was moved at the bar. And Anderson openly in Court declared, that he and all his companions were agreed, that the land at the time of the feoffment was not discharged of all former rights, titles and charges; and therefore commanded, that judgment should be entred for the plaintiff.

Savil Rep. 74. Owen Rep. 6. 1 Co. 52. 1 And. 162. Ante 33. 3 Len. 43.

HILL. 30 ELIZ. IN THE KINGS BENCH.

CXXI. HOWEL AND TRIVANIANS CASE.

Assumpsit.

Howel brought an action upon the case against Trivanian in the Common Pleas, and declared, that he delivered certain goods to the brother of the defendant, who made the defendant his executor, and died, after which the plaintiff came to the defendant, and spake with him concerning the said goods, upon which communication and speech the defendant promised the plaintiff, that if the plaintiff could prove, that the said goods were delivered to the testator, that he would pay the value of them to the plaintiff: and the declaration was in consideration, that the said goods came to the hands of the testator, and also afterwards the goods came to the defendants hands, and upon non assumpsit pleaded, it was found for the plaintiff, and judgment given: and afterwards error was brought in the Kings Bench, and error assigned, because that the plaintiff had not averred in his declaration, that he had proved the delivery of the said goods to the said testator, for the words of the promise are, si probare potuisset: and also it was assign-**[94]**-ed for error, that here is not any consideration upon which this promise could receive any strength, for the defendant hath not any profit or advantage thereby, scil. by the bailment of the said goods to the brother of the defendant; and also it is a thing before executed, and not depending upon the promise, nor the promise upon it: as the case reported by the Lord Dyer 10 Eliz. 272. The servant is arrested in London, and two men to whom the master is well known, bail the said servant, and after the master promiseth to them for their friend-ship, to save them harmless from all costs and damages, and in an action upon the case brought upon that promise, the plaintiff was barred, for here is not any consideration, for they bailed the servant of their own head without the request of the master, and the matter which is alledged for consideration is executed before the assumpsit, and the promise was not before the enlargment, and the said bailment was not at the instance, or request of the master. And the case of one Hudson was cited, adjudged in the Kings Bench: the defendant in consideration that he was administrator, and natural son of the intestate, and that the goods of his father have come to his hands, promiseth to pay the debt to the plaintiff. And in an action upon the case upon that promise, the defendant pleaded he made no such promise, and it was found that no goods came to the hands of the defendant; And it was holden, that the consideration that he was administrator and son to the testator, was not of any force to maintain the action, and afterwards in the principal case the judgment was affirmed. And it was moved by Coke that judgment should not be given against the executor of his own goods if he had not goods of the testator, for the charge doth not extend beyond the consideration, i.e. that the goods of the testator came to the hands of the defendant. But Wray Justice was of opinion, that judgment shall be of his proper goods, as in case of confession. Kemp secondary, if the action be brought upon assumpsit of the testator, judgment shall be of the goods of the testator; but of the promise of the executor, of his own goods; but the original judgment which is now affirmed was general.

2 Roll. 594. 1 Cro. 205. Claytons Rep. 45. 1 Cro. 756.

HILL. 30 ELIZ. IN THE KINGS BENCH.

CXXII. SAVEL AND WOODS CASE.

The case was; that a parson did libel in the Spiritual Court against a parishoner for tythes of such lands within his parish, the defendant came into the King's Bench and surmised, and that he and all those whose estate he hath in the lands out

of which the tythes are demanded, have used to pay every year five shillings to the parish clark of the same parish for all the tythes out of the same place; and it was argued by Coke, that that could not be, for a parish clark is not a person corporate, nor hath succession: but if he had prescribed, that they had used to pay it to the parish clark to the use of the parson, it had been good; also he ought to shew, that the parson ought of right to find the parish clark, &c. And he cited the case of Bushie the parson of Pancras, who libelled in the Spiritual Court for tithes, the defendant to have a prohibition did prescribe, that he, and all those, &c. had time out of mind, &c. used to pay to the vicar, &c. and at last a consultation was awarded because it was triable in the Ecclesiastical Court, for both parties as well vicar as parson are spiritual persons, and the modus decimandi is not in question, but cui solvend. And at another day, it was agreed by the justices, that of common right, the parson is not tied to find the parish clark, for then he should be said the parsons clark and not the parish clark: but if the parson be tied to find such a clark, and such a sum hath been used to be paid to the parish clark in discharge of the parson, the same had been a good prescription, and so by way of composition; and by Clench **[95]** tythes are to be paid to spiritual persons, but a parish-clark is a lay-person: and afterwards the Court granted a consultation.

1 Cro. 71. 3 Len. 203. 265. Post, 128.

HILL. 30 ELIZ. IN THE KINGS BENCH.

CXXIII. HIGHAM AND REYNOLDS CASE.

In an action of trespass the plaintiff declared, that the defendant 1 Maii 28 Eliz. cut down six posts of the house of the plaintiff at D. The defendant doth justifie, because that the free-hold of the house, 10 Aprilis 27 Eliz. was to I. S. and that he by his commandment the same day and year did the trespass, &c. upon which the plaintiff did demur in law, because the defendant did not traverse, without that that he was guilty before or after. And the opinion of Wray was, that the traverse taken was well enough, because the free-hold shall be intended to continue, &c. Vide 7 H. 7. 3. But all the other three justices were of a contrary opinion to Wray: but they all agreed, that where the defendant doth justifie, by reason of his free-hold at the day supposed in the declaration, there the traverse (before) is good enough; and afterwards judgment was given against the defendant.

HILL. 30 ELIZ. IN THE KINGS BENCH.

CXXIV. KNIGHT AND FOOTMANS CASE.

Surrender of Copy-hold Land.

In trespass by Knight against Footman, the case upon the pleading was, that one Margaret had issue two sons, Richard and Thomas, and surrendred to the use of Richard for life, and afterwards to the use of Thomas in fee; they both, Thomas being within age, surrender to the use of one Robert ap John in fee, who is admitted; Richard dieth; Thomas dieth, having issue A. who is also admitted, and enters into the land, and if his entry be lawful, or that he be put to his plaint in the nature of a dum fuit infra ætatem was the question. And Wray was clear of opinion that it was: and if a man seised of copy-hold land in the right of his wife, or tenant in tail of a copy-hold doth surrender to the use of another in fee, the same doth not make any discontinuance, but that the issue in tail and the wife may respectively enter; and so was it holden in the sergeants case, when Audley, who afterwards was made Chancellor of England, was made sergeant; and afterwards it was adjudged, that the entry of the enfant was lawful.

Co. 1 Inst. 248. 1 Cro. 372. 380. 391. 483. 717. More 596.

MICH. 29 ELIZ. IN THE EXCHEQUER.

CXXV. SIR WOLLASTON DIXIES CASE.

Information upon the Statute of 13. *Eliz. of Usury.*

An information was in the Exchequer against Sir Wollaston Dixie, upon the Statute of Usury, & upon not guilty pleaded, the informer gave in evidence an usurious contract upon a bargain of wares: the opinion of the Court was, that the information being exhibited for the loan of money, that the evidence was not pursuing nor leading to the issue. And yet the jury against the opinion of the Court upon that evidence found the defendant guilty. And it was moved in arrest of judgment, that the evidence did not maintain the information, nor prove the issue, ex parte querentis, and it was said, there are three things within the statute, i. three words, i. bargain, loan, and cheivizance, and these three are several things, **[96]** and therefore, if the information be conceived upon loan, and the informer giveth in evidence a corrupt bargain for cloth, as it is in this case, the same doth not maintain the information; so if the information be granted upon usurious contract by way of mortgage, and giveth in evidence an usurious loan, ut supra. But if the information had been conceived generally, upon an usurious agreement, and giveth in evidence a loan, the same is good enough, for every loan is an agreement.

Manwood, there cannot be any loan without bargain, nor any forbearing without bargain, for he contracts or bargains to do it, viz. to lend, or forbear: bargain of forbearing is where the first day of payment is not kept and the parties have agreed for a further day for payment, &c. And it appeareth in this case, that it was a bargain to forbear a sum of money which should have been paid before; and the information here is upon a bargain by way of loan, where was a bargain for forbearing. Fuller, this word (bargain) in the statute cannot be intended a bargain for wares or such things, and so distinct from the other two things, &c. If in information upon loan, an usurious contract had been given in evidence, that would not maintain the information: and it was moved in this case, if the time of the loan or forbearance of the money shall be accounted according to eight & twenty days to every month, or by the months in the kalender, viz. January, February, &c. And it seemed to some according to the days, as in case of the statute of 23 Eliz. of recusants; and others conceived contrary in both cases. And Fuller said, that in the case of policy of assurance made to warrant a ship, one was bound to warrant a ship for twelve months; & the truth was, she did not perish within the time of the twelve months, being accounted according to eight and twenty days, but being accounted by the kalender, as January, Feb. &c. it perisheth, &c. and it was said and holden, that he had not forfeited his bond. Gent Baron. If I lend one a hundred pounds without any contract for interest, and afterwards at the end of year he gives me twenty pounds for the loan thereof, the same is within the statute, for my acceptance makes the offence without any bargain or contract. And by Clarke Baron, the place where the defendant accepted excessive interest ought to be shewed in the information, but not the place where the contract for the loan or forbearance was made, for the same is not needful. See the case betwixt Stradling and Morgan, Plowd. 200. for the setting down of the place in the declaration, where the extortion was committed: the information here is by way of corrupt bargain and loan. The defendant took at Dertford such a sum, where the taking is layed, apud Dertford, but no place of the corrupt bargain or of the loan. And by Gent. If I lend to Beesie for a year, and afterwards he takes further forbearance of another year beyond the rate, the same is within the statute: but in all cases, the place where the corrupt bargain was made ought to be certainly alledged: Manwood Baron, the information is not good for the incertainty of the place, where the corrupt bargain was made; and although there are many presidents on the informes part, it is not to purpose, for they were admitted without exception, and then they passed sub silentio, and so of no force. There are three things, or rather degrees of offences within the statute. In usury, within the statute, there ought to be corrupt loan, cheivisance, or shift,

1. corruption, 2. he ought to take more than eight pounds for one hundred pounds, 3. it ought to be for lending or forbearing. There was a case in this Court in the time of this Queen, that the defendant had taken more than ten pounds in the hundred pounds, but in the information no corruption in the bargain was alledged; and therefore judgment was given against the informer: but in the case at bar corruption is set forth in facto, and therefore as to that the information is good enough: as unto the forbearing & giving of days of payment the same is alledged in the infor-**[97]**-mation, but not according to the statute, for the statute is in the disjunctive, but the information is in the copulative; here in our case the issue is not guilty, under which general issue all the points of the statute are included and ought to be tried, as unto the corruption the same is not sufficiently laid, for no place is assigned where the corrupt bargain was made, ergo no visne for it to be tried, ergo, no trial can be, ergo, no issue for it, ergo, this point of the statute doth not come in issue, nor can it be tried upon the general issue, not guilty. Also he held, that all the offence ought to be within the year, for if one make a corrupt bargain for this year, and ten years after he takes excessive usury, the same is not within the statute to inform upon it. And in truth there is no such offence without corrupt bargain, so as he conceived, that the word (lending) is a strange word, but where the statute is forbearing or giving day of payment, & in the information it is giving and forbearing in the copulative, that is good enough, for the one word enforceth the other, and is not double. Also the information hath not shewed whose money it is, and therefore it is not good: and afterwards judgment was given against the informer; and a writ of error thereupon brought in the Exchequer Chamber. And it was argued by Popham Attorney-General, that judgment ought to have been given for the Queen and the informer, for the shewing of the place where the corrupt bargain was made needs not to be alledged in the information, for the offence punishable by the statute is the receipt of excessive usury, and not the contract: and it was the case of one Bird, 20 Eliz. where the plaintiff shewed the place of the receipt, and not of the contract, and yet had judgment for the Queen, without any exception to it before judgment, or error after, for the contract is but inducement to the receipt, and it shall be tried where the taking was; therefore it is not necessary to shew the place of the bargain; and it was adjorned.

MICH. 30 ELIZ. IN THE EXCHEQUER.

CXXVI. SALIARD AND EVERATS CASE.

Recusants. What Statutes extend to Copy-holds.

Thomas Saliard and Hen. Everat being recusants convicted, and not having paid twenty pounds for every month, a commission issued forth to enquire of their goods and lands in the county of Suffolk, to levy thereon the debt and penalty due to the Queen. And now the commission being returned, the parties appeared, and by their council shewed, that some of their lands returned in the commission are copy-hold, and prayed as to those, manus Dominæ Reginæ amoveantur, and that upon the statute of 29 Eliz. cap. 5. concerning recusants: viz. that upon default of payment of penalties, &c. which process issued out of the Exchequer to take and seize all the goods, and two parts as well of all the lands, tenements and hereditaments, leases and farms of such offender, as of all other the lands, tenements, and hereditaments, liable to such seisure, or to the penalties aforesaid, by the true meaning of this Act, leaving the third part, &c. And Popham Attorney General moved, if a recusant hath more than a third part of his lands in copyhold land, if this copy-hold as to the surplusage shall be liable to the penalty. Manwood Chief Baron conceived, that the copy-hold is liable in this case by the statute, although not directly by express words, yet within the intent of it, and that by reason of these words all other the lands, &c. liable to such seisure, &c. Walmes. Serjeant, copy-hold is not liable to a statute merchant or staple; also if the Queen hath the copy-hold, how shall the lord have the services which the Queen cannot do? Also a copy-hold is not an hereditament

within this statute, which extends only to hereditaments at the common law, and not by custom: also in Acts of Parliaments which are enacted [98] for forfeiture of lands, tenements, and hereditaments, by those words they shall not forfeit copy-holds. Clark Baron, this statute was made to restrain recusants from taking the benefit of their livings, and copy-holds are their livings as well as free-holds, and by this statute, the Queen shall not have every estate in the copy-hold land, but only the taking of the profits; but the scope of the statute was to impair the livings of recusants, and that by driving of them for want of maintenance to repair to the church.

Walmesley, If the statute had given to the Queen to seise two parts of their livings, then the statute had extended to copy-holds. Manwood, when a statute is made to transfer an estate by name of lands, tenements, and hereditaments, the copy-hold is not within such statute; but if the lords signiory, his customs and services, are not to be impeached, or taken away by such statute, then it is otherwise; for such statute doth not make another tenant to the lord; and by him copy-holder shall pay subsidies, and he shall be assessed according to the value of his copy-hold as well as of his freehold, and in this case, the Queen is to have the profits of the lands only, but no estate. At another day, the case was argued for the recusants by Snag Serjeant, and he said, that these words lands, tenements, and hereditaments are to be construed, which are such at the common law, not by custom: if I give to one all my lands, tenements, and hereditaments in D. my copy-holds do not pass, and statutes which are made to take away possessions and hereditaments out of persons ought to be strictly taken, and not by equity: the statute of 13 Eliz. of bankrupts enacts, that the commissioners may sell the lands and tenements of the bankrupts; if the statute had not made a further provision, the commissioners could not sell copy-hold lands, but there are express words in the statute for that purpose, i.e. as well copy as fee: also the statute of 13 Eliz. cap. 4. of auditors and receivers of the Queen doth not extend to copy-holds: and it should be a great prejudice to the lords of such copy-holds, that the Queen should have the land. Popham, the intention of the law sometimes causes a liberal construction of a statute in the letter of it, somtimes a strict and precise exposition, and here it appeareth, that the intention of the statute was, that the Queen should have all the goods of the offender, and two parts of the lands, &c. leases and farms, and the recusant but the third part of all his lands only; and therefore the recusant is not to have any other thing but only that which is allotted to him by the statute, and that is the third part, which is all the maintenance which the law allows him; and then if copy-holds be not within this statute, a recusant who hath great possessions in copy-holds, and hath no free-hold should be dispunishable, and hath his full maintenance, against the meaning of the statute: and he said that many things are within the meaning of a statute, which are not within the words, as bonds, obligations and specialties made to recusants, shall pass to the Queen by this statute by force of the word, goods, according to the meaning of the statute, and all personal things are within the statute, &c. profits of the lands, advowsons, and the like; and the very scope of the statute was to take away from recusants all personal things whatsoever, and two parts of real things, as leases, farms, lands, tenements, &c. with the intent that with the superfluity of their goods and possessions, she should not maintain Jesuits, and seminary priests, people more dangerous than the recusants: and by him, lands in ancient demesne are liable to the penalties by the statute; although not by express words; so if a recusant hath lands extended by him upon a statute acknowledged unto him, that interest is not properly a lease, or farm, yet it is land within this statute liable, &c. And if I be tenant by elegit, or sta-[99]-tute, &c. of lands in D. not having other lands in the said town, and I grant all my lands in D. my interest ut supra, shall pass; contrary, if I have other lands there: and I grant, that if I have copy-hold lands in D. and none other; and I grant all my lands in D. copy-hold land shall not pass by such assurance; because that copy-hold cannot pass but by surrender; if I put out a copy-holder out of his lands, the same is a disseisin to the lord of whom the copy-hold is holden: and if I levy a fine of such lands and five years pass, not only the lord is bounden as to his free-hold and inheritance, but also the copy-holder for his possession, for the intent of the statute of 4 H. 7. was to

take away controversies, & litibus finem imponere, and contention may be as well for copy-hold as for land at the common law. One hath a lease for years to begin at a day to come, he who hath the free-hold thereof is disseised, the disseisor levieth a fine, five years pass, he who hath the free-hold is bound by it, but not he who hath the interest for years in futuro, as it hath been lately adjudged; but he said, that if that point were to be handled again, the law would be taken to the contrary; but it is clear that a lease in possession shall be bound by such fine: and as unto any prejudice to the lord it is clear, that notwithstanding that the Queen hath the copy-hold land, yet the lord shall have the rent during the possession of the Queen, which is the most valuable part of the services of the copy-holder. The statute of 1 E. 6. of chantries, doth extend to copy-hold, by the general words, lands, tenements, and hereditaments, for otherwise the proviso which excepts copy-holds were not necessary: and in our statute, the words are lands, tenements, and hereditaments, which are forceable words, which proves that our exposition to extend it to copy-holds is proper and agreeable to the statute, and this in the first branch of it; for copy-hold is some land, tenement, or hereditament; the clause in this branch of the statute is, and also all other the lands, tenements, and hereditaments liable to such seisure, &c. the same is to be meant of such lands which are bound with clause of revocation, of which is spoken in the former part of this statute. He who departs out of the realm against the statute of 5 R. 2. shall forfeit his goods, and thereby his debts also: the King grants omnia bona & catalla felonum, debts of felons shall pass; ergo copy-holds also, by the name of lands, tenements, &c. as well as debts by the name of goods. In our case, the meaning of the statute was, that the Queen should have two parts of the whole estate of the recusant, be it copy-hold, ancient demesne, &c. If upon the statute of bankrupts, a copy-hold estate be sold to the King, the King shall pay the rent, but shall not do any of the services, and in so much the lord shall be prejudiced; patiatur etiam & hic, rather than recusants should not be punished; and it is not a strange thing in law, that the lord of a copy-holder should be prejudiced for the offence of his tenant; as where a copyholder is outlawed, the King shall have the profits of his copy-hold lands, and the lord hath not any remedy for his rent.

Owen. Rep. 37. Dy. 5. 6. Co. 3. Inst. 109. Yel. 60. 12 Co. 12. 5 Co. 124. 2 Len. 56. Post. 201. 202.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXXVII. STEBBS AND GOODLACKS CASE.

Fraud shall not avoid payment of Tithes.

Betwixt Stebbs & Goodlack, the case was, the parson of Letcome in the county of Berks, libelled in the Spiritual Court for tithes, the defendant shewed, that the custome of the town of Letcome is, that the parson shall have for his tithes the tenth land sowed with any manner of corn, and he shall begin his reckoning always at the first land which is next to the church, &c. The parson shewed that the defendant, by fraud and covin sowed every tenth land which belonged to the parson, ut supra, very ill and with small quantity of corn, and did not dunge or manure it as he did the other nine parts, by means where-[100]-of, whereas the other nine every of them yielded eight cocks, the tenth yielded but three cocks, and for this matter the parson libelled in the Spiritual Court and confessed the custome, but for abusing of the custom prayed to have his tythes in kind; the defendant prayed a prohibition, and the parson afterwards a consultation: and the opinion of Wray Justice was that the custom was against common reason, and so void, but if it be a good custom, then the parson shall have the action upon the case.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXXVIII. RUMNEY AND EVES CASE.

Copy-holder.

In ejectione firmæ by Jane Rumney against Lucie Eve, it was holden, that if customary land do descend to the younger son by custom, and he enters and leaseth it to another, who takes the profits, and after is ejected: that he shall have an ejectione firmæ without any admittance of his lessor or presentment that he is heir. For which the defendant shewed, that there were thirty years incurred betwixt the death of the father, and the making of the lease, so that here is supina negligentia, which shall disable his person to make any demise, quod fuit concessum. In answer of which it was said, that the lessor at the time of the death of his ancestor was but of the age of two years, and that after his full age no court had been holden for a long time, and that at the first court that was holden, which was of late, he prayed to be admitted, but the steward refused to admit him; and the same was holden a good excuse of his negligence: and it was holden, that the plaintiff ought not to shew that the lease is warranted by the custom, but that shall come of the other side; and so it had been lately adjudged, which Wray granted: and by him, if a copy-holder surrender in extremis to the use of himself for life, &c. If he shall be well again, the surrender shall stand, for he hath reserved an estate to himself. It was further holden in this case, that if a copy-holder dieth, his heir within age, he is not bound to come at any court during his non-age to pray admittance, or to tender his fine: also if the death of the ancestor be not presented, nor proclamations made, he is not at any mischief, although he be of full age.

Poph. 39. 4 Co. 22. 1 Cro. 469. 483. 717. 728. Ante 16. 4 Len. 30. 31. 8 Co. 100.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXXIX. SAINT-JOHN AND PETITS CASE.

It was covenanted betwixt Saint-John and Petit, that Saint-John should present Petit to the church of A. and that afterwards Petit should lease the parsonage to Saint-John, or to any other person named by him, and that the said Petit should not be absent by eighty days, and that he should not resign; and Petit was bound to perform these covenants, & Petit is presented to the benefice: Saint-John brought an action upon the obligation, pretending, that he could not enjoy his lease by reason of the absence of the said parson, &c. And the lease was made to the curate at the nomination of Saint-John. The parson said, that the obligation is void by the statute of 14 Eliz. cap. 11. See the statute, all leases, &c. made by any curate shall be of no better force, than if it had been made by the beneficed parson himself. Tanfeild by 13 Eliz. 20. When a parson leaseth to his curate, who leaseth over, the statute doth not make the lease void by any absence of the parson, but of the curate by forty days, quære. For that it seemeth, that by the statute of 14 Eliz. the curate cannot lease, &c.

[101] PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXXX. GATES AND HALLIWELS CASE.

Betwixt Gates and Halliwel the case was, one having two sons, devised, that his eldest son with his executors should take the profits of his lands until his youngest son should come to the age of two and twenty years, and that then the said youngest

son should have the land to him and the heirs of his body: it was holden clearly by the whole Court, that the eldest son should have fee in the interim until the youngest son came to the said age.

3 Len. 55.

PASC. 30 ELIZ. IN THE KINGS BENCH.

CXXXI. PROWSE AND CARYS CASE.

Prowse brought an action upon the case against Cary for words: that the plaintiff did subborn, procure, and bring in false witnesses in such a court at Westminster, &c. The defendant pleaded, not guilty: and it was found, that he did procure and brought in false witnesses, but was acquitted of the suborning. It was objected, that the action doth not lie, for it may be, that the defendant did not know that he would depose falsly: thou art a forger of false writings are not actionable, and so it was adjudged, for it may be understood of letters of small importance; but that exception was not allowed, for it shall be taken in malam partem, and cannot be spoken of any honest man.

1 Cr. 296. 554. 607.

CXXXII. PASCH. 30 ELIZ. IN THE KINGS BENCH.

A. was bounden in an obligation to B. upon condition, that if A. deliver to B. twenty quarters of corn the nine and twentieth of February next following, datum presentium, that then, &c. and the next February had but eight and twenty days; and it was holden, that A. is not bounden to deliver the corn, until such a year as is leap-year, for then February hath nine and twenty days, and at such nine and twentieth day he is to deliver the corn, and the obligation was holden good.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXXXIII. ALLEN AND PALMERS CASE.

Copy-holder surrenders where his heir shall be in by purchase.

The case was, a copy-holder did surrender his lands to the use of a stranger for life, and afterwards to the use of the right heirs of the copy-holder, who afterwards surrendred his reversion to the use of a stranger in fee, & died, and the tenant for life died, and the right heir of Palmer the copy-holder entred; and by Cook nothing remained in the copy-holder upon the said surrender, but the fee is reserved to his right heirs, for if he had not made any such second surrender, his heir should be in, not by descent but by purchase. And the common difference is, where a surrender is to the use of himself for life, and afterwards to another in tail, the remainder to the right heirs of him who surrendreth, there his heirs shall have it by descent; contrary where the surrender hath not an estate for life or in tail limited to him, for **[102]** there his heir shall enter as a purchasor, as if such use had been limited to the right heirs of a stranger And by him, if a copy-holder surrenders to the use of his right heirs, the land shall remain in the lord until the death of the copy-holder, for then his heir is known &c. See Dyer 99. The husband made a feoffment to the use of his wife for life, and afterwards to the use of the right heirs of the body of the husband and wife begotten, they have issue, the wife dieth, the issue cannot enter in the life of his father, for then he is not his heir. See Dyer 7 Eliz. 237. The husband is sole seised in fee, and levieth a fine of the land to the use of himself and his wife, and the heirs of the husband, and they render the land to the conusor for the life of the husband, the remainder to B. for life, the remainder to the right heirs of the husband: the husband dieth, B. dieth: now the wife shall have the land for the life of the wife, for she shall not lose her estate by that

render; and this remainder to the right heirs of the husband is void, and the land and estate in it is in him as a reversion, and not as a remainder. And a man cannot tail a remainder to his right heirs whilest he is living, unless it begin first in himself. See Br. 32. H. 8. Gard. 93.

2 Roll. 416. Co. 1 Inst. 226.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXXXIV. PEARLE AND EDWARDS CASE.

Assumpsit. Consideration.

The case was, that the defendant had leased lands to the plaintiff rendring rent for certain years, and after some years of the term expired, the lessor in consideration that the lessee had occupied the land, and had paid his rent, promised the plaintiff to save him harmless against all persons, for the occupation of the land past, and also to come: and afterwards H. distrained the cattle of the plaintiff being upon the lands, upon which he brought his action. Golding, Here is not a sufficient consideration, for the payment of the rent is not any consideration, for the lessee hath the ocupation of the land for it, and hath the profits thereof; and also the consideration is past. Cook, The occupation, which is the consideration, continues, therefore it is a good assumpsit, as 4 E. 3. A gift in frank-marriage after the espousals, and yet the marriage is past, but the blood continues, so here; and here the payment of the rent is executory every year; and if the lessee be saved for his occupation, he will pay his rent the better. Godfrey, If a man marrieth my daughter against my will, and afterwards in consideration of that marriage I promise him one hundred pounds, the same is no good consideration, which Clench Justice denied. And afterwards the plaintiff had judgment to recover his damages.

1 Cro. 94. 2 Len. 111.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXXXV. WAKEFORDS CASE.

Extinguishment of Copy-hold by Release.

The Earl of Bedford lord of the manor of B. sold the free-hold interest of a copy-holder of inheritance unto another, so as it is now no part, but divided from the manor, and afterwards the copy-holder doth release to the purchasor. It was holden by the Court, that by this release the copy-hold interest is extinguished, and utterly gone; but it was holden, that if a copy-holder be ousted, so as the lord of the manor is disseised, and the copy-holder releaseth to the disseisor nihil operatur.

[103] PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXXXVI. DOCTON AND PRIESTS CASE.

In trespass for breaking of his close, it was found by special verdict, that two were tenants in common of a house, and of a close adjoyning to the house, and they being in the house make partition without deed of the house and the close, see 3 E. 4. 9. 10. Partition without deed upon the land is good enough: vide 3 H. 4. 1. And it seems by 3 E. 4. partition made upon the land amounts to a livery: vide 2 Eliz. Dyer 179. Partition by word out of the county void, 19 H. 6. 25. Betwixt tenants in common not good without deed; 47 E. 3. 22. being upon the land it is good without deed: two joynt-tenants make partition by word, & make partition in another county, the same is no partition, for as to that matter the common law is

not altered by the statute, but as to compel such persons to make partition. Wray Justice conceived, that the partition here being without deed was not good, although made upon the lands: vide 18 Eliz. Dyer 35. And at another day Wray said, that partition by tenants in common without deed wheresoever it is made is good; but in this case it appears, that the parties who made the partition were in the house (for they were tenants in common of the messuage and a close adjoyning to it) and made partition, that one should have the house, and the other the close, so as they were not upon the close when they made the partition, and then it was void for the close, and if for the close then also for the house. And judgment was given accordingly.

1 Cro. 95. 2 Roll. 255. Dy. 179. 6 Co. 12.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXXXVII. COOK AND SONGATS CASE.

In an action upon the case by Cook against Songat, the plaintiff declared, quod cum quædam lis and controversie had been moved betwixt the plaintiff lord of the manor, &c. and the defendant claiming certain lands parcel of the said manor, to hold it by copy; and whereas both parties submitted themselves to the judgment and arbitrament of I. S. counsellor at law, concerning the said land, and the title of the defendant to it: the defendant in consideration that the plaintiff promised to the defendant, that if the said I. S. should adjudge the said copy to be good and sufficient for the title of the defendant, that then he would suffer the defendant to enjoy the said land accordingly without molestation: the defendant reciprocally promised the plaintiff, that if the said I. S. should adjudge the said copy not sufficient to maintain the title of the defendant, that then he would deliver and surrender the possession of the said land to the plaintiff without any sute: and shewed further, that I. S. had awarded the said copy utterly insufficient, &c. yet the defendant did continue the possession of the land, &c. And by Godfrey, here is not any consideration: but by Gawdy, the same is a good and sufficient consideration, because it is to avoid variances and sutes: and judgment was given for the plaintiff.

[104] PASC. 30 ELIZ. IN THE KINGS BENCH.

CXXXVIII. PAWLET AND LAWRENCES CASE.

George Pawlet brought an action of trespass against one Lawrence, parson of the church of D. for the taking of certain carts loaded with corn, which he claimed as a portion of tythes in the right of his wife; and supposed the trespass to be done the seven and twentieth of August, 29 Eliz. & upon not guilty it was given in evidence on the defendants part, that the plaintiff delivered to him a licence to be married, bearing date the eight and twentieth of August, 29 Eliz. and that he married the plaintiff and his said wife the same day, so as the trespass was before his title to the tythes: and it was holden by the whole Court, that that matter did abate his bill: but it was holden, that if the trespass had been assigned to be committed one day after that, it had been good; but now it is apparent to the Court, that at the time of the trespass assigned by himself, the plaintiff had not title, and therefore the action cannot be maintained upon that evidence, for which cause the plaintiff was non-suit.

MICH. 30 ELIZ. IN THE KINGS BENCH.

CXXXIX. SIR JOHN BRAUNCHES CASE.

Forfeiture. Copy-holder.

In the case of Sir John Braunch, it was said by Cook, that if a copyholder be dwelling in a town long distant from the manor, a general warning within the manor

is not sufficient, but there ought to be to the person notice of the day when the Court shall be holden, &c. For his not coming in such case cannot be called a wilful refusal: so if a man be so weak and feeble that he cannot travel without danger, so if he hath a great office, &c. these are good causes of excuse: it was also holden, that if a copy-holder makes default at the Court, and be there amerced, although that the amercement be not estreated, or levyed, yet it is a dispensation of the forfeiture. Gawdy, Justice, if the copyholder be impotent, the lord may set a fine upon him, and if he will not pay the fine, then it is reason that he shall forfeit his land. Egerton sollicitor, warning to the person of the copy-holder is not necessary, for then, if the lord of a manor hath one copy-holder of it dwelling in Cornwal, and another in York, &c. the lord ought to send his bayliff to give notice of the Court to them, which should be very inconvenient, and by him continual default at the Court doth amount to a wilful refusal. And by the whole Court, general warning within the parish is sufficient, for if the tenant himself be not resient upon his copy-hold, but elsewhere, his farmer may send to him notice of the Court: and it was further given in evidence, that Sir John Braunch had by his letter of attorney appointed the son of his farmer his attorney to do the services for him due for his said copy-hold: and it was holden that such a person so appointed, might essoin Sir John, but not do the services for him, for none can do the same but the tenant himself.

1 Cro. 353. 505. 506.

[105] MICH. 30 ELIZ. IN THE KINGS BENCH.

CXL. WILKES AND PERSONS CASE.

Trespass.

John Wilkes and Margery his wife, and Thomas Persons brought trespass, quare clausum fregit, herbam suam messuit, & fœnum suum asportavit, ad damnum ipsius Johannis, Margeriæ, & Thomæ; and exception was taken, that it was not the day of the wife, nor she was not damnified by it, but her husband: Wray Justice, the declaration is good enough, for although it be not good for the day, yet clausum fregit & herbam messuit, makes it good: and judgment was given for the plaintiffs.

1 Cro. 96. accord.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CXLI. ATKINSON AND ROLFES CASE.

Notice.

In an action upon the case by Atkinson against Rolfe, the plaintiff declared, that the defendant in consideration of the love which he bore unto A. his father, did promise that if the plaintiff would procure a discharge of a debt of I. S. which his said father owed to the said I. S. that he would save the plaintiff harmless against the said I. S. And declared further, that he had discharged the father of the defendant from the said debt, and is become bounden to the said I. S. in an obligation for the payment of the said debt, upon which obligation the said I. S. hath sued the plaintiff, and hath recovered, and had execution accordingly, and so hath not been saved harmless, &c. It was objected, that the declaration was not good, because the plaintiff hath not shewed in his declaration, that he had given notice to the defendant of the said obligation, or of the suit brought against him; but that was not allowed, but the declaration was holden to be good, notwithstanding the exception. Shuttleworth, if I be bound to make to you such an assurance as I. S. shall devise, I am bound at my peril to procure notice: but if I be bound to you to make such assurance as your counsel shall advise, there notice ought to be given unto me. It was adjorned.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CXLII. BEAR AND UNDERWOODS CASE.

Discontinuance of Suit in Court.

In a replevin it was agreed by the whole Court, that the plaintiff cannot discontinue his suit without the privity of the Court; for as Leonard, custos brevium, said, the entry is, recordatur per curiam; and if the plaintiff would discontinue without moving the Court, the defendant may enter the continuance if he will. It was also holden, that where an original is discontinued, the defendant shall not have costs; but if the plaintiff be non-suit the defendant shall have costs, by 32 H. 8. 15. But after a discontinuance in a latitat, the defendant shall have costs by the statute of 8 Eliz. cap. 2. And in this case it was agreed, that the plaintiff may be non-suit after a demurrer, and so he was.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXLIII. JEROM AGAINST NEAL AND CLAVE.

Assault and Battery. Imprisonment not Good.

George Jerom, and Avice his wife brought an action of trespass of assault and wounding of the wife, and the action was laid in Midd. and brought against Neal and Cleave, who pleaded that Salisb. is an antient city, and that within the same, there is this custom, that if any make an **[106]** affray and assault any officer of the said city, or any other person, if he upon whom such assault is made, complain unto the mayor of the said city, that the mayor for the time being may send for him who made the affray as a justice of peace, to make him to answer to it, and shewed further, that the said Jerom made an affray within the said city; of which complaint being made to the mayor, the said mayor sent the defendants being constables to bring the said Jerom to him, by virtue whereof, they went to the house of the plaintiff, and signified to him the commandment of the said mayor, and would have brought the plaintiff to him, and the wife of the plaintiff did assault them, and they moliter put their hands upon the said wife, which is the same assault, battery, and wounding, &c. upon which it was demurred in law. Coke for the plaintiff; this custom is not good or reasonable: see Magna Charta 29. Nullus liber homo capiatur, vel imprisonetur, &c. nisi per legale judicium parium suorum vel per legem terræ, therefore shall not be taken or imprisoned upon a bare suggestion, and see 24 E. 3. Br. Com. 3. where a commission issued to take all which were suspected notoriously for felonies and trespasses, although they are not endicted, and the same was holden against the law, and therefore it was revoked, and see the statute of 5 E. 4. 9. 25 E. 4. 13. 28 E. 4. 13. 28 E. 3. 3. 37 E. 3. 18 & 42 E. 3. 3. 2. To be a justice of peace doth not lye in prescription. For one justice of peace was before the statute of 1 E. 3. and then the commencement being known, prescription cannot be of it. 3. Admit, that the mayor was justice of peace, yet he cannot determin any thing out of the sessions. 4. The prescription is, that the mayor might send for him, and doth not say within the city, and it shall be an unreasonable prescription to say, that the mayor might send for him in such case, in any place within England. 5. It is not shewed that they of Salisbury have a corporation, so as they might be enabled to prescribe. 6. The wounding is not answered, for moliter injicere manus cannot be taken for a wounding; it may well answer the battery, &c. Fleetwood Recorder of London, if the statute of Magna Charta should be observed, no felon is duly handled at Newgate, and here we have not pleaded by way of prescription, but of usage; consuetudo and usage are all one. And afterwards judgment was given for the plaintiffs, for the plea in bar was holden to be naught, because the wounding is not answered; and the custom is too general, and also for the 4th exception.

1 Cro. 268.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXLIV. SIR JULIUS CÆSARS CASE.

Fleetwood came to the bar and shewed, that Julius Cæsar Judge of the Admiralty had libelled against an officer of the Mayor of Lond. Simon Nicholas, for measuring of coals at Wiggins Key, in the parish of St. Dunstan in the east, and it was upon the Thames, and prayed a prohibition, because such measuring of coals had always appertained to the Mayor of London; for the statute of 28 H. 8. 15. gave jurisdiction to the Admiralty in case of robbery and murder: and that prohibition was grounded upon the statutes of 13. & 15 R. 2. 2 H. 4. 11. And it was said, that this measuring whereof, &c. was in the body of the county; and note, that the said Julius Cæsar being Judge of the Admiralty had put in this bill, ex officio judicis, upon which it was said by Wray Justice, that it was hard that he should be both plaint. and judge, and that his jurisdiction should be tryed before himself, and afterwards, it was moved by Egerton solicitor, who said he had spoken with the Lord Admiral, who told him that the Mayor of Lond. used to take a fine for measurage, and had made an office of it, and that he conceived, the same is extortion, and being made upon the water, he conceived he is punishable in this court, for by the same reason the mayor might take a fine for the measuring of corn, clothes, &c. Wray and **[107]** Gawdy Justices; if it be extortion in the mayor, there is no remedy for it in the Court of Admiralty: but in the Kings Court. Gawdy; it shall be redressed here in a quo warranto.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXLV. THE TOWN OF SUSSEX.

Amercement. Escape.

The town of Green in Sussex was amerced for the escape of a felon, and the said amercement was grounded upon an inquisition taken before the coroner, by whom the escape was found; and it was moved for the town, that here is not any such escape found, for which the town ought to be amerced, for it is found, that he who escaped, 10 die Januarij, 30 Eliz. circa horam quartam post meridiem, with a pitchfork mortally struck one A. which A. of the said stroak died at eight in the evening of the same day, and that then the other escaped, for which escape being made in the night, the town by the law ought to be amerced, for it is not felony, until the party dieth, which see 11 H. 4. and Coles case, Pasch. 23 Eliz. 401. And therefore the town nor any other was chargeable with the offendor before that the party was dead. Wray; it should be hard, that the town should be amerced upon this matter, for although the town in discretion might have stayed the offender before the death of the party, yet it is not bound so to do: and the Court took time to advise of the case.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CXLVI. JEROM AND KNIGHTS CASE.

Conspiracy. Upon an Acquital of Grace, no Conspiracy lieth.

Joan Jerom brought an action upon the case in the nature of conspiracy against one Knight, and declared that the said Knight had maliciously caused the plaintiff to be endicted of felony, and to be arrained upon it, and that she was legitimo modo acquietat. &c. And the case was, that the defendant came into the Court where the sessions was holden, and complained of the plaintiff for the said felony, for which the justices there comanded her to cause an indictment to be drawn, &c. Coke upon the books of 27 H. 6. 12. 35 H. 6. 14. 27. H. 8. 2. Fitz. 115. it appeareth, that if one come voluntarily into the Court and discover felonies, and if it be true which he saith,

or if he come in Court and draw an indictment by the command of the justices, or if he be bound by order of law, to cause the party to be indicted, or to give in evidence, although he do it falsely, yet he shall not be punished for the same in conspiracy, or in an action upon the case; but if he come gratis with malice in him before, and maliciously and falsely cause the party to be indicted, so as falsity and malice are the ground of it, &c. it is otherwise. Gawdy Justice; how shall it be tried, if he doth it with malice or not? Coke, it may be enquired of, for malice makes the difference betwixt murder and manslaughter; and in such case it is to be enquired; and here he came to do the same without process or cohersion in law. But if he will safely do such office, his direct course is to come to a justice of peace, and to shew to him, that his goods are stolen, and that he doth suspect such a one, and then upon examination he shall be bound to come and give in evidence against the party, &c. and in such case although that his evidence be false, yet he is not punishable: at another day, it was said by Coke in the same case, ut supra, if a man be bound to give evidence against any person, although he give false evidence, no action lieth: also if one come into Court gratis, and discloseth a felony, and gives evidence, if no malice proceed against the party, it is not punishable; and here fore-thought malice is alledged, and put in the declaration, to which the defendant hath pleaded not guilty; and now he is found guilty. See the statute of Westminster, **[108]** 2. cap. 12. Si inveniatur per inquisitionem quod aliquis sit abettator per malitiam, &c. Wray Justice; it should be hard to charge one with this action, where he hath his goods stolen from him, and therefore causeth an indictment to be drawn against one who he suspects of it, who shall be found guilty, who should be punished for it; for many malefactors notwithstanding that the evidence against them be full and pregnant, in favour of life are acquitted, whereas by law they ought to be hanged; and it is not reason, that upon such an acquital of grace and mercy, he should have this action; if such person had used any words of malice before the sessions, an action upon the case would have lain: and afterwards judgment was given for the plaintiff, Trin. 27 Eliz. 750. Ratford, and afterwards a writ of error was brought, Trin. 29 Eliz. Rot. 669. In the original action the writ and declaration were that the defendant, malitiose intendens querentem in nomine, vita, fama, & bonis defraudare quandam billam indictamenti scribi fecit, & eam exhibuit to the grand enquest, & ibidem false deposuit omnia in ea contenta esse vera, which by Coke is full matter of conspiracy; for the drawing of an indictment is not the office of a witness, but if it were by the commandment of the Court, or of one justice of peace, it should be otherwise, for there he goes by course of justice, 21 E. 3. 17. If one conspire with another, and afterwards he procures himself to be one of the indictors, his oath shall not excuse his malice before. Gawdy, if the party had taken upon him to proceed against the party upon any good presumtions, he might have pleaded it, as to say, he found the party in the house suspiciously, &c. but because he doth not plead any such matter, but generally not guilty, and the writ and declaration stand not answered specially, nor controlled with the verdict, there is no reason but that the judgment should be affirmed; and afterwards, the judgment was affirmed, and it was said by Wray, that here the words in the writ and declaration are all one as the words in a writ of conspiracy, and the defendant hath not shewed any special matter to enduce him to the proceedings.

1 Cro. 70. Owen 158.

Pasch. 30 Eliz. In the Kings Bench.

CXLVII. Ferrers Case.

Prescription.

Humphry Ferrers brought an action upon the case, and declared, that he is seised of an ancient messuage in the town of Tamworth, and that he and all his ancestors, whose heir he is, owners of the messuage, &c. have used time out of mind, &c. to erect herdells, in aperta platea of Tamworth juxta messuagium prædict. every market day, to make penns there for sheep, and that he, &c. have used for such penning of

sheep, there to take divers sums of mony of such persons who would penn their sheep there; and further declared, that the defendant had broken and pulled down his herdels, per quod proficuum suum inde amisit; and upon this declaration, Godfrey did demur in law, 1. The plaintiff hath not shewed in his declaration, specially where he hath used to erect his herdels, but generally in aperta platea, without shewing in his own land, or in the land of another; if in the land of another, it is no good title, for although that those who fish in the sea may prescribe to set stakes on the land adjoyning to the sea, to hang their nets to dry after they have done fishing, and that is through the whole county of Kent 8 E. 4. for their prescription is for the common wealth, but the same is not so here, but only for a private gain; also no prescription is good, but where some profit comes to him who prescribes for it, which see in the case of the Abbot of Buckfast, 21 E. 4. 4. 21 H. 7. 20. Also the declaration is, that the plaintiff hath taken diversas denariorum summas, and see the Prior of Dunstables case, **[109]** 11 H. 6. 19. 19. R. 2. Action sur le case 51. But the certainty of the sums do not appear in this declaration, so as the reasonableness of the custom might be known: also it appeareth here upon the declaration, that trespass, vi & armis, should lye and be brought, for the declaration is, that the defendant did break and pull down the herdels which cannot be without express force, as 42 E. 3. 24. Trespass upon the case against a miller, and declared that the plaintiff used to grind at the said mill without toll, and that he sent his corn to the said mill to be ground, and there the defendant came and took two bushels of his said corn; and the writ was upon the prescription to grind sine multura, and that the defendant, prædict. querent. sine multura molire impedivit, and by award of the Court the plaintiff took nothing by his writ, for he hath declared that the defendant hath taken toll, and therefore he ought to have a general writ of trespass. Beaumont, to the contrary; a market is as well for the common wealth as a fishing: also he is at the costs for providing of herdels, and the erecting of them, so (as he hath declared) he hath taken divers sums of mony for it; and as to any sum not certain, it is well enough, for peradventure sometimes he hath taken a penny, sometimes two pence, as the parties could agree: and as to the exception of vi & armis, the same is not material, for the plaintiff doth not rely upon the pulling down of the herdels only, but upon the loss of the money also, which he should have had if the defendant had not broken his herdels: and afterwards judgment was given for the plaintiff.

Pasch. 30 Eliz. In the Kings Bench.

CXLVIII. Beverly and Bawdes Case.

Error. Tryal by Inquest of what County or Place.

Beverly brought a writ of error to reverse an out-lawry pronounced against him at the suit of one Bawdes, and shewed, that he was out-lawed by the name John Beverly of Humby in the county of Lincoln gent. And that within the said county there are two Humbyes, scil. Magna Humby, & Parva Humby, and none without addition; to which it was said, of the other side, that the truth is that there are two such towns, and that Humby Magna is known as well by the name of Humby only, as taken for the name of Humby Magna: and upon that they are at issue: and it was moved, if the inquest to try this issue shall come de corpore comitatus, or from Humby Magna. And by Cooke, it shall be tryed by an inquest of Humby Magna; and he confessed, that if the issue had been, no such town; then the inquest ought to be of the body of the county, but here is another issue to be tryed, 22 E. 4. 4. In trespass done in Fulborn and Hinton in the County of C. the defendant said, that there is no such town nor hamlet of Hinton within the same county. Judgment of the writ. See there by Briggs the tryal shall be, de corpore comitatus. See 14 H. 6. 8. Over-dale and Nether-dale, and none without addition, and so at issue tryed by them of the body of the county, 35 H. 6. 12. And by him, wheresoever an issue may be tryed by an inquest out of a special visne, there it shall never be tryed by the body of the county. As the case before, 22 E. 4. Trespass in two towns

A. and B. the def. as to A. pleads, there was no such town, and as to B. pleaded another plea. Now the whole inquest shall come out of B. for the inquest in one town may try any thing within the same county, which see Fitz. Visne, 27. 22 E. 4. 4. And here in our case the issue is, if Humby Magna be as well known by the name of Humby only, as by the name of Humby Magna. And therefore the same may well be tryed by inquest out of the town of Humby Magna. But by Wray Justice, this issue doth amount to no such town, for the perclose of the plea is, and no Humby without addition; and the book cited out of 22 E. 4. is not ruled, but **[110]** is only the opinion of Brian. And afterwards it was awarded, that the tryal was well. Another matter was objected, because it is not shewed in the writ of error betwixt what parties the first writ did depend, for otherwise how can the plaintiff in the writ of error have a scire facias ad audiendum errores, if none be named in the writ of error against whom it shall issue. And Godfrey affirmed, that upon search of presidents it was both ways, so as it is at the pleasure of the plaintiff to do it or not. And Kemp secondary shewed divers presidents to that purpose: and afterwards the out-lawry was reversed.

Pascil. 30 Eliz. In the Common Pleas.

CXLIX. Cibel and Hills Case.

Debt for a Nomine Penæ. Roll. Tit. Extinguishment. Suspension of Rent by entry upon part of the Land.

A lease was made of a certain house and land rendring rent, and another sum, nomine pœnæ; and for the nominæ pœnæ the lessor brought an action of debt: the lessee pleaded, that the lessor had entred into parcel of the land demised, upon which they were at issue, and found for the plaintiff: and now the lessor brought debt for the rent reserved upon the same lease: to which the defendant pleaded, ut supra, scil. an entry into parcel of the land demised: and issue was joyned upon it; and one of the jury was challenged, and withdrawn, because he was one of the former jury: and the issue now was, whether the said Cibel the lessor, expulit & amovit & adhuc extra tenet, the said Hills. And to prove the same, it was given in evidence on the defendants part, that upon the land demised there was a brick-kill, and thereupon a little small cottage, and that the lessor entred, and went to the said cottage and took some of the bricks and untiled the said cottage: but of the other side it was said, that the lessor had reserved to himself the bricks and tiles aforesaid, which in truth were there ready made at the time of the lease made, and that he did not untile the brick-kill house, but that it fell by tempest, and so the plaintiff did nothing but came upon the land to carry away his own goods: and also he had used the said bricks and tiles upon the reparation of the house. And as to the extra tenet, which is parcel of the issue, the lessor did not continue upon the land, but went off it, and relinquished the possession: but as to this last point, it seemed to the court, that it is not material if the plaintiff continued his possession there or not, for if he once doth anything which amounts to an entry, although that he depart presently, yet the possession is in him sufficient to suspend the rent, and he shall be said, extra tanere the defendant the lessee, until he hath done an act which doth amount to a re-entry. And afterwards to prove a re-entry, it was given in evidence on the plaintiffs part, that the defendant put in his cattel in the field where the brick-kill was, and that the cattel did estray into the place where the defendant had supposed that the plaintiff had entred. And by Anderson Justice, the same is not any re-entry to revive the rent, because they were not put into the same place by the lessee himself, but went there of their own accord. And such also was the opinion of Justice Periam.

Hob. 326. Rolls ubi supra. Post. 172.

CL. PASCH. 30 ELIZ. IN THE COMMON PLEAS.

Tenant in tail covenanted with his son to stand seised to the use of himself for life, and afterwards to the use of his son in tail, the remainder to the right heirs of the father: the father levyed a fine with proclamation and died. It was moved by Fenner, if any [111] estate passed to the son by the covenant, for it is not a discontinuance, and so nothing passed but during his life, and all the estates which are to begin after his death are void. Anderson, the estate passeth until, &c. and he cited the case of one Pitts, where it was adjudged, that if tenant in tail of an advowson in gross grant the same in fee, and an ancestor collateral releaseth with warranty and dieth: that the same is a good bar for ever.

PASCH. 30 ELIZ. IN THE COMMON PLEAS.

CLI. STAFFORDS CASE.

Attachment upon a Prohibition.

The case was, that the parson of the church of B. did libel in the Ecclesiastical Court for tithe-milk of eight kine depasturing within such a field within his parish: the defendant said, that he and all those, &c. had used time out of mind, &c. to pay every year a certain sum of mony to the parson, &c. for the tithes of the same field; which plea the judges of the Ecclesiastical Court would not allow, and therefore the party had now a prohibition and an injunction against the judges, doctors, proctors, &c. And afterwards the same parson libelled again for the same tithes against the same parishioner; and in both libels there was no difference, but that in the later libel it was for a less number of kine, and now the parishioner upon this matter prayed an attachment upon the prohibition, which was granted unto him by the Court, for otherwise a prohibition should be granted to no purpose.

More. 599.

PASCH. 30 ELIZ. IN THE COMMON PLEAS.

CLII. SAMFORD AND WARDS CASE.

Ravishment of Ward.

Samford brought a ravishment of ward against Ward, and counted that one A. ancestor of the infant, whose heir he is, was seised of certain lands in fee, and held the same of the Bishop of Winchester in socage, and died, his heir within the age of 14 years; and that the custody of the infant did belong unto him as his prochein amy; by force of which he seised him and was possessed, &c. The defendant saith, that the land was holden of him by knights service, absque hoc, that it is holden of the Bishop of Winchester as the plaintiff hath counted. And upon that issue was joyned. And it was moved by Serjant Puckering on the plaintiffs part, that the truth of the case was, that all the land descended is holden in socage, and no part in knights service, but that part of it is holden of another in socage: and prayed the opinion of the Court, if that matter shall trench to the issue as the same is joyned: and the Court was of opinion, that it did not: for if all be holden in socage, it is not material if part of it be holden of another, so as it be holden in socage.

PASCH. 30 ELIZ. IN THE COMMON PLEAS.

CLIII. STAMP AND HUTCHINS CASE.

Administration. Assets. Retainer by Administrations.

The case was, the obligor makes his executors and dieth; the executors become bounden to the obligee for the payment of the said debt, and the obligee doth deliver back the obligation of the testator to them; and afterwards another creditor of the testator sues the executors, who pleaded, that they have fully administred, upon which they are at issue, and the said especial **[112]** matter was found by verdict. And by Shuttleworth and Walmesley, the jury have found for the plaintiff, and that the defendants have not fully administred: and yet they agreed the case of 20 H. 7. 2. The executors paying to the creditors of the testator a debt with their own goods, they may retain so much of the goods of the testator; but that case is not like to this, for here the executors have not made any payment or satisfaction of the debt, nor disbursed any mony, &c. nor other things, but only have made an obligation, to pay a sum of mony at a day to come, before which day it may happen that the obligation be cancelled or released; but it may more fitly be compared to the case of 27 H. 8. 6. where an executor had compounded with a creditor of the testator for the payment of 20l. for a debt of 40l. and had an acquittance testifying the payment of the 40l. where it was holden, that the other 20l. is assets. And by Rhodes, this making of an obligation by executors, (although the obligation, in which the testator was bounden, be delivered to the executors and cancelled) is not any administration nor payment of the said debt due: so if the executors pledge the goods for the payment of such a debt, yet they shall be accounted assets until payment be made, which Periam denied. And Periam and all the other justices held clearly, that if in such case the executors make a sufficient obligation to the creditor of the testator, and sufficiently discharge the testator without fraud or covin, that they may retain the goods of the testator for so much: and the goods retained shall not be said assets: and this case is all one with the case of 20 H. 7. for here they have discharged the testator, and the executors do remain charged with the same to the creditor, and it is so fully administred, as if the executors had expresly paid the debt. And it is not like to the case of 27 H. 8. cited before, for there, although they have discharged the testator, yet they have not charged themselves, otherwise it is in the principal case; and although they have appointed ulteriorem diem, for the payment of the said debt, yet the same is not material: but the Lord Anderson conceived, that if the creditor doth deliver unto the executors the obligation as an accquittance or discharge, and in consideration thereof they promise to pay the debt, the same is not any administration as to the said debt. And by some of the serjants, if the plea stand good to prove fully administred, then executors in such case may make an obligation to pay the debt 40 years after, and so defraud the other creditors, which is not reasonable: if a feoffment in fee made upon condition to pay certain mony at such a day, and at the day the feoffees make an obligation to the feoffor for the payment of it, the same is no performance of the condition. And by Periam, if the executor be taken in execution for the debt of the testator, he may retain so much of the goods of the testator amounting to the sum for which he is in execution, and it shall be accounted assets in his hands. Anderson, if he to whom the testator was endebted in 20l. be endebted to the executors in so much, and the executor in satisfaction of the debt of the testator releaseth his debt, the property shall be altered presently of the whole goods in the hands of the executors; so where the debtor makes the creditor his executor. And judgment was given for the executors.

1 Cro. 120.

PASCH. 30 ELIZ. IN THE COMMON PLEAS.

CLIV. BEARS CASE.

Formedon. Devise of Lands in Gavel-kind.

A formedon in the discender was brought by Samuel Bear, James Bear, and John Bear of lands in gavel-kind; and the warranty of their ancestor was pleaded against them in bar, upon which they were at issue: **[113]** if assets by discent. And it was found by special verdict, that Thomas, father of the demandants, was seised in fee of the lands supposed to be descended to the demandants, being of the nature of gavel-kind, and devised the same to the demandants, being his heirs, by the custom, and to their heirs equally to be divided amongst them: and if the demandants shall be accounted to be in of the lands by descent, or devise, was the question; for if by devise, then they shall not be assets. Anderson, let us consider the devise by it self without the words (equally to be divided amongst them). And I conceive, that they shall be in by the devise, for they are now joynt-tenants, and the survivor shall have the whole, whereas if the lands shall be holden in law to have descended, they should be parceners, and so as it were tenants in common. And although the words subsequent, equally amongst them to be divided, makes them tenants in common, yet that doth not amend the matter; and so also was the opinion of Windham and Rhodes Justices.

Owen. 65. Dy. 350. 1 Cro. 431. More 594. 558. Sty. 434. 3 Cro. 330. 443. 695. 696.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CLV. NASH AND EDWARDS CASE.

Devises.

In an ejectione firmæ by Nash against Edwards, it was found by special verdict, that one Dover ancestor of the plaintiff, whose heir he is, being seised of certain lands holden in socage, devised the same by word to his three sisters; And a stranger being present recited to the devisor the said words of his will, and he did affirm them: and afterwards the said stranger put the said words in writing for his own remembrance, but did not read them to the devisor, who afterwards died. And it was moved, if this devise being reduced in writing, modo & forma, be good or not. Spurling conceived that not, for the statute intends a will in writing, but not such writing as is here without privity or direction of the devisor, and it is not like to the case of Brown and Sackvil, 6 E. 6. Dyer 72. For the notes were written by the commandment of the devisor, but here it doth not appear that the meaning of the devisor was, that the devise should be put in writing: and devises in law are favoured, as the case in the Chancery was, that Sir Richard Pexhal devised certain lands to his wife, and the scrivener inserted of his own head a condition, scil. (that she should be chast) which was disallowed by the devisor himself, for which after his death, the condition, although it was put in writing, was void. And by the whole Court the devise is void. And by Wray, if he appoint A. to write his will, and it is written by B. it is void; but if after he had written the will if he had read it to the devisor, and he had confirmed it, it had been a good will, which Gawdy granted: and afterwards judgment was given, that the plaintiff should recover.

1 Cro. 100. 3 Len. 79. 2 Len. 35.

TRIN. 30 ELIZ. ROT. 771. IN THE KINGS BENCH.

CLVI. STONE AND WITHYPOLLS CASE.

Stone brought an action upon the case against Dorothy Withypol the executrix of W. Withypol her husband, & declared that where her said husband for certain yards of velvet of the value of fourteen pounds, & pro diversis alijs mercimonijs, was endebted to the plaintiff in the sum of ninety two pounds, and made the defendant his executrix & died, that after his death he came to the defendant, and demanded of her the said debt, who gave to him such answer, forbear me until Michaelmas, and then I will pay it you, or put you in sufficient security for the **[114]** true payment thereof: and declared further, that at Michaelmas aforesaid, the defendant did not pay, nor hath found any security, and shewed a request, to which the defendant said that the said testator at the time of the said contracts for the velvets and other wares, was within age: and upon that bar the plaintiff did demur in law. Egerton solicitor, for the plaintiff. As I conceive these contracts made by the plaintiff are not meerly void, so that if an action of debt, or upon the case, had been brought against the testator himself, he could not have pleaded upon the matter nihil debet, or non assumpsit, or non est factum, but he ought to avoid the matter by special pleading, and therefore here it is a good consideration; and I conceive that if the testator at his full age had assumed to pay the debt, that that promise would have bound him, 9 Eliz. it was the case of the Lord Grey, his father was endebted to diverse merchants upon simple contracts, and died seised of diverse lands which descended to his son and heir in fee, the creditors demanded their debts of the heir, who answered unto them, if my father were endebted unto you, I will pay it, and upon that promise an action was adjudged maintainable, although the heir by the law was not chargeable; and also here the defendant is to have ease, and shall avoid trouble of suits, for perhaps if she had not made such promise, the plaintiff would have sued her presently, which should be a great trouble unto her, and therefore it is a good consideration. Cooke contrary, no consideration can be good, if not, that it touch either the charge of the plaintiff, or the benefit of the defendant, and none of them is in our case, for the plaintiff is not at any charge, for which the defendant can have any benefit, for it is but the forbearance of the payment of the debt, which she was not compellable to pay, and as to the suit of the Chancery, the same cannot make any good consideration, for there is not any matter in the case which gives cause of suit in Chancery, for they will not order a matter there which is directly against a rule and maxim of the common law. As if a feme covert be bound, &c. and the obligee bring her into the Chancery, and if a man threaten me, that if I will not pay to him ten pounds, he will sue me in Chancery, upon which I promise to pay it him, no action will lye: and an infant is not chargeable upon any contract, but for his meat, drink, and necessary apparel, 19 Z. 4. 2. And in debt upon such necessary contract, the plaintiff ought to declare specially, so as the whole certainty may appear upon which the Court may judge, if the expense were necessary and convenient or not, and upon the reasonableness of the price, for otherwise, if the necessity of the thing, and reasonableness of the price doth not appear, the Chancellor himself would not give any remedy, or recompence to the party. Wray Justice conceived that the action would not lye, for the contract was void, and the infant in an action against him upon it may plead nihil debet: and if an infant sell goods for money and doth not deliver them, but the vendee takes them, he is a trespassor; but if the infant had been bounden in an obligation with a surety, and afterwards at his full age he in consideration thereof promiseth to keep his surety harmless, upon that promise an action lyeth, for the infant cannot plead non est factum, which see Mich. 28, & 29 Eliz. in the case of one Edmunds: and afterwards it was adjudged against the plaintiff.

1 Cro. 126. Owen. 94. 9 Co. 94.

TRIN. 30 ELIZ. ROT. 833. IN THE KINGS BENCH.

CLVII. CHARNOCK AND WORSLEYS CASE.

Fine reversed as to one, to stand good against another.

Charnock and his wife brought a writ of error against Worsley, the case was that the husband and wife, the wife being within age levyed a fine, and the wife upon inspection was adjudged within **[115]** age, & it was moved, if the fine should be utterly reversed, or as to the wife only, & should stand against the husband; & by Godfrey the book of 50 E. 3. 6. was vouched where it is said by Candish, that where such a fine is reversed, the plaintiff shall not have execution till after the death of the husband; and by Coke and Atkinson, a fine acknowledged by the husband and wife, is not like to a feoffment made by them, for in case of feoffment something passeth from the husband, but in case of a fine all passeth out of the wife, and the conusee is in by her only: and Atkinson shewed a precedent in 2 H. 4. where the fine was reversed for the whole, and also another precedent, P. b. H. 8. Rot. 26. A fine levyed betwixt Richard Elie plaintiff, and N. Ford. and Jane his wife deforceants, the wife being within age, and judgment was given quod finis prædict. adnulletur, & pro nullo penitus habeatur, and that the husband and wife should be restored, and thereupon a writ issued to the custos brevium, to bring into Court, the foot of the fine, and it was presently cancelled in Court. Wray, this is a strong precedent, and we will not varse from it, if other precedents are not contrary. Gawdy (who was the same day made justice) the fine cannot be reversed as to one, and stand as to the other, and resembled it to the case of Littleton 150. where land is given to husband and wife in tail before coverture, and the husband aliens, and takes back an estate to him and his wife for their lives, they both are remitted, for the wife cannot be remitted if the husband be not remitted: and a precedent was cited to the contrary, 7 Eliz. where the case was that the husband and wife levyed a fine, the husband died, the wife being within age the wife took another husband, and they brought a writ of error, and the wife by inspection adjudged within age, and the fine was reversed as to the wife and her heirs. And it was argued by Golding, that here the writ of error ought to abate, for the writ is too general, whereas it ought to be special, ex querela A. B. nobis humillime supplicantis accepimus, &c. See the Book of Entries 278. Also the purclose of the writ is, ad damnum ipsorum, the husband and the wife, whereas the wife only hath loss by it; and as to the fine it self, he conceived that it should be reversed but as to the wife; as if a man of full age, and a man within age, levy a fine, in a writ of error brought, the fine shall be reversed, as to the infant only, and shall stand against the other; and he cited the case of the Lord Mountjoy, 14. Eliz. where a man seised in the right of his wife acknowledged a statute, and afterwards he and his wife levyed a fine, and he said that during the life of the husband, the conusee of the fine should hold the land charged with the statute: Also in the precedent of 2 H. 4. the judgment is, that propter hunc & alios errores, the fine should be reversed, and I conceive that another error was in the said writ, for which the fine might be reversed in all, viz. the fine was levyed of two parts of the manor of D. without saying in tres partes dividend. And see that where two parts are demanded in a writ, the writ shall say so, Brief 244. Coke contrary, and as to the last matter I confess the law is so in a writ, but not in a fine, for the same is but a conveyance, for if I be seised of a manor, and I grant to you two parts of the said manor, it is clear, it shall be intended in three parts to be divided. And as to the principal matter, I conceive, when the fine is levyed by the husband and wife, it shall be intended that the land whereof, &c. is the inheritance of the wife, if the contrary be not shewed, and therefore if the party will have an especial reversal, he ought to shew the special matter, as in Englishes case: a fine was levyed by tenant for life, and he in the reversion being within age, bringeth a writ of error, now the fine shall be reversed as to him in the reversion, but not as to the tenant for life, but here it shall be intended the inheritance of the wife, and that the husband hath nothing but in the right of his wife, and therefore she shall be

resto-[116]-red to the whole, for nothing passeth from the husband, but he is named with his wife, only for conformity, 11 H. 7. 19. A. takes to wife an inheretrix, who is attainted of felony, the King shall not have the land presently, by which it appeareth that all is in the wife, and she shall be restored to the whole, and the judgment shall be according to the presidents cited before: and as to the president cited 7 Eliz. the same is not to the purpose, for the second husband was a stranger to the fine, for it would be absurd to reverse the fine as against him. Egerton Solicitor General; presidents are not so holy, quod violari non debeant, as to be rules to other judges, in perpetuum; and I conceive that the fine shall be reversed as to the wife only, for the fine is but a conveyance, and the husband may lawfully convey the land of his wife for his life; and if the husband alone had levyed the fine, the same had bounden the wife during his life: if a woman lessee for life taketh to husband him in the reversion, and they joyn in a fine, the fine shall stand as to the inheritance of the husband, but shall be reversed as to the interest of the wife. Coke, it shall be intended here, all the interest and estate in the land to be in the wife, as 20 H. 7. 1. Where the husband and wife are vouched, it shall be intended by reason of the warranty of the wife only, and so the counter-plea shall be of the seisin of the wife and her ancestors. Wray, when the husband and wife joyn in the fine, it shall be presumed the inheritance of the wife, and if it be otherwise, it ought to be specially shewed; and as to that which hath been said, that if the husband alone had levyed a fine, it should have bounden the wife during the life of the husband, the same is true, but such fine is but a discontinuance, but the right continueth in the wife; but when the husband and wife joyn in the fine, all passeth out of her, and if the fine in such case for the inheritance shall be reversed in all, to whom belongs the free-hold, & to whom shall he be attendant? Gawdy, 12 H. 7. 1. In a præcipe quod reddat against three, they vouch severally, the voucher was not received, and yet they might have several causes of voucher, but the law presumes they are joynt-tenants, and have a joynt cause of voucher, if the contrary be not shewed: and afterwards judgment was given, quod finis predict. reversetur; and Wray said he had conferred with many of the other justices, who were of the same opinion. Gawdy, the fine shall be reversed in all, for this is an error in law of the Court, F. B. 21. D. For by this fine the husband giveth nothing divided from the estate of the wife, but all passeth from the wife, and therefore all shall be reversed, and if the fine should be reversed as to the wife only, then the fine levyed now by the husband alone is a discontinuance, by which the wife by the common law shall be put to her cui in vita, and that is not reason. Also we cannot by this reversal, make the conusee to have a particular estate during the life of the wife: and therefore the fine is to be reversed for the whole, and as void for the whole to the conusee.

Owen. 21. 1 Cr. 129. 3 Co. 58, 59. Modern Rep. 182.

Trin. 30 Eliz. In the Kings Bench.

CLVIII. Cage and Paxlins Case.

Daniel Cage brought an action of trespass against Thomas Paxlin for trespass done in a close of wood, called the Frith-Close, and in the park, and for taking of certain loads of wood: the defendant pleaded, that the Earl of Oxford was seised of the mannor of W. of which the place where, &c. is parcel, and leased the same to J. S. for years, excepting all woods, great trees, timber-trees, and under-[117]-woods, &c. And covenanted with the lessee and his assigns, that he might take hedg-boot, and fire-boot super dicta premissa, and shewed further, that the said I. S. assigned his interest unto the defendant, and that he came to the said close called the Frith-Close, and cut the wood there for fire-boot, as it was lawful for him to do, &c. And note, that after the lease aforesaid, the said earl had assured the inheritance thereof to Cage the plaintiff. And it was argued by Godfrey, that the lessee cannot take fire-boot in the said close, for the wood, &c. is excepted, and was never demised, and by the exception of the wood, the soil thereof is excepted: see 46 E. 3. 22. A.

leased for life certain lands reserving the great wood, by that the soil also is reserved, vi. 33 H. 8. Br. Reservation, 39, 28 H. 8. 13. And by the words of the covenant, the intent of the lessor appeareth, that the lessee shall have his fire-boot out of the residue of the lands demised, for præmissa here is equivalent with prædimissa: and he cited the case moved by Mountaine Cheif Justice, 4. E. 6. in Plowden, in the case betwixt Dive and Manningham, 66. A. leaseth unto B. a manor for years, excepting a close, parcel of it, rendring a rent, and the lessee is bounden to perform all grants, covenants, and agreements, contenta & expressa aut recitata in the indenture; if the lessee disturb the lessor, upon his occupation of close excepted, he hath forfeited his obligation, &c. But our case is not like to that: and if I let the manor of D. for years, except green-meadow, and afterwards I covenant that the lessee shall enjoy the premisses, the same doth not extend to green-meadow. Snagg Serjeant to the contrary, and by him præmissa, are not restrained to prædimissa, but to all the premisses put in the former part of the indenture of demise, therefore the lesse shall have fire-boot in the one, and the other; and he put a difference betwixt all woods excepted, and all woods growing excepted, for in the one case the soil passeth, in the other not; and as to the case cited before in Plowden. 66. that is true, for exception is an agreement: and he said that by that exception the soil it self is excepted, and these woods which are named by name of woods: contrary where a close containeth part in woods, and part in pasture; and by the exception of timber-trees, and under woods, all the other woods are excepted but not the soil: as if a man grant all his lands in D. land, meadow, pasture, and woods thereby passeth; by exception of this close of wood, the soil also is excepted, and he conceived, that although all the woods be excepted, yet by the covenant an interest passeth to the lessee, so as he may take fire-boot without being put to his action of covenant: as 21 H. 7. 30. A. leaseth unto B. for life, and covenants in the indenture of lease, that he shall be dispunished of wast, although the same be penned by way of covenant, yet it is a good matter of bar, being all by one deed: and afterwards judgment was given for the plaintiff, as to that close of wood called Frith-close; but as to the park, for the defendant, for that Frith-close was all excepted, scil. the wood and the soil: and these words, supra præmissa, shall be intended such things which were demised, and no other, and by this covenant, the lessee hath power to take the wood upon the other lands, although that the wood be excepted, for the soile was demised, and he shall not be punished in trespass, and put to his remedy, by action of covenant against the lessor: and by Wray, there is not any colour against the plaintiff for the Frith-close, if not that the defendant had averred, that there is not any wood upon the other lands not excepted but demised; and this word, præmissa, doth not extend by construction to this mentioned before, being excepted, but only to the things demised.

1 Cro. 125. 3 Len. 16. 3 Len. 16. Post. 122. 2. Roll. 455. 2 Cro. 534. Post. 122. Select Case 155. Hob. 173. Dy. 19, 198, 314. 21 H. 7, 31. More 23. 1 Roll. 939. Dy. 199. Hob. 173. 2 Cro. 172. Bridg. 117.

[118] TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLIX. RIVETT AND RIVETTS CASE.

Assumpsit. Request.

Edmund Rivett brought an action upon the case against Geoge Rivett, and declared, that where it was pretended by the defendant, that one R. made his will, and by the same devised certain legacies to the defendant, and the plaintiff upon that had sued in the Prerogative Court of Canterbury for to disprove the said will; and if he prosecutus fuisser, he might have disproved the said will, and so defeated the defendant of his pretended legacies: the defendant in consideration that the plaintiff, ultra non procederet, did promise to give to the plaintiff one hundred pounds; and averred, that he had surceased his said suit; and further declared, that licet the

defendant, ad hoc requisitus suerit tali die & anno, &c. It was moved in arrest of judgment, that here is not any consideration, for the defendant hath not any means to compel the plaintiff for to surcease his suit, for there is not any cross promise set forth in the declaration; and although that he doth surcease his suit, yet he may begin the same again, and therefore the plaintiff ought to have shewed in his declaration a release or other discharge of it, as the case was 3 Eliz. reported by Bendloe. A. was bound unto B. in twenty pounds, and afterwards A. promised B. that in consideration the said A. should not be damnified by reason of the said bond, to give the said B. ten pounds, and upon that promise B. brought an action upon the case, and shewed, that the defendant was not damnified by reason of the said bond. But it was adjudged, that the action was not maintainable upon that matter, because that the plaintiff did not shew in his declaration, that he had released or otherwise discharged the defendant of the said bond, and so no consideration in the case.

Another exception was, because the request is not layed certainly, but generally, licet requisitus, and doth not say by whom he was required, or what thing to do: and afterwards a precedent was shewed, Trinit. 28 Eliz. rot. 523. betwixt Smith and Smith. An assumpsit, in consideration that the plaintiff should not implead the defendant upon bond; and the plaintiff had judgment to recover. And as to the request it was said by Kempe, that there are many precedents, that a request generally layed is sufficient: and afterwards in the principal case judgment was given for the plaintiff.

Owen 133, 134.

Trin. 30 Eliz. In the Kings Bench.

CXL. Wheeler and Twogoods Case.

Covenant amounts to a grant.

Wheeler brought an ejectione firmæ against Twogood, and it was found by special verdict, that the Earl of Oxford was seised of the manor of Hornely, in which were divers copy-holds: and that the said earl leased the said manor to one Heywood for one and twenty years, to begin two years after. Except all casualties and profits of courts, which severally did not pass the value of six shillings eight pence. And afterwards the earl bargained and sold the reversion to Anthony Cage: and afterwards a composition was made betwixt Anthony Cage and the lessee, by which the lessee did grant and covenant to and with the said A. Cage, that he would permit the said Anthony Cage peaceably to hold the courts and to take the profits to his own use, proviso, that the said lessee should have the rents of the copy-holders & freeholders: and afterwards the lessee granted over his interest in the **[119]** said term. It was moved by Towse, that by this exception the court baron is not excepted nor severed from the manor, nor destroyed, for it is incident to the manor, and this covenant betwixt the lessee and Anthony Cage amounts to a grant of the court to Anthony Cage. See 44 E. 3. Fitz. Mannors de faits 144 & 29 E. 3. Burr. 280. and see 37. H. 8. & 1 E. 6. Br. Leases 60. That where I. S. covenants, & concessit to I. N. that he shall have twenty acres of land in B. for one and twenty years, it is a good lease, for this word concessit is as strong as dimisit. And it was moved, that here the earl leased for years to begin two years after, and the lessee being in possession, doth continue it after the two years, and afterwards before any entry the lessee assignes over his interest, that the same is not a good grant, but only a right: but by the whole Court the grant was holden good, notwithstanding the said exception: and it was holden also, that the covenant (ut supra) was void; for although that Anthony Cage hath authority to hold the courts, yet it ought to be in the name of the lessee.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXI. STRETTON AND TAYLORS CASE.

Information upon the Statute of Usury. Retraxit by the Queens Attorney shall not bind the Informer.

Stretton did inform against Taylor upon the Statute of Usury: qui sequitur tam pro Domina Regina, quam pro seipso: and the Queens Attorney enterd upon it, &c. non vult prosequi, and that was pleaded in bar against the informer for the whole: and by Wray, the same is not any barr to the informer. But Popham the Attorney General said, that by the favour of the Court he would maintain the authority of his place, which his predecessors had enjoyed, for he said, it cannot be found by any record in this Court, Common Pleas, or the Exchequer, that the informer had proceeded where the Attorney General had made such an entry, for we have not used to do it without great consideration; for if the informer hath ceased to prosecute the suit two or three terms, then we used to enter a non vult prosequi. For it is not reason that the subject should be molested or attendant so long without just cause, and it is not against law, that in personal suits the act of one should prejudice the other; and the Queen is the principal party in this suit, for the replication shall be made in the name of the Queen only, and not of the informer. And afterwards by award of the Court it was ruled, that that entry by the attorney is not any barr, quoad the informer, so if the Queen be nonsuit, so the nonsuit of the informer is no barr against the Queen: and Wray said, that such was the opinions of Anderson and Gawdy Justices, &c.

1 Cro. 138. & 583.

TRIN. 30 ELIZ. IN THE KINGS BENCH. INTRAT. HILL. 30 ELIZ. ROT. 10.

CLXII. THE QUEEN AGAINST LEWIS, GREEN, AND OTHERS.

Grants of the King. Grants of the King taken according to his intent.

An information for the Queen against Lewis, Green, and others: the case was, King E. 6. was seised of the manor of Stepneth, and twenty acres of lands in Stepneth, called Stepneth Marsh, and of another Marsh also called Stepneth Marsh, and granted unto the Lord Wentworth and his heirs the manor of Stepneth, in the county of Midd. Nec non mariscam in Stepneth, appel. Stepneth Marsh in com. prædict. nec non omnia terr. & ten. eidem manerio sive premissis pertinent. And if twenty acres, called Stepneth Marsh, not parcel of the said manor pass, or not, was the question: Cook, [120] that they shall pass: here this grant doth consist of three parts; 1. The grant of the manor; 2. Nec non mariscum in Stepneth; 3. Nec non omnia terras & tenementa dicto manerio sive præmissis pertinen. And by the second clause these twenty acres shall pass, be the same parcel or not; and the latter words cannot refer to that, for it is certainly expressed before. And the case lately agreed in the Court of Wards betwixt Bronker and Robotham was cited, which was, that the King being seised of the manor of Sandridge and Newnam, parcel of the possessions of the Monastery of Saint Albans, and part of the manor of Newnam extended into the parish of Sandridge, and the King granted the manor of Sandridge, nec non omnia terras & tenementa sua in Sandridge, dicto nuper monasterio pertinen. nec non omnia terras & tenementa sua dicta manerio de Sandridge pertinen. By which grant, although that the latter clause doth restrain it to the manor of Sandridge, yet the general words of the second clause shall extend to make pass all the whole manor of Newnam, which extended into the parish of Sandridge, & a decree was in the said Court accordingly.

At another day the case was argued, and the case put to be thus. King E. 6. was seised of the manor of Hackney and Stepneth in the county of Midd. within which was a great marsh, called Stepneth Marsh, parcel of the manor of Stepneth, which the

King had by exchange of the Bishop of London, and there were also twenty acres of lands which were lying in Stepneth Marsh, and were known by the name of Stepney Marsh, late parcel of the possessions of the Priory of Grace, and granted unto the Lord Wentworth and his heirs, Dominia sive maneria sua de Hackney & Stepney, nec non mariscos suos de Stepney in Stepney prædict. nec non omnia maneria terras & tenem. & mariscos dictis maneriis aut cæteris præmissis pertinen. If these twenty acres pass in the general words in the first nec non, or if the words in the second nec non (dictis maneriis pertinen.) doth restrain the generality of the first words, was the question; and by Phillips the twenty acres do not pass, for the grant of the King shall be always taken to a common intent: and because here the King hath these marshes by several titles, that marsh only shall pass, which by general entendment shall be intended to pass, scil. the great marsh, which was in truth parcel of the manor of Stepney, and not the twenty acres which the King hath by a special title, although, that ex vi termini, the grant may extend unto it: also the grant of the King shall be taken, secundum intentionem regis, and not in deceptionem; and here it appeareth, that the intent of the King was not, that these twenty acres should pass, i. the King grants maneria sua & terras, and all lands, &c. iisdem pertinen. but it is not part of any thing pertinen. to those twenty acres, therefore his intent was not to pass them. Secondly, the grant is to have them as fully as the Bishop of London had them, without mentioning of the prior. Thirdly, as fully as the bishop had granted them to us, but the bishop had not granted these twenty acres to the King. Fourthly, in the letters patents the King recites the value of the manor of Hackney and Stepney, but no value of the twenty acres, (quære, what difference there is betwixt Stepney Marsh and the Marsh of Stepny.) As to the first, the grant is iisdem & ita præmissis pertinen. which word præmissis includes the premisses or otherwise should be void: secondly, the words, as the bishop had, and as amply as we have from the bishop, are suplusage, & nihil operatur by them. And if the King had not the same of the bishop it is not material, but they shall pass notwithstanding, because by a special name: as if the King grants to me manerium de dale, quod à nobis nuper concelat. fuit, and in truth it was not concealed, yet it shall pass by his special name: but if the grant had been, proviso, that if the said manor were concealed, &c. the same had been good, for it is good by way of proviso, but not by reference. As to the valuation the same is not material, for who can restrain the bounty of the King. 29 E. 3. 7. and 8. The King granted omnes advocationes **[121]** pertinend. to such a priory, quas nuper concessimus patri of the patentee, although the King had not ever made such a grant, yet it is a good grant to the sons, causa qua supra. Gawdy Justice conceived, that the twenty acres did pass, and he confessed the case betwixt Bronkor and Robotham to be good law, for there the intention is fully, that all appertaining to the monastery, whether it were parcel of the mannor of Newnam or of Sandridge, passeth, 6 E. 6. 8. Dyer. A man leaseth all his meadows in A. containing ten acres, whereas in truth they are twenty acres, all passeth, &c. And if the King grant the manor of D. to A; and further saith, damus & concedimus, so freely as I. S. had it, and I. S. never had it, yet the grant is good: and as to the misrecital of the value, the same is helped by the statute. Clench Justice to the same intent; and the jury hath found, that the twenty acres are parcel of Stepney Marsh. Wray to the same intent, against express words no favour shall be given to the King. And note, that the marshes pertaining to the manor are in the third clause, ergo, the marsh in the second clause shall be intended a marsh in gross, or otherwise it should be idle. And afterwards judgment was given against the Queen.

2 Roll. 51. 1 Co. 46. Hob. 175. 303. Dy. 207. 6 Co. 39.

Trin. 30 Eliz. In the Kings Bench.

CLXIII. Piers and Leversuchs Case in Ejectione firmæ.

It was found by special verdict, that one Robert Leversuch grand-father of the defendant, was tenant in tail of certain lands, whereof, &c. and made a lease for years to one Pur. who assigned it over to P. father of the plaintiff. Robert Leversuch

died: W. his son and heir entred upon P. who re-entred. W. demised without other words the land to the said P. for life, the remainder to Joan his wife for life, the remainder to the son of P. for life with warranty, and made a letter of attorney therein to enter and deliver seisin accordingly. P. died before that the livery was executed, and afterwards the attorney made livery to Joan. W. died; Ed. his son and heir entred upon the wife, she re-entred, and leased to the plaintiff, who upon an ouster brought the action. Heale. When P. entred upon W. Leversuch the issue in tail, he was a disseisor, and by his death the land descending to his heir, the entry of W. Leversuch, the issue in tail, was taken away. Cook contrary. P. by his entry was not a disseisor, but at the election of W. for when P. accepted such a deed from W. it appeareth that his intent was not to enter as a disseisor; and it is not found that the said P. had any son and heir at the time of his death, and if not, then no descent; and there is not any disseisin found that P. expulit Leversuch out of the land. And judgment was given against the plaintiff. And Cook cited a case which was adjudged in the Common Pleas, and it was the case of Shipwith; grand-father, tenant in tail, father and son; the grand-father died, the father entred and paid the rent to the lessor, and died in possession, and adjudged, that it was not any descent, for the paying of the rent doth explain by what title he entred, and so he shall not be a disseisor but at the election of another.

3 Cro. 222.

[122] TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXIV. SEVERN AND CLERKS CASE.

Agreements. Recital.

The case was, that A. by his deed poll recited, that (whereas he was) possessed of certain lands for years of a certain term; by good and lawful conveyance he assigned the same to I. S. with divers covenants, articles and agreements in the said deed contained, which are or ought to be performed on his part. It was moved, if this recital (whereas he was) be an article or agreement within the meaning of the condition of the said obligation, which was given to perform, &c. Gawdy conceived, that it is an agreement: for in such case I agree, that I am possessed of it, for every thing contained in the deed is an agreement, and not only that which I am bound to perform: as if I recite by my deed, that I am possessed of such an interest in certain land, and assign it over by the same deed, and thereby covenant to perform all agreements in the deed, if I be not possessed of such interest, the covenant is broken. And it was moved, if that recital be within these words of the condition (which are or ought to be performed on my part.) And some were of opinion, that it is not within those words; for that extends only in futurum, but this recital is of a thing past, or at the least present.

Clench. recital of it self is nothing, but being joyned and considered with the rest of the deed it is material, as here, for against this recital he cannot say that he hath not any thing in the term. And at the length, it was clearly resolved, that if the party had not that interest by a good and lawful conveyance the obligation was forfeited.

2 Cro. 281. Yyl. 206.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXV. PAGE AND JOURDENS CASE.

A general entry amounts to a disseisin.

In trespass betwixt Page and Jourden the case was: a woman tenant in tail took a husband, who made a feoffment in fee and died. The wife without any entry made

a lease for years: it was moved, that the making of this lease is an entry in law. As if A. make a lease for years of the land of B. who enters by force of that lease, now the lessor without any entry is a disseisor. And it was resolved, that by that lease, the free-hold is not reduced without an entry.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXVI. HAVITHLOME AND HARVIES CASE.

Action upon the Statute of 5 Eliz. cap. 9.

Havithlome brought an action upon the statute of 5 Eliz. cap. 9. against Harvy and his wife for the penalty of ten pounds given by the said statute against him who was served with process, ad testificandum, &c. and doth not appear, not having any impediment, &c. and shewed that process was served upon the defendants wife, and sufficient charges, having regard to her degree and the distance of the place, &c. tendred to her, and yet she did not appear. And it was found for the plaintiff. It was moved in arrest of judgment, that the declaration is not good, because the plaintiff in setting forth that he was damaged for the not appearance of the wife according to the process, hath not shewed how damnified: also it was moved, that a feme **[123]** covert is not within the said statute, for no mention is made of a feme covert, and therefore upon the Statute of West. 2. cap. 25. if a feme covert fail of her record, she shall not be holden disseisseress, nor imprisoned. Also here the declaration is, that the plaintiff tendered the charges to the wife where he ought to have tendered the same to the husband.

To these three exceptions it was answered. 1. That although the party be not at all damnified, yet the penalty is forfeited. 2. Feme coverts are within the said statute, otherwise it should be a great mischief, for it might be that she might be the only witness: and feme coverts, if they had not been expressly excepted, had been within the statute of 4 H. 7. of fines. 3. The wife ought to appear, therefore the tender ought to be to her: and afterwards judgment was given for the plaintiff.

1 Cro. 130. 3 Cro. Goodwin. *vers.* West.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CLXVII. DELLABY AND HASSELS CASE.

Assumpsit.

In an action upon the case, the plaintiff declared that the defendant in consideration that he had retained the plaintiff to go from London to Paris to merchandize diverse goods to the profit of the defendant, promised to give to him so much as should content him, and also to give him all and every sum of money which he should expend there in his affairs; and further declared, that he was contented to have twenty pounds for his labour, which the defendant refused to pay: and exception was taken to the declaration, because there is not set down any place or time of the notification of his contentment, for the same is traversable. Gawdy, the issue here is, non assumpsit; and therefore that matter is out of the book. Cook, if one assume to pay twenty pounds to another upon request, although the defendant plead, non assumpsit, yet if the place and time of request be not shewed, judgment many times hath been stayed, for no action without a request; so here without notification of his contentment, no action, therefore he ought to shew it. Gawdy, the ground of this action is the assumpsit, but that cannot be certain without declaration, and thereof notice ought to be given to make certainty of the duty, but not to enforce the promise; but in our case, without a request assumpsit will not lye; but here it being but conveyance, the certainty of the time and place is not necessary to be shewed, but the general form shall serve,

for it is but inducement: as if a man will plead a devise of goods to him, and assent of the executors to take them, he need not to shew the time and place of the assent. Gawdy, at another day, said that judgment ought to be given for the plaintiff; the assumpsit is the ground and cause of the action, and the shewing of the contentment is only to reduce the action to certainty: and judgment was given for the plaintiff.

1 Cro. 132.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXVIII. MUSKET AND COLES CASE.

William Musket brought an action upon the case against Cole, and declared that in consideration, that the plaintiff had payed unto the defendant forty shillings, for the debt of Symon his son, the defendant promised to deliver to him, omnes tales billas & obligationes, in which his son was bounden to him; which thing he would not do, and it was found by verdict for the plaintiff: and it was moved for stay of judgment, because the plaintiff had not averred in his decla-**[124]**-ration, that the said defendant had bills or obligations, in which Simon his son was bounden to the defendant, for if there were none, then no damage. And see Onlies case, 19 Eliz. Dyer. 356. D. in consideration that the plaintiff had expended divers sums of money circa the businesses of the defendant, promised, &c. Exception was taken to that declaration by Manwood and Mounson Justices, because it was not shewed, in what businesses certain, and betwixt what persons. Gawdy, the plaintiff here is not to recover the bills or obligations, but damages only, and therefore needeth not to alledge any bills in certain. And 47 E. 3. 3. A. covenants with B. to assure unto B. and his heirs, omnia terras & tenementa quas habet in such counties, and for not assurance, an action of covenant was brought, and the plaintiff declared, that the defendant had broken the said covenant, and that he had required the defendant to make a feoffment unto him of all his lands and tenements in the said counties; and the plea was not allowed, for the land is not in demand, but only damages to be recovered. See also 46 E. 3. 4. and 20 E. 3. And in the principal case, the plaintiff had time enough for the shewing to the jury what bills or obligations for the instructing of the jury of the damages.

1 Cro. 13.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXIX. ENGLISH, AND PELLITARY AND SMITHS CASE.

Assault and Battery.

In an action of trespass of assault and battery and wounding: the defendants say, that they were lessees of certain lands, and the plaintiff came to the said lands, and took certain posts which were upon the lands, and they gently took them from him. S. pleaded, that he found the plaintiff and P. contending for the said posts, and he to part them mollite, put his hands upon the plaintiff; which is the same, &c. The plaintiff replyed, De injuriis suis propriis absque tali causa per ipsos P. & S. allegat. upon which issue was joyned, which was found for the plaintiff. It was moved in arrest of judgment, that here was not any issue, for the plaintiff ought severally to reply to both pleas aforesaid, for here are several causes of justification, and his replication, absque tali causa, doth not answer to both. Cook, this word (causa) is, nomen collectivum, which may be referred to every cause by the defendants alledged, reddendo singula singulis, and their justifications are but one matter, and the defendants might have all joyned in one plea. Wray, both pleas depend upon one matter, but are several causes; for two justifie by reason of their interest, and the third for the preservation of the peace. And by him and the whole Court, although it be not a good form of pleading, yet by reasonable construction this word

(cause) shall be referred to every cause, and so the pleading shall be maintained: and afterwards judgment was given against the plaintiff.

1 Cro. 139, 140. Post. 139. Dy. 182.

TRIN. 30. ELIZ. IN THE KINGS BENCH. INTRAT. HILL. 30 ROT. 58. OR 581.

CLXX. CATER AND BOOTHES CASE.

Covenant. Request.

If a writ of covenant the plaintiff declared, that the defendant by his deed, hearing date the first of October, 28 Eliz. did covenant, that he would do every act and acts at his best endeavour to prove the will of I. S. or otherwise, that he would procure letters of administration, by which he might convey such a term lawfully to the plaintiff, which he had not done, licet sæpius requisitus, &c. The defendant pleaded that he came to Doctor Drury into the Court of the Arches, and there **[125]** offered to prove the will of the said I. S. but because the wife of the said I. S. would not swear, that it was the will of her husband, they could not be received to prove it; upon which it was demurred in law. It was moved by Williams, that the action doth not lie, for there is no time limited by the covenant when the thing should be done by the defendant, for which he hath time during his life, for as much as it is a collateral thing. See 15 E. 4. 31. if there be not a request before; but admit that the covenant had been to perform upon request, then the plaintiff in his declaration ought to have shewed an express request with the place and time of it, for that is traversable. See 33 H. 6. 47, 48. 9 E. 4. 22. Gawdy, if the covenant had been expresly to do it upon request, there the request ought to be shewed specially: but when a thing upon the exposition of the law only is to be done upon request, such request alledged generally is good enough. And by Wray, the covenantor hath not time during his life to perform this covenant, but he ought to do it upon request within convenient time; but in some case a man shall have time during his life, as where no benefit shall be to any of the parties, as if the condition were to go to Rome: and as to the request, he conceived, that it ought to be shewed specially and certainly; for it is for the benefit of the covenantee for without request, the action doth not lie, which Clench granted. And it was holden by the whole Court, that the bar shall not help the insufficient declaration: no more, if the Defendant plead, non assumpsit, yet the defect in the declaration of a request not duly shewed, remaineth. Gawdy, the bringing of the action is a request. Clench, a writ of debt is a præcipe, for which there, licet sæpius requisitus, is sufficient; but a writ of covenant is not so.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXXI. PIERS AND HOES CASE.

Trespass. Forfeiture. Construction of Deeds.

In an action of trespass, it was found by special verdict, that A. seised of land in the right of his wife, being her joynture by a former husband, he and his wife made a feoffment to a stranger and his heirs, habend. to the use of the stranger and his heirs during the life of the wife only. Shutleworth, the same is a forfeiture, for if the same feoffment had been without any use expressed, then it should be to the use of the feoffor and his heirs, and by consequence a forfeiture; and as the case is here, it is also a forfeiture, for during the life of the wife the use is expresly to the use of the feoffee and his heirs, and the remainder of the fee-simple is to the use of the feoffor, scil. the husband and his heirs. Popham, I conceive that here is a forfeiture, for here are several limitations, limitation of the estate unto one, and of the use unto another: and the words (for the life of the wife) do not refer to the estate, but to the

use, with proximum antecedens; and he resembled the same to the case of Leonard Sturton, in which he was of councel. A man granted lands, habend. unto the grantee, to the use of the grantee, and the heirs of his body; the same is no estate tail in the grantee, but only an estate for life, for the limitation of the use cannot extend the estate. Cook contrary. The case is, that A. wife of one Piers, being tenant for life of the joynture of the said Piers, took to husband Hoe, they both by deed grant totum suum messuagium to one Clarke, habendum to him and his heirs for the life of the wife only, I conceive, that here is not any forfeiture, for it is but one intire sentence: and if there be a double construction of a deed, that which is most reasonable shall be taken, so as wrong be not done, and therefore these words (for the life of the wife) shall refer unto both, scil. the estate and the use, and their intent was not to commit a forfeiture, as appeareth by the words of the deed, **[126]** for they grant solum messuagium, and that was not but for the life of the wife ad solum usum of the feoffee and his heirs, during the life of the wife, and violence should be offered to this word (solum) if the feoffee or his heirs, should have ultra the life of the wife; and the word (tantum) cannot otherwise be expounded, but that the estate for life only shall pass from them: and he cited the case of 34 E. 3. Avowry 258. A. gives lands unto B. in tail, and for default of such issue, to the use of C. in tail, rendring rent, the same render shall go to both the estates: so a lease for life to A. the remainder to B. to the use of C. the same use goeth out of both the estates, and not only out of the remainder; so here upon the same reason, these words, for the life of the wife, shall refer to the first estate, as well as to the use; and in such cases the rule of Bracton ought to be observed, viz. Benignæ faciendæ sunt interpretationes verborum, ut res magis valeat, quam pereat. As the case in 6 H. 7. 7. in a cessavit, the plaintiff counted, that the tenant held by homage, fealty, sute at Court, and certain rent, and in the doing of the services aforesaid, the defendant had cessed, and in not doing of homage and fealty, a man cannot cesse by two years; but it was holden that the said cessavit should be referred to such services only, in which one might cease, and that is sute of Court, and rent; and if pleadings shall have such favourable construction, a multo fortiori, shall a deed, 4 E. 3. Wast. 11. A man leased for life, and by the same deed granted power unto the lessee, to take and make his profit of the said lands, in the best manner should seem good to him without contradiction of the lessor or his heirs; yet by those words it is not lawful for him to do wast, for there it is said, that in construction of deeds, we ought to judge according to that intent, which is according to law and reason, and not to that which is against reason: see 17 E. 3. 7. accordingly, so in the principal case, the words in the deed of feoffment shall be so expounded, that the estate be saved and not destroyed.

Popham contrary, the cases put by Coke are not like to the case in question; for where the rent is out of both estates the same is but reason, for the rent is in respect of the land, and because he departs with both estates, it is reason the rent issue out of both; and the like reason is of the case of an use, for if a man makes a lease for life to A. the remainder over to B. the same shall be to their use respectively, and if he do express the use, the same shall be accordingly, and shall bind both estates, but there Clark hath two estates, one by the common law, and the other by the statute; but the words subsequent (for the life of the wife only) cannot refer to both estates: A. gives lands to one & his heirs for forty years, the same is but a plain term for years: but if a feoffment in fee be made to one & his heirs to the use of another for forty years, there the fee passeth to the feoffee, and the term to cestuy que use. Gawdy conceived, that it is not any forfeiture, for these words (during the life of the wife only) were put in the deed to express the intent of the parties, and therefore the same shall not be void, and he conceived that they were put in, to exclude the forfeiture, and therefore they shall serve for that purpose. And afterwards it was resolved by all the justices except Gawdy, that it was a forfeiture, for by the feoffment the fee-simple passeth, and that to the use of the feoffor; & the estate, and the use are several things, and the limitation for the life of the wife cannot extend to both: and as to the book of 24. H. 8. Br. Forfeiture 87. Tenant for life aliens in fee to B. habendum sibi & hæredibus suis, for term of the life of the tenant for life, the same is not a forfeiture, for the whole is but the limitation of the estate: and afterwards it was adjudged that it was a forfeiture, Gawdy continuing in his former

opinion: and Wray said that he had conferred with the other Judges of their house, and they all held clearly, that it is a forfeiture.

1 Cro. 131. 1 Roll. 854. Owen 64. 2 Cr. 200, 201. 3 Cr. 167. Hob. 373. 3 Cro. 167. 3 Cro. 167, 168.

[127] TRIN. 30 ELIZ. IN THE KINGS BENCH. ROT. 528.

CLXXII. TOFT AND TOMPKINS CASE.

Discontinuance.

Upon a special verdict the case was, that the grand-father, tenant for life, the remainder to the father in tail, that the grand-father made a feoffment in fee to the use of himself for life, the remainder to the father in fee; and afterwards they both came upon the land, and made a feoffment to Tompkins the defendant. Coke, there is not any discontinuance upon this matter, for the father might well have the advantage of the forfeiture committed by the grand-father; then when the father joyns with the grand-father in a feoffment, the same declares that he came upon the land, without intent to enter for a forfeiture: it was one Waynmans case, adjudged in the Common Pleas, where the disseissee cometh upon the land to deliver a release to the disseissor, that the same is no entry to revest the land in the disseissee: then here it is the livery of the tenant for life, and the grant of him in the remainder, and he in the remainder here was never seised by force of the tail, and so no discontinuance. Godfrey, here is a remitter by the entry, and afterwards a discontinuance, for by the entry of both, the law shall adjudge the possession in him who hath right, &c. Gawdy, this is a discontinuance, for when the father entreth, ut supra, he shall be adjudged in by the forfeiture, and then he hath gained a possession, and so a discontinuance, for both cannot have the possession. Clench, the intent of him in the remainder when he entred was to joyn with the grand-father, and when his intent appeareth, that the estate of the grand-father, and his own also shall passe, that doth declare that he would not enter for the forfeiture: Shute agreed with Gawdy.

1 Cro. 135.

TRIN. 30. ELIZ. IN THE KINGS BENCH.

CLXXIII. BROAKE AND DOUGHTIES CASE. HILL. 31 ELIZ. ROT. 798.

Action upon the Case for words.

An action upon the case for words, viz. thou wast forsworn in the Court of Requests, and I will make thee stand upon a stage for it: it was found for the plaintiff. It was moved in arrest of judgment, that the action will not lye for these words, for he doth not say, that he was there forsworn as defendant, or witness: and Trin. 28 Eliz. betwixt Hern and Hex, thou wast forsworn in the Court of Whit-church; and judgment given against the plaintiff, for the words are not actionable, and as to the residue of the words, I will make thee stand upon the stage for it, they are not actionable, as it was adjudged between Rylie and Trowgood, if thou hadst justice thou hadst stood on the pillory; and judgment was given against the plaintiff. Daniel contrary, thou wast forsworn before my Lord Chief Justice in an evidence, these words are actionable, for that is perjury upon the matter, and between Foster and Thorne, T. 23 Eliz. Rot. 882. Thou wast falsly forsworn in the Star-Chamber, the plaintiff had judgment, for it shall be intended that the plaintiff was defendant or a deponent there: and yet the words in the declaration are not in the Court of Star-Chamber. Wray, thou art worthy to stand upon the pillory, are not actionable, for it is but an implication; but in the words in the case at the bar there is a vehement intendment, that his oath was in the quality of a defendant, or deponent; which Gawdy granted. In the case 28 Eliz. thou wast forsworn in Whit-[128]-Church

Court, there the words are not actionable; for that Court is not known to you as Judges, and it may be it is but a great house or mansion house called Whit-church Court: but here in the principal case it cannot be meant but a Court of Justice, and before the Judges there juridice, and the subsequent words found so much, I will make thee stand upon a stage for it. And afterwards judgment was given for the plaintiff.

1 Cro. 135.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXXIV. GATEFOULD AND PENNS CASE.

Prescription for tythes.

Gatefould parson of North-linne libelled against Penne in the Spiritual Court for tythes in kind of certain pastures: the defendant to have prohibition doth surmise, that he is inhabitant of South-linne, and that time out of mind, &c. every inhabitant of South-linne, having pastures in North-linne hath paid tythes in kind for them unto the vicars of South-linne, where he is not resident, and the vicar hath also time out of mind payed to the parson of North-linne for the time being two pence for every acre. Lewis, this surmise is not sufficient to have a prohibition, for upon that matter modus decimandi shall never come in question, but only the right of tythes, if they belong to the parson of North-linne, or to the vicar of South-linne, and he might have pleaded this matter in the Spiritual Court, because it toucheth the right of tythes, as it was certified in the case of Bashly by the doctors of the civil law. Gawdy, this prescription doth stand with reason, for such benefit hath the parson of North-linne, if any inhabitant there hath any pastures in South-linne. And afterwards the whole Court was against the prohibition, for modus decimandi shall never come in debate upon this matter, but who shall have the tythes, the vicar of South-linne, or the parson of North-linne? and also the prescription is not reasonable.

1 Cro. 136. 3 Len. 203, 265. Antea. 94.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXXV. GOMERSAL AND BISHOPS CASE. HILL. 31 ELIZ. ROT. 175.

Prohibition for tythes.

Bishop libelled in the Spiritual Court for tythe pay, the plaintiff Gomersal made a surmise, that there was an agreement betwixt the said parties, and for the yearly sum of seven shillings to be paid by Gomersal unto Bishop, Bishop faithfully promised to Gomersal, that Gomersal should have the tythes of the said land during his life. And upon an attachment upon a prohibition Gomersal declared, that for the said annual sum Bishop leased to the plaintiff the said tythes for his life: and upon the declaration Bishop did demur in law for the variance between the surmise and the declaration; for in the surmise a promise is supposed, for which Gomersal might have an action upon the case, and in the declaration a lease. But note, that the surmise was not entred in the roll, but was recorded by it self, and the declaration only enrolled. Godfrey, it was resolved in the case betwixt Pendleton and Hunt, that an agreement betwixt the parson and any of his parishioners is a good cause to grant a prohibition, if he libel in the Spiritual Court against such agreement, because the Spiritual Court cannot try it, and they will not allow such plea. Curia, the surmise is as a writ, for which if variance be betwixt the same and the declaration all his naught.

1 Cro. 136.

[129] TRIN. 30. ELIZ. IN THE KINGS BENCH.

CLXXVI. COLEBOURN AND MIXSTONES CASE. INTRAT. HILL. 31 ELIZ. ROT. 146.

Devises. Extinguishment. Estate executed. Assent not to be apportioned.

Colebourn was sued in the Spiritual Court, for that being executor to one Alice Leigh, he had not brought in a true inventory of all the goods of the said Alice, but had omitted and left out a lease of two houses, and this suit was at the pursuit of two daughters of the testator. Colebourn sueth for a prohibition; and surmises and declares, how this lease is extinct, and the matter was this, H. Leigh was seised of a house called the Marigold, and two other houses in London, and leased the said two houses to one Alice Cheap for 21 years, if she should live so long, and afterwards made a lease in reversion of the said two houses to the said Alice Leigh for 21 years, and afterwards he devised these two houses, and also the house called the Marigold to the said Alice Leigh for her life for to bring up his children, and died, after whose death the said Alice Leigh entred into the said house called the Marigold, and took the rents and profits of the said two houses for the space of 7 years, virtute testament. prædict. upon which declaration the defendants do demurr in law. Coke, the declaration is not good, and for the matter of it, it is clear, that by this devise unto Alice, her term in futuro is not extinct without her agreement to it: and also in this case the devise is not for the benefit of the said Alice Leigh, but of her children, and she hath liberty to accept or refuse the said estate by devise, and to make her election: and the plaintiff hath declared, that she hath accepted the rent reserved upon the lease of the said two houses for 7 years: and therein the declaration naught in divers respects. 1. He hath declared, that the said Alice Leigh hath accepted the rents of the said two houses, by reason of the reversion, & virtue testament. prædict. by 7 years, which is double and treble; for acceptance of a rent at one day, scil. one rent day is a sufficient election: as if the issue in tail, after the death of his ancestor, who hath made a lease not warranted by the statute, once accepts the rent, the lease is affirmed; but if in plea pleading, the acceptance of the said rent for 3 years be pleaded, the same clearly is not good; for no good issue can be taken thereupon. 2. This acceptance is not pleaded (as the law wills) and in the phrase of the law, viz. to which devise she agreed, but pleads the acceptance of the rent, which is matter of evidence, the which is not good pleading. As 5 H. 7. 1. One sweareth another to enter into his land, and the same to occupy for a certain time, the same is a lease in law; and if in pleading the party is to make his title to the same land, he ought to plead it as an expres lease, and not as a licence; and if the lease be traversed, he may give the licence in evidence. Tanfield, presently by the devise, the estate for life is in the devisee and the term extinct by it, and that is sufficient for the plaintiff: and if there was any disagreement the same is to be shewed on the other side. But if Alice had not notice of the devise, but dieth before notice, the same amounteth unto a disagreement. And as to the pleading of the agreement, I conceive its well enough pleaded, for if the lease had not been she might have entred, and then if such entry had been pleaded it had been good enough; and then because she could not enter by reason of the said lease, she hath taken the rents and profits which is an actual agreement, and as strong as an entry. Also we have shewed that she had entred into the house called the Marigold, of which the devisor died seised in possession, and that is a sufficient agreement for the whole, for it is an entire legacy. As 18 E. 3. Variance 63. If the reversion of three acres be granted, and the tenant for life attorneth for one **[130]** acre, it is a good attornment for the whole, for he cannot apportion his assent: and 2 E. 4. 13. If the executor deliver unto the devisee goods to him devised to redeliver them to him again at such a day, the same is a good assent, and execution of the devise, and the words of the re-delivery are void. Gawdy, the devise doth not vest the estate in the wife until agreement, where a man takes in a second degree, as in a remainder the same vests presently before agreement, but where he taketh immediately it is otherwise, and he held the agreement was well enough pleaded. Wray, presently upon the death of the testator, the free-hold rested

in the devisee, and it was not an agreement, ut supra, by taking of the rents, yet the entry into the Marigold was a consent, and an execution of the whole legacy; and as to the rest he agreed with Gawdy. Clench, The free-hold rested presently in Alice Leigh before agreement, also the entry into the Marigold is an execution of the whole legacy to the devisee, for her entry shall be adjudged most beneficial for her; and that is, for all the three houses.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXXVII. STRANSHAM AND MEDCALFES CASE.

No Prohibition for Costs in the Spiritual Court.

Stransham libelled in the Court of the Bishop of Norwich against Medcalfe, for a portion of tithes, as farmor of the rectory of Dunham; the parson of Stonham came in and said, that the land, whereof the tithes are demanded, is in his parish of Stonham, and not in the parish of Dunham; and afterwards sentence passed against Stransham; who brought an appeal, and notwithstanding that, by the statute of 32 H. 8. cap. 7. the Spiritual Judges may proceed to make process against the appellant for costs, for the principal matter, scil. parcel, or within such a parish or not, is tryable at the common law. Cook now prayed a consultation; and he confessed (ut supra) that the matter was tryable at the common law; but yet the costs were not given for the matter, but for the unjust vexation, and it was his suit and own act to prosecute the same in the Spiritual Court. Note, that Stransham had a prohibition to stay the proceedings for the costs, for in some cases the plaintiff himself, who libelleth, may have a prohibition, and that was the case betwixt Wignal and Brook. And afterwards a consultation was granted by the Court; for Stransham had begun the suit in the Spiritual Court in the principal matter, and therefore he cannot have a prohibition for the costs. But afterwards judgment was stayed, for the said statute speaks specially in case of tithes, where the Court hath jurisdiction, and here it hath not of the matter: but it was said, that if a consultation be once granted, the party shall never have another prohibition in the same cause, as it was holden in the case betwixt Hoskins and Jones.

1 Cro. 178. 1 Cro. 277.

PASCH. 31. ELIZ. ROT. 186. IN THE KINGS BENCH.

CLXXVIII. CHAMBERLAIN AND THORPS CASE.

Recognizances in London, by Custom.

In debt upon a recognizance acknowledged in London, the plaintiff declared, that London is antiqua civitas, and that they have used time out of mind, &c. That the mayor take recognizances of any person being of full age, and not a feme covert, every day in the year, except Sundays, holy-days, counsel days, and days of quarter sessions and gaol-delivery; and declared further, how that the defendant such a day did acknowledge a recognizance to him, &c. Tanfield, The declaration is not good, but the custom, as it is laid is unreason-**[131]**-able, for thereby the mayor may take recognizances of idiots, men of non sanæ memoriæ, &c. nor is it restrained to any persons, or to any matters, but is too general, and therefore cannot be a good custom. Gawdy, The declaration is good notwithstanding the exception for want of averment, for that ought to come in on the other side. And as to the custom I conceive it is not good, for it is hard, that they should take recognizances of all persons, and for all causes which rise out of the city, and through the whole realm, as well as within the city: also none shall take a recognizance, but a Judge of record, and a recognizance cannot be taken by prescription. As to the first exception, Wray agreed with Gawdy; and as to the custom, he held the same to be good. For it hath been always allowed,

and their customs are confirmed by Act of Parliament which makes them good. But if the custom be not confirmed by Parliament it is not good; also it is not an unreasonable custom, for it is for the benefit of the subjects to have security for their debts. Coke, The recognizance makes the debt local, and therefore 13 Rich. 2. bar. 649. Debt was brought in London upon a recognizance acknowledged in the Chancery at Westminster, and the writ was abated; for the recognizance makes it local there; and by him the custom stands with reason: the mayor is such a person who may take a recognizance, for he is a Judge of record. See 1 H. 7. 20. and Br. Recognizance 8. and the recognisee cannot have an action of debt upon this recognizance elsewhere than in London. For it is not a debt out of the jurisdiction of the Court, for the recognizance hath made it local. Wray, If the recognisor be within age, the same shall come in of the other side, and the plaintiff needs not shew the same in his declaration. Cooke, It was agreed betwixt Mabbe and Frend, that such a recognizance was good. Tanfield, The said recognizance was taken for orphans goods which is a thing within their jurisdiction. Clench, They of London cannot take recognizance of more than they can hold plea of it. Wray, They have used of long time to take recognizances, and their customs are confirmed by Parliament, and a more strange custom than this hath been allowed of here before, scil. that a feme covert shall sue an action alone without her husband, for she is a sole merchant; also they do certifie recognizances ore tenus. Gawdy, A feme covert may have an action within the city, but not here.

1 Cro. 186.

HILL. 32 ELIZ. ROT. 434. IN THE KINGS BENCH.

CLXXIX. PIERCE AGAINST HOWE.

Action upon the Case for Words.

An action upon the case for these words, Pierce hath taken a false oath in the Consistory Court of the Bishop of Exeter, and upon the declaration, the defendant did demur in law. And by Prideaux these words are actionable, although the perjury be supposed to be committed in the Spiritual Court; for he shall be excommunicated if he will not appear, and he shall do pennance in a white sheet, which is as great a disgrace as to be set upon the pillory. And it was ruled in an action upon the case betwixt Dorrington and Dorrington, upon these words, thou art a bastard, that an action lyeth, and yet bastardy is a spiritual matter, and there determinable; so for these words, thou art a pirate, an action lyeth, and yet piracy is not punishable by the common law, but in the Court of Admiralty. And these words, he hath taken a false oath, do amount to these words, he is forsworn. Wray conceived, that the words are not actionable, for there is a proviso in the statute of Eliz. cap. 9. that the said Act shall not extend to any Ecclesiastical Court, but that every such offendor shall be and may be punished by such usual and ordinary laws as heretofore have been, and is yet used, and **[132]** frequent in the said Ecclesiastical Court. Gawdy upon these words, an action doth not lye, for they are not pregnant of any perjury in the pl. for he may be meer passive in it: for if one of the Masters of the Chancery minister an oath unto any person, or any commissioners, &c. and the plaintiff sweareth falsly, a man may say, that the Master of the Chancery, or the commissioner hath taken a false oath, and yet he is not guilty of falsity. And afterwards Wray, mutata opinione, that the proviso in the said statute, is to this intent, that notwithstanding the said statute, such an offence may be enquirable and examined in the Ecclesiastical Court in such manner as it was before, but the same doth not take away or restrain the authority of the common law, but that such an offence may be here examined. And it hath been lately adjudged in the Star-Chamber, that such perjury was examinable there, for it is not restrained: and as to the latter exception, upon these words (he hath taken a false oath) it shall be intended actively, and not passively, and if so, the defendant ought to have so pleaded it, and afterwards judgment was given for the plaintiff.

1 Cro. 185.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CLXXX. PALMER and SMALBROOKS CASE.

In an action upon the case by Palmer against Smalbrook, the plaintiff declared, that the defendant had recovered a certain debt against A. and thereupon purchased a writ of capias against A. to take his body, and delivered the said capias to the plaintiff being then sheriff, and prayed a warrant for the serving of the said capias; and that he would name in it, one B. for special bailiff, and promised the plaintiff that if B. arrested A. by force of the said capias, and suffered him to escape, that he would not sue the plaintiff for the escape: and shewed further, that he made a warrant according to the said capias, and therein named and appointed the said B. his special bailiff, who arrested A. accordingly and afterwards suffered him to escape, and the defendant notwithstanding his promise aforesaid, sued the plaintiff, for the said escape. And it was found for the plaintiff; it was moved in arrest of judgment, that the promise is against the law, to prevent the punishment inflicted by the statute of 23 H. 6. upon the sheriff, and it is meerly within the statute, and so the promise void. Cooke, the same is not any bond or promise taken of the prisoner, nor of any for him, and therefore it is not within the statute, as it was in Danvers case. Wray, A promise is within the statute as well as a bond; but the statute doth not extend but where the bond or promise is made by the prisoner, or by any for him; and after judgment was given for the plaintiff.

1 Cro. 178. Owen 97. 3 Len. 227.

HILL 30 ELIZ. IN THE COMMON PLEAS.

CLXXXI. MOUNSON AND WESTS CASE.

Where Jurors shall be fined for Eating before Verdict; but it shall not make void the Verdict.

In trespass by Mounson against West, the jury was charged and evidence given, and the jurours being retired into a house for to consider of their evidence, they remained there a long time without concluding any thing; and the officers of the Court who attended them seeing their delay, searched the jurours if they had any thing about them to eat; upon which search it was found, that some of them had figs, and others pippins; for which the next day the matter was moved to the Court, and the jurours were examined upon it upon oath. And two of them did confess that they had eaten figs before **[133]** they had agreed of their verdict: and three other of them confessed, that they had pippins, but did not eat of them, and that they did it without the knowledge or will of any of the parties. And afterwards the Court set a fine of five pound upon each of them which had eaten, and upon the others who had not eaten forty shillings. And they would advise, if the verdict was good or not, for the jury found for the plaintiff. And afterwards at another day, the matter was moved, and Anderson was of opinion, that notwithstanding the said misdemeanor of the jury, the verdict was good enough, for these victuals were not given to them by any of the parties to the action, nor by their means, or procurement. Rhodes thought the contrary, because some of the jurors had eaten, and some not, contrary if all of them had eaten. See 14 H. 7. 1. A jury was charged and before their verdict, they did eat and drink, and it was holden that upon that misdemeanor, their verdict was void, for which cause a venire facias de novo was awarded. And it was prayed by the counsel of the defendant West, that the said misdemeanor so found by examination might be entred of record, which the Court granted. And afterwards at another day, the matter was moved again. And upon great advice and deliberation, and conference with the other Judges, the verdict was holden to be good notwithstanding the misdemeanor aforesaid. See 24 E. 3. 24. 15 H. 7. 1. 2 H. 7. 3. 29 H. 8. 37. and 35 H. 8. 55. where it was holden, where the eating and drinking of the jury at their own costs is but fineable, but if it be at the costs of the parties, the verdict is void. And

see Book of Entries 251. The jurors after they went from the Bar ad seipsos of their verdict to be advised, comederunt quasdam species, sci. raisins, dates, &c. at their own costs, as well before, as after they agreed of their verdict; and the jurors were committed to prison; but their verdict was good, although the verdict was given against the King.

Owen 38. Plowd. 520. Co. 1 Inst. 227. Dyer 37.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CLXXXII. HUNT AND GILBORNS CASE.

Dower of Gavelkind by Custom.

In dower brought by Hunt and his wife against Gilborn, the defendant pleaded, that the land of which dower is demanded, is of the nature of gavelkind, and that the custom is, that in dower of land of such nature the wife ought to be endowed of the moity of such land, tenendum quam diu non maritata remanserit, & non aliter; upon which plea in bar, the demandants did demur in law; and the Lord Anderson was of opinion, that the custom is strongly pleaded against the dower in the affirmative with a negative & non aliter, and that is confessed by the demurrer, that dower out of such land ought to be so allowed, and so demanded, and in no other manner. And by Periam, if those words (& non aliter) had not been in the plea, yet the demandants should not have judgment: for dower by moiety, & non maritatis, is as proper in case of gavelkind, as dower of the third part of land at the common law, and as the descent in such case of lands to all the sons. And afterwards judgment was given against the demandants.

Ante. 62, 63. 1 Cro. 825.

[134] HILL. 30. ELIZ.

CLXXXIII. THE CASE OF THE PROVOST AND SCHOLARS OF QUEENS COLLEDGE IN OXFORD.

The provost, fellows, and scholars of Queens Colledge in Oxford, are guardians of the hospital, or meason de Dieu in Southampton. And they make a lease of the land parcel of the said hospital to one Hazel for term of years by the name Præpositus Socii & Scholares Collegii reginalis in Oxonia, Gardianus Hospitalis, &c. And in an ejectione firmæ upon that lease it was found for the plaintiffs; and it was objected in arrest of judgment, that the word gardianus, ought to be gardiani, for the colledge doth consist of many persons, and every person is capable, and it is not like unto abbot and covent: but the whole Court was of opinion, that the exception was not good, but that as well the lease as also the declaration was good, for the colledge is one body, and as one person: and so it is good enough gardianus.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CLXXXIV. WOODEN AND HAZELS CASE.

Nisi Prius. Essoin. Amendment.

In an ejectione betwixt Wooden and Hazel they were at issue upon, not guilty: and a venire facias awarded returnable, tres trinit. And the essoin adjudged and adjorned by the plaintiff until Michaelmas term; and at next Assises, the plaintiff not withstanding that essoin, and the adjorning of it procured a nisi prius, by which it was found for the plaintiff: and now it was moved in Court for the stay of judgment,

because no nisi prius ought to issue in the case. For the essoin was adjudged and adjorned until Michaelmas Term by the plaintiff himself. And Leonard custos brevium said, that the words of the statute of Westminster 2 cap. 27. Postquam aliquis posuerit se in aliquem inquisitionem ad proximum diem allocet. ei esson. imports, that the essoin shall not be taken at the return of the process against the jury, although the jury be ready at the bar. Anderson was of opinion, that the awarding of the nisi prius ut supra, is but a misawarding of the process, and then relieved by the statute. And afterwards the case being moved at another day, the Court was clear of opinion, that no nisi prius ought to issue forth in this case, because that the plaintiff himself, by the adjorning of the essoin, cast by the defendant until Michaelmas Term, had barred himself of all proceedings in the meantime: but afterwards it was surmised to the Court on the plaintiffs part, that he the defendant was not essoined, for the name of the defendant is Edward Hazel, and it appeared upon the tryal that Edward Russel was essoined, but no Edward Hazel, and then if no essoin, no adjornment, and then the plaintiff is at large, &c. and may proceed, &c. But the remembrance of the clark was Edward Hazel, as it ought to be, and yet it was holden of no effect, being in another term: and afterwards the counsel of the defendant prayed, that the roll in hac parte, be amended according to the remembrance of the clark: but the Court utterly denied that, for no statute gives amendment, but in the affirmance of judgments, and verdicts, and not in defeazance of judgments or verdicts: and afterwards it was resolved by the whole Court, that judgment be entred for the plaintiff.

1 Cro. 367.

[135] HILL. 32 ELIZ. INTRATUR M. 29 & 30. ELIZ. ROT. 2116.

CLXXXV. SIR HENRY GOODIERS CASE.

Renouncing of an Executorship.

In an ejectione firmæ the case was, Sir Ralph Rowlet possessed of certain lands for years made his will, and ordained Sir Nicholas Bacon, Keeper of the great Seal of England, Sir Robert Catline, Lord Chief Justice of England, Justice Southcote, and Gerrard Attorney General his executors, and died. And afterwards the said persons named executors sent their letters to the chief officer of the Prerogative Court as followeth. Whereas our loving friend Sir Ralph Rowlet knight, lately deceased, made and ordained us executors of his last will, and whereas our business is so great, that we cannot attend the execution of the said will, therefore we have thought good to move the bearer hereof Mr. Henry Goodier one of the co-heirs of the said Sir Ralph to take upon him the execution of the said will. And therefore we pray you to grant letters of administration in as ample manner as the justice of the cause doth require; and afterwards an entry was made in this manner in the same Court, Executores testamenti prædict. executionem inde super se assumere distulerant & adhuc distarent: and upon that the said Goodier obtained letters of administration, and granted a lease to A. for years, of which the said Sir Ralph Rowlet died possessed. And afterwards Sir Robert Catline claiming as executor, granted the same term to another, &c. and all the matter of difficulty was, if this letter written by the executors be a sufficient renunciation of the executorship in law, so as the executors cannot afterwards claim or use the said authority, &c. 2. If the entry of the said renuntiation be sufficient and effectual. And it was argued by Ford, one of the doctors of the civil law, that as well the renunciation as the entry of it is good and sufficient in law, so that none of the executors could not after enter-meddle. And he said, that in their law, there is not any certain form of renuntiation, but if the meaning and intention of the renouncer appeareth, it is sufficient without any formal terms of renunciation: and he put many rules and maximes in their law to the same purpose, ego dico ne nollo esse hæredem, are sufficient words to such intent. Non vult hæres esse quin ad aliam transferre debet hæreditatem. Qui semel repudiavit hæreditatem non potest eam repetere. Quod semel placuit, post displicere non potest. Variatio non permittitur in contractibus. So that after the

executors have signified to the officer of their Court their pleasure to renounce the execution of the will, they cannot afterwards entermeddle, nam interest reipublicæ ut dominia rerum sint in certo. And as to the entry of the said renunciation inter acta curiæ, distulerint et adhuc distarent, that was the error of the clark. And it is rule in our law, veritas rerum gestarum non vitiatur errore factorum. And the Lord Anderson demanded of the said doctor, how far those words hæres, et hæreditas did extend in their law, who answered, that hæreditas comprehends all chattels, as well real as personal, inheritance as well as chattels, for by their law, hæreditas nihilaliud est quam successio in universum jus quod defunctus habuit tempore mortis suæ. And afterwards the Court gave day to the other party to hear an argument of their side, but the case was so clear, that no professor of the civil law would be retained to argue to the contrary. And afterwards judgment was given, that the said renunciation, and the entry of it was sufficient.

Owen. 44. Office of Executors. 54. 1 Cro. 92. 9 Co. 37.

[136] MICH. 30 ELIZ. IN THE COMMON PLEAS.

CLXXXVI. LITTLETON AND PERNES CASE.

Debt.

Littleton brought debt upon an obligation against Humphry Pernes, who pleaded, that the said obligation was endorsed with this condition, for the performance of certain articles and covenants contained in certain indentures, by which indentures the plaintiff first covenanted, that Edward brother of Humphry should enjoy such land until the Feast of Michaelmas next following, rendring such rent at the end of the said term: and the said Humphry covenanted, that the said Edward at the feast aforesaid should surrender quietly and peaceably the said lands to the plaintiff, and that the said plaintiff to such of the said lands as by the custom of the country, tunc jacebant frisca, should have in the mean time free ingress, egress, &c. at his will and pleasure, with his servants, ploughs, &c. And as to that covenant, the defendant pleaded, quod permisit querentem habere intrationem & exitum, &c. in tales terras, quales tunc jacebant secundum consuetudinem patriæ, &c. And exception was taken to this plea, because he hath not shewed in certain, which lands they were which then did lie frecy, according to the custom of the country; which Anderson allowed of, but Walmsly strongly insisted to the contrary: and he confessed, that where an act is to be done, according to a covenant, he who pleads the performance of it ought to plead it specially; but as our case is, here is no act to be done, but a permittance as abovesaid, and it is in the negative, not a disturbance, in which case permisit is a good plea; and then it shall come on the other side on the plaintiffs part, to shew in what lands the defendant non permisit: which difference see agreed, 17 E. 4. 26. by the whole Court. And such was the opinion of the whole Court in the principal case.

Another exception was taken to it, that the defendant had covenanted, that his brother Edward should pay to the plaintiff the said rent; to which the defendant pleaded, that his said brother had payed to the plaintiff before the said Feast of Michaelmas, in full satisfaction of the said rent, three shillings, and that was holden a good plea; and upon the matter the covenant well performed, for there is not any rent in this case, for here is not any lease, and therefore not any rent. For if A. covenant with B. that C. shall have his land for so many years rendring such a rent, here is not any lease, and therefore neither rent. But if A. had covenanted with C. himself, it had been otherwise, because it is betwixt the same parties. And if the lessee covenant to pay his rent to the lessor, and he payeth it before the day, the same is not any performance of the covenant, causa patet, contrary of a sum in gross: another covenant was, that the said Humphry solveret ex parte dicti Edwardi 20l. to which the defendant pleaded, that he had paid ex parte dicti Humfridi 20l. and that defect was holden incureable, and therefore the plaintiff had judgment to recover.

1 Co. 127. 1 Roll. 847. 1 Cro. 173. Owen 97.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CLXXXVII. GESLIN AND WARBURTONS CASE.

Devises. Error. Dower.

In an ejectione firmæ by Joan Geslin against Hen. Warburton and Sebastian Crispe of lands in Dickilborough in the county of Norf. Mich. 30. & 31 Eliz. rot. 333. upon the general issue, the jury found a special verdict, that before the trespass supposed one Martin Frenze was seised of the **[137]** lands, of which the action was brought in tail to him and his heirs males of his body, so seised suffered a common recovery to his own use, and afterwards devised the same in this manner: I give my said land to Margaret my wife, until such time as Prudence my daughter shall accomplish the age of nineteen years, the reversion to the said Prudence my daughter, and to the heirs of her body lawfully begotten, upon condition that she the said Prudence shall pay unto my said wife yearly during her life, in recompence of her dower of and in all my lands 12 pounds, and if default of payment be made, then I will that my said wife shall enter and have all my lands during her life, &c. the remainder ut supra, the remainder to John Frenze in tail, &c. Martin Frenze died, Margaret entred, the said Prudence being within the age of fourteen years; Margaret took to husband one of the defendants, John Frenze being heir male to the former tail brought a writ of error upon the said recovery and assigned error, because the writ of entry upon which the recovery was had, was præcipe quod reddat unum messuag. and twenty acras prati in Dickelborough, Linford Hamblets, without naming any town: and thereupon the judgment was reversed. And it was further found, that in the said writ of error, and the process upon it, no writ of scire facias issued to warn dictam Prudentiam ten. existentem liberi ten. præmissorum, ad ostendendam quid haberet, vel dicere sciret quare judicium prædict. non reversaretur: the jury further found, that the said Margaret, depending the said writ of error was possessed virtute testamenti & ultimæ voluntatis dict. Martini, reversione inde expectant. dictæ Prudentiæ pro ut lex postulat: and they further found, that six pound of the said twelve pounds were unpaid to the said Margaret at the feast, &c. and they found, that the said John Frenze, prætextu judicii sic reversat. entred into the premisses as heir male, ut supra. And so seised, a fine was levied betwixt John Frenze plaintiff, and one Edward Tindal, and the said Prudence his wife deforceants, and that was to the use of the said John Frenze: and that afterwards Humphry Warburton and the said Margaret his wife, brought a writ of dower against the said John Frenze, Edw. Tindal, and Prudence his wife, of the said lands: the said Edward and Prudence made default, and the demandants counted against the said Frenze, and demanded against him the moity of the third part of the said lands: to which the said Frenze pleaded, that the default of the said Edward and Prudence idem John Frenze nomine non debet, quia he said, that he the said John was sole seised of the lands aforesaid at the time of the writ brought, &c. and pleaded in bar, and it was found against the said John, and judgment given for the demandants of the third part of the whole land, and seisin accordingly: and that afterwards, 17 Eliz. the said Frenze levyed the fine to the said Tindal, to the use of the said Tindal and his heirs: and they found, that after the said feast the said Henry Warburton and Margaret his wife came to the messuage aforesaid half an hour before sun-set of the said day, and there did demand the debt of the said twelve pounds, to the said Margaret, by the said Martin Frenze devised to be paid unto them, and there remained till after sun-set of the said day, demanding the rent aforesaid, and that neither the said Tindal nor any other was there ready to pay the same.

And first it was moved, if the said yearly sum of twelve pounds appointed to be paid to the said Margaret were a rent, or but a sum in gross: and the opinion of the Court was, that it was a rent, and so it might be fitly collected out of the whole will, where it is said, that Prudence his daughter should have the land, and that she should pay yearly to Margaret twelve pounds in recompence of her dower, &c. But if it be not a rent, but a sum in gross, it is not much material to the end of the case:

for put case it be a rent, the same not being pleaded in bar, the dower is well recovered, and then when de-[138]-fault of payment is made, if the wife of the devisor shall have the whole, was the question: and the Court was clear of opinion, that by the suit and judgment in the writ of dower, the wife of the devisor had lost all the benefit which was to come to her by the devise: for the said rent was devised to her in recompence of her dower, so as it was not the meaning of the devisor that his wife should have both; and therefore by the recovery in dower she had dismissed her self of the rent, and by consequence of the benefit of the penalty for not payment of it.

1 Cro. 128. Hutt. 106. 2 Cro. 574. 3 Cro. 196. Owen 157. Dyer 321. 1 Cro. 471. 739.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CLXXXVIII. STEPHENS CASE.

Fines levyed to raise an Use.

In an ejectione firmæ the case was, that the father covenanted with one A. that in consideration of a marriage to be had betwixt the son of the covenantor and the daughter of A. that he before such a day would levy a fine, which fine should be to the uses of the son and daughter in tail for the joynture of the daughter. The fine is levyed accordingly to the uses aforesaid: the father dieth, but in the fine no mention is made of any marriage had: and upon that matter the Court was clear of opinion, that notwithstanding that the marriage was not accomplished, yet the estate tail was well enough executed in the son and daughter, for the fine without any consideration doth carry the uses, but without a fine such a consideration would not raise such an use without accomplishment of the marriage, for the consideration executed ought to produce the use. But in this case the uses are perfected by the fine, and A. upon the matter might have had covenant against the father to have the fine before the marriage.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CLXXXIX. BILLFORD AND FOXES CASE.

Debt. Supersedeas by the Husband is not good for the Wife.

Billford brought an action of debt against Fox and his wife, executrix of one A. her former husband, process continued against them till the exigent, upon which the husband appeared, and put in a supersedeas for himself only, without making mention of his wife, and the case being moved to the justices, they demanded of the prothonotaries what was to be done, for the same is practise and a dangerous case for example. And it was answered by the prothonotaries, that the Court cannot remedy it, for now by the supersedeas the husband is sine die, for he shall not be driven to answer without his wife, as this case is, and he is impleaded, as in the right of his wife, and therefore the wife shall be waived, and the husband discharged. See the Book of Entries 187. Debt against the husband and wife, and process continued until the exigent, the husband rendred himself, and the wife was waive, and judgment given, quia videbatur justiciariis hic that the husband absque præfata uxore sua respondere non potuit, & ratoni dissonum sit, ipsum in curia hic, cum in eadem loquela respondere non potuit, ulterius detineri, ideo eat inde sine die. And so see 43 E. 3. 18. Detinue against the husband and wife, the wife is waive, and the husband rendred himself at the exigent. And the point of the action was upon a bailment to the wife, dum sola suit, and the husband was sine die, for he could not answer in such case without the wife. But at the last the justices advised thereof, and gave order that the supersedeas should by stayed without recording the appearance of the husband. And by Anthrobus one of the attorneys of the Court, that was the case of the Lady Malory and her husband,

who [139] were sued in an action of debt, and process continued against them till the exigent, upon which the husband appeared and put in a supersedeas for himself, without speaking of his wife, and his supersedeas was not allowed, but process continued until out-lawry.

1 Cro. 118.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CXC. THE QUEEN AGAINST THE BISHOP OF CANTERBURY AND OTHERS.

Quare Impedit.

The Queen brought a quare impedit against the Archbishop of Canterbury, the Bishop of Chichester, and the incumbent: and counted, that Ashburnham was seised of the advowson, and that he was out-lawed in an action personal at the suit of such a one, and shewed the whole out-lawry certain. And exception was taken to the count, because in the setting down of the out-lawry, the process is alledged to be returned by the sheriff, but the name of the sheriff is not there expressed. As to that, it was agreed by the Court that the truth is, that it is provided by the statute of 12 E. 2. cap. 5. that the sheriffs in their returns put their names to the said returns; but it is not requisite so to plead it, for the omitting thereof doth not make the return void, but the sheriff shall be amerced.

Another matter was objected, for that whereas the patron had pleaded one plea, and the incumbent the same plea by himself in bar. The Queen demurred in law in this manner, quoad seperalia placita per dictos, &c. seperaliter placitat &c. dicta Domina Regina necesse non habet, nec per legem terræ tenetur respondere: and the Court was clear of opinion, that the demurrer ought to have been several, upon the plea of the patron by it self, and upon the plea of the incumbent by it self.

1 Cro. 140. Dyer 181, 182. Ante 124.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CXCI. MALLET AND FERRERS CASE.

Damages increased of a Maim by the Court.

In trespass of battery; the parties were at issue upon not guilty, and at the Nisi Prius it appeared, that the thumb of the right hand of the plaintiff was clear cut off, and so maimed; and it was found for the plaintiff, and damages taxed to forty pounds, and now the party came in person into Court, and prayed, in respect of the heinousness of the maim, that the Court would encrease the damages; which damages, upon great consideration had, were made one hundred pounds, and judgment given accordingly. See that the cutting off any of the fingers is a maim, 28 E. 3. 54. by Stone; and as for the damages further assessed by the Court, than the damages taxed by the jury, see Book of Entries, 46. 8 H. 4. 135. 39 E. 3. 20.

Dyer, 105. 1 Cro. 223. 544. Sty. 310, 311.

HILL. 30. ELIZ. IN THE COMMON PLEAS.

CXCII. ATKINS AND HALES CASE.

Forger of False Faits.

Richard Atkins of Lincolns-Inn brought a writ of forger of false faits against Hale of Gloucester, and counted upon the forger of an indenture, in quo continetur quod quidam Abbas Monasterii de Gloucester demisit situm manerii de R. & terras dominicales, &c. The defendant pleaded, not guilty. And it was given in evidence on the plaintiff's part, a lease supposed to be made and forged; containing that the

said abbot leased the said **[140]** site and all the demesne lands of the said manor, exceptis duobus seperalibus clausuris inde, &c. vocat. &c. And it was moved, if this evidence doth not maintain the issue. And it was holden by the whole Court, that the evidence was good enough, for it is not necessary to construe terras dominicales, omnes terras dominicales, for the lands not excepted are terræ dominicales, and so the count is satisfied by that evidence, &c.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CXCIII. CHAMBERLAIN AND STAUNTONS CASE.

Deeds, and Sealing of Them.

Chamberlain brought debt upon an obligation against Staunton, and upon non est factum, the jury found this special matter, that the defendant subscribed and sealed the said obligation, and cast it upon a certain table, and the plaintiff took it without any other delivery or any other thing amounting to a delivery. And the Court was clear of opinion, that upon that matter the jury had found against the plaintiff, and it is not like the case which was here lately adjudged, that the obligor subscribed and sealed the obligation, and cast it upon a table, saying these words, this will serve, the same was held to be a good delivery, for here is a circumstance, the speaking of these words, by which the will of the obligor appeareth, that it shall be his deed.

Owen 95.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CXCIV. OLDFIELD AND WILMERS CASE.

Arbitrament.

In debt upon an obligation, the defendant pleaded, that the obligation was endorced with condition, that the defendant should stand to the award of I. S. &c. who awarded, that the defendant should pay to the plaintiff at such a day 100l. or should find two sufficient sureties to be bound with him to the plaintiff to pay the said 100l. to the plaintiff, by twenty pound a year, until the whole sum be paid: and pleads further, that he had performed the said award. The plaintiff by replication saith, that the defendant hath not paid unto him the said one hundred pounds, and so in that assigned the breach of the award, and upon the replication the defendant doth demur in law, because by the pretence of the award, the defendant had election either to pay the one hundred pounds at the day, or to find two sureties for the payment of it by twenty pounds per annum, &c. for so is the award in the disjunctive. But the Court was clear of opinion, that the replication was good, for although that the award be set down and conceived in words disjunctive, yet in law and in substance it is single, for as to the finding of suretis the award is void, and so nothing is awarded but the payment of the one hundred pounds at the day, to which the plaintiff in his replication hath fully answered: and judgment was given for the plaintiff.

Postea. 304. 1 Cro. 4.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CXCV. THE LORD DUDLEY AND LACYES CASE.

Audita querela.

The Lord Dudley brought an audita querela against Lacy, and upon it a scire facias against the same party; and at the day it was moved by the counsel of Lacy,

that in as much as no execution was sued against the person of the lord upon the statute merchant in which the said lord was bound to the said Lacy, so as he was not in prison, a scire facias ought not to issue, but a venire facias. And the Court was clear of **[141]** opinion, that it is at the election of the party grieved, which of them he will sue, scil. a scire facias, or a venire facias. See 15 E. 4. 5. by Cooke, scire facias and venire facias are all one in effect: another matter was moved on the part of Lacy; that this audita querela ought to be sued in the Chancery and not in the Common Pleas. But the Court was clear of opinion, that the party might sue in which of the Courts he would. See 16 Eliz. Dyer, 332. An audita querela upon a statute merchant directed to the Justices of the Common Pleas; but upon a statute staple, the suit shall be in the Chancery by audita querela directed to the Chancellor, or by scire facias directed to the sheriff, quod sit in Cancellaria, &c.

1 Cro. 208. 384.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CXCVI. ASKEW AND THE EARL OF LINCOLNS CASE.

Audita querela.

Askew was bound to the Earl of Lincoln in a statute staple, the earl sued execution, by which Askew was put in prison; and now the friends of Askew offered the mony in Court, and cast an audita querela for Askew, and prayed he might be bailed and the mony remain in Court till the audita querela determined. But the earl presently demanded the mony to be delivered to him, but the Court denied it, and commanded the prothonotaries to keep the mony, until the audita querela were determined: and let Askew to bail for the costs of suit.

TRIN. 31. ELIZ. IN THE KINGS BENCH.

CXCVII. WARD AND BLUNTS CASE.

Trover and Conversion.

Ward brought an action of trover and conversion against Blunt of forty loads of corn: as unto twenty loads the defendant pleaded not guilty, and as to the residue a special plea, upon which the plaintiff did demur in law, and it was adjudged for the plaintiff, upon which issued a writ of enquiry of damages, which is returned: it was moved, that the writ of enquiry of damages ought not to have issued forth, for the issue doth yet depend untryed, and the book of 34. H. 6. 1. was vouched, and there the case was, that in trespass against many, one of them made default after a plea pleaded; now a writ of enquiry of damages shall be awarded, but shall not issue forth until the plea of the others be tryed; and if the issue be tryed for the plaintiff, then the enquest who tryed the issue shall assess damages for the whole, and if for the defendant against the plaintiff, then the writ which was awarded to issue forth. See 44. E. 3. 7. Cook, It is in the discretion of the Court, to award such writ or not, which Wray granted, but it is usual here to grant the writ presently. Gawdy, The case in 39 H. 6. is not like this case, for in this case the trespass is divided, and as it were apportioned in twenty loads, and twenty loads, but in the other case not.

TRIN. 31 ELIZ. ROT. 666.

CXCVIII. SMITH AND BUSTARDS CASE.

Conditions Expounded liberally for the Party who is to Perform it.

In an ejectione firmæ it was found by special verdict, that one S. was seised of lands, and leased the same to F. for 31 years, yielding and **[142]** paying twenty pounds per annum at the Font-stone in the Temple Church (the land it self lying in

Essex) upon the Feasts of the Annunciation of our Lady and St. Michael, or within twelve days after either of the said feasts, by even portions, upon condition, that if the said rent or any part thereof be unpaid by the said space of twelve days, proxime post aliquod festorum vel dierum solutionis inde, that then it should be lawful for the lessor to re-enter. T. assigned his interest to Bustard the defendant, at Michaelmas the rent is behind, and the twelfth day after the lessor demanded the rent at the Temple Church, and for not payment thereof re-entered. Towse, The re-entry of the lessor was not lawful, for by the said reservation the rent was not due until the twelfth day after Michaelmas, for before that he cannot have an action of debt, or distrein for it; and these words (dierum solutionis) are greatly material, for conditions are odious in law, and if the words thereof be doubtful, they shall be construed for the avail of him who is bound by it. As in the case of 28 H. 8. 17. If I be bound to you upon condition, to pay to you before the Feast of St. Thomas twenty pounds, if there be in one year two Feasts of St. Thomas, the latter feast shall be my day of payment. Wray, This rent is not due until the last day of the twelve days, for neither debt or distress lieth for it, then the day of payment mentioned in the condition ought to be the last day of the last twelve days, and dict. spatium shall be construed the same number of days, and not the same days. And at last it was resolved and adjudged, that the entry of the lessor was not congeable, but he ought to expect the latter day of the twelve days.

10 Co. 129. Dyer 142. 4 Len. 91.

Trin. 31. Eliz. In the Kings Bench.

CXCIX. Sir George Farmer and Brooks Case.

Prescription. Grant of the King void.

In an action upon the case the plaintiff declared, that time out of mind, &c. there had been a manor called Tocester, and also there had been there a town called Tocester, and that all the messuages, lands and tenements within the said town had been holden of the said manor, and that he is lord of the said manor, and that he, and all those whose estate he hath in the said manor, have used to have a bake-house, and a baker, to bake white bread and house bread for all the inhabitants and passengers there, which bread hath been of a reasonable assize and price, and sufficient for all the inhabitants and passengers there (but doth not say wholsom.) and that time out of mind, &c. no person had or used any bake-house there, but by the appointment of the said lord of the manor for the time being: but that now the defendant had erected a bake-house unto the nusance of the plaintiff: the defendant shewed, that at the time he had set up his bake-house, there were three bakers there; and shewed, how that he was apprentice to the trade, and that at the time, he set up the said bake-house for the benefit of all persons, as it was lawful for him to do. Morgan, The matter only is, if this prescription made by the plaintiff be good or not: it is to be considered, if all prescriptions at the common law are one, and if all prescriptions be guided by one rule and line: and I conceive, that prescription at the common law is but one: and there are two points in prescriptions, usage and reasonableness, but they are not guided by one line, for some prescriptions are against strangers, and then there ought to be consideration and recompence; some prescriptions against privies, as between lord and tenant, for there the tenure is sufficient, & volenti non fit injuria. For the first, see 5 H. 7. 9. where in trespass the defendant doth justifie, that the place where, is his free-hold, and that he had a foldage, and that he, and all those whose estate he hath, &c. have used, that if any man depasture **[143]** his sheep with the sheep of the defendant for the day time, that it was lawful at night to take all the sheep and put them in his fold all the night, and in the morning to put them out, and the same was holden a good prescription, for which the plaintiff traversed the prescription: and for the other see 11 H 7. 13, 14. 21 H. 7. 40. betwixt lord and tenant, that every tenant for every pound-breach should forfeit three pounds; and see the Prior of Dunstables case, 11 H. 6. 19. Br. prescription 98. The prior declared that he and his predecessors

time out of mind, &c. had had a market in D. every week one day, and that butchers and others, who sold victuals, should sell the same in the high street upon stalls of the prior to them assigned, and that the prior should have one penny for every stall every day; and shewed, that the defendant had sold in his house, whereby the prior had lost the advantage and profit of his stalls there. And the same was holden a good prescription. And on the other side, the defendant did prescribe, that he and all house-holders of D. had used to sell in their houses: the same was holden a naughty prescription. See 43 E. 3. 5. and see also suit ad moliendum, upon prescription without tenure, for peradventure he had not any will there before, and now it is an ease to the neighbours: vide Register 105. where the writ is, Cum querens habeat ratione dominii sui apud R. talem libertatem quod nullus in eadem villa uti debeat seu consuever. officio, sine mysterio tinctoris sine licentia ipsius querentis, the same is good by way of prescription, but is void by way of grant: and there the defendant is forbid to use the trade of his dye-house within his manor without his licence, which appeareth upon the writ which is in the register (which register was made by the judgment and advise of the grave Judges of the law) and there is remedy given for the like case, as in the case at the bar. And see F. B. 122. b. sectam ad furnam, and although such a manner of prescription should bind a stranger, yet here our case is stronger, for the defendant is our tenant. And Hill. 15 Eliz. Rot. 166. an express judgment was given in such case for the plaintiff. Buckley contrary, although here be a loss to the plaintiff, yet there is not a wrong, as the case in 12 H. 8. 3. If I have an acre of land adjoyning to your acre, and my acre is drowned, I may make a sluce to carry away the water, and although that by so doing your acre is drowned, yet I shall not be punished for it, because it is lawful for me to make a trench in my own land, and then if it be any nusance to you, you may make a trench in your ground, and so carry away the water until it come to a river or ditch. See the case 11 H. 4. of School-masters 200. for it is damnum absque injuria. And it is against the liberty of the common-wealth, that liberty of contracts be not free but restrained with priviledges to one only: vide 22 H. 6. 14. If one erect a mill neer to my mill, no action lieth against him, for it is for the use of the Kings subjects, and God forbid, that bread and the baking of it should be restrained to any special person, especially in a market town. And as to the case of the Prior of Dunstable, that is not to the purpose, for there he prescribed to have a market and the correction of it; and the fault there is not in the usurping of a market in nusance of the plaintiff, but because the defendant sold meat there secretly, so as the plaintiff could not have the correction of it. See 22 H. 6. 14. And it is not reasonable, that such profits be restrained and drawn from the publick good to the private commodity of any person. And he cited a case which was ruled in the Exchequer 9 Eliz. upon an information exhibited there by the burgesses of Southampton, that the King had granted to the burgesses of Southam. that all the sweet wines brought within the realm should be unladen at Southam. only: and it was agreed by Wray, that such a grant was not good to deprive the common-wealth of such a benefit, and to appropriate it to one, which might be profitable to many: and it was further said by the Lord Wray, **[144]** that if the King will grant by his letters patents, that A. B. shall be of counsel only with the defendant in the Chancery, and C. B. with the plaintiffs in the Exchequer Chamber, the same is no good grant, &c.

Owen 67. 1 Cro. 203. 8 Co. 125. 1 Cro. 112, 113.

TRIN. 31 ELIZ. IN THE KINGS BENCH. INTRAT. HILL. 31. ROT. 31.

CC. PARK AGAINST MOSS AND HOW.

Trover and Conversion. Execution against an Administrator, after the Death of the Intestate of the Intestates Goods; good. Execution shall relate to the Date of the Writ.

In an action upon the case upon trover and conversion, the defendant pleaded that one A. recovered in debt against I. P. executor of E. P. one hundred pounds and twenty pounds in damages: the debt of the goods of the testator, and the damages of

the goods of the testator, si quæ fuerint, and if not, of the goods of the executor. Upon which A. procured a fieri facias directed to the Sheriff of N. who made his warrant to the defendants to execute the said writ. And before execution I. P. died intestate, and administration was committed to the plaintiff, and the defendants afterwards did execution of the proper goods of I. P. and sold them, and deliver'd the money to the sheriff, which is the same trover and conversion, and averred that E. P. had no other goods. The plaintiff by replication said, that the sheriff upon return of the said writ of execution, returned as to the principal debt, that the goods of the testator were wasted, and as to the damages that he could not execute the writ, quia tarde.

Tanfield, I conceive that the false return of the sheriff shall not make the defendant punishable, for they did execution secundum exigentiam brevis, and delivered the monies coming thereby to the sheriff; and if they should not be excused it should be a great inconvenience, for it is necessary that the sheriff have inferior officers under him. As 37 H. 6. an executor named in the will, named one to take the goods of the testator in such a place, who did accordingly, and afterwards the executor doth refuse; yet the servant shall not be punished for that medling, 13 H. 7. 2. 21 H. 7. 23. Where it is said by Read chief Justice, that if the Baily delivereth the body of one who he hath taken in execution to the sheriff, he shall be excused, although that the sheriff doth not return the capias; and we have pleaded in this case, that we have delivered the mony to the sheriff, and that is confessed by the demurrer. Altham, I conceive that this execution after the death of the party is not good. For an administrator is another person, wherefore new process shall issue against him, as in all cases where the person is changed: 18 E. 3. If one sueth a certificate out of a statute, and before execution had he dieth, his executors shall not have execution upon that certificate, but first they ought to have a scire facias: and 28 H. 8. Dyer 29. Transcript of a fine is removed by the ancestor out of the Treasury into the Chancery, and comes in by mittimus to have execution, and the ancestor dieth before execution; now the heir cannot proceed without a new mittimus, for he is another person. See 36 H. 8. Br. Statute Merchant 43. and in our case here, at the time of the execution these are not the goods of the executor, for he is not in esse, and it ought to appear whose goods they are which are taken in execution: if lands be recovered against the father who dieth, and the heir be ousted by execution, without a scire facias against the heir, he shall have an assize. And 6 E. 6. Dyer 76. is our case. A. is condemned in debt, and a fieri facias is awarded, and before execution A. dieth intestate: the sheriff levyed the debt upon the goods of the intestate in the hands of the administrators; upon which the administrators brought error and reversed the execution. Tanfield, The execution is erroneous, but is not void, but shall stand until it be reversed by error. And it was holden by the whole Court, that the false return of the sheriff should not prejudice the defendants: at another day it was moved again, and it was holden, that the averment, that the goods put in **[145]** execution were the goods of the testator the day of the writ of execution sued, was a good averment without saying, the day of execution done, for the award of the writ of execution shall bind all his goods against whom the judgment was given which he had at the day of the writ of execution awarded. And it was also holden, that notwithstanding the death of the party against whom, &c. The sheriff might do execution of the goods of the dead in the hands of his executors, according to the opinion of Bryan. 16 H. 7. 6. and afterwards in the principal case judgment was given against the plaintiff.

1 Cro. 181. More 352. 1 Roll. 893. 3 Cro. 106, 330. 1 Roll. 893.

Trin. 31 Eliz. In the Kings Bench.

CCI. Carie and Denis Case.

Retorn of the Sheriff.

The case was; upon a latitat, the sheriff returned, that by vertue of the said process he had arrested the body of the defendant, and that such a day after, and

before the return of the latitat, a habeas corpus came to him to bring the body immediately into the Chancery, which was done accordingly, and there the prisoner was discharged by the order of the said Court: and the same was holden a good return, for the sheriff is bound to obey the Kings writs, and to execute them, and he cannot compel the party to put in sureties to appear here: and the truth was, that the party was brought before the Master of the Rolls, and he did discharge him. And per Curiam, the same is no offence in the Court; but it was an ill act of the Master of the Rolls: for we oftentimes have persons here upon habeas corpus who are also arrested by process out of the Exchequer, or of the Common Pleas, but we will not discharge them before they have found sureties for their appearance, &c. and so the said Courts use to do reciprocally: and we cannot punish the sheriff, for the hebas corpus was first returnable before the latitat, but the party may have an action against the sheriff, but we will speak with the Master of the Rolls, &c. and afterwards baill was put in. But afterwards another exception was taken to the return: scil. a custodia nostra exoneratus fuit, which might be intended as to the cause in the Chancery only, and not for the cause here, for he hath not alledged, that he hath not alledged, that he was committed to any other in custody, and for that cause day was given to the sheriff to amend his return.

TRIN. 31. ELIZ. IN THE KINGS BENCH.

CCII. UPTON AND WELLS CASE.

In an ejectione firmæ by Upton against Wells, judgment was given for the plaintiff, and upon the habere facias possessionem, the sheriff retuned that in the execution of the said writ he took the plaintiff with him, and came to the house recovered, and removed thereout a woman, and two children, which were all the persons which upon diligent search, he could find in the said house, and delivered to the plaintiff peaceable possession to his thinking, and afterwards departed, and immediately after three other persons which were secretly lodged in the said house expulsed the plaintiff again: upon notice of which he returned again to the said house to put the plaintiff in full possession, but the other did resist him, so as without peril of his life, and of them that were with him in company he could not do it. And upon this return the Court awarded a new writ of execution, for that the same was no execution of the first writ, and also awarded an attachment against the parties.

2 Len. 12, 13. Latch. 165.

[146] TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCIII. MARSH AND ASTREYS CASE.

Marsh brought an action upon the case against Astrey, and declared, that he had procured a writ of entry sur disseisin against one A. and thereupon had a summons for lands in London, and delivered the said summons to Astrey being under-sheriff of the same county; virtute cujus, the said Astrey summoned the said A. upon the land, but notwithstanding that did not return the said summons. Astrey pleaded not guilty; and it was tryed in London, where the action was brought for the plaintiff; and it was moved by Cook in arrest of judgment, that here is a mis-trial, for this issue ought to be tryed in the county where the land is, because that the cause is local; but the exception was not allowed, for the action is well layed in London, and so the trial there also is good. Another exception was moved because the action ought to be against the sheriff himself, and not against the under-sheriff, for the sheriff is the officer to the Court, and all returns are in his name; and I grant that an action for any falsity or deceit lyeth against the under-sheriff, as for embesseling, rasing of writs, &c. but upon non feasans, as the case is here, the not retorn of the summons, it

ought to be brought against the sheriff himself. See 41 E. 3. 12. And if the under-sheriff take one in execution, and suffereth him to escape, death lyeth against the sheriff himself. Another exception was taken because the declaration is that the said Astrey intendens & machinans ipsum querent. in actione sua prædict. prosequend. impedire, &c. did not retorn the said summons, but doth not say, tunc exist. under-sheriff. Snag, contrary, If a baily errant of the sheriff, take one in execution, and he suffer him to escape, an action lieth against the baily himself. And that was agreed in the case of a baily of Middlesex, and Sir Richard Dyer Sheriff of Huntington, and his under sheriff, who suffered a prisoner to escape, and the action was brought against the under-sheriff; for it may be the sheriff himself had not notice of the matter, because the writ was delivered to the under-sheriff, and he took a fee for it, and therefore it is reason that he shall be punished. As if a clerk in an office mis-enter any thing, he himself shall be punished, and not the master of the office, because he takes a fee for it. But if the retorn made by the baily be insufficient, then the sheriff himself shall be amerced; but in the principal case it is clear, that the action lieth against the under-sheriff if the party will, and such was the opinion of Gawdy and Clench: as to the other matter, because it is not alledged in the declaration, that the defendant was under-sheriff at the time, the declaration is good enough notwithstanding that, for so are all the presidents, and if the defendant were not under-sheriff the same shall come in of the other side. See 21 E. 4. 23. And afterwards in the principal case, judgment was given for the plaintiff.

1 Cro. 175.

TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CCIV. HEDD AND CHALONERS CASE.

In an ejectione firmæ by Hedd against Chaloner upon a demise for years of Jane Berd, it was found by especial verdict, that William Berd was seised in fee, and made a feoffment to the use of himself for life, and afterward to the use of his two daughters Joan and Alice in fee, and died, and Joan en-**[147]**-tred into the land, and by indenture by the name of Jane Berd, leased the same to the plaintiff for three years. And it was further found; that Joan intended in the feoffment, and Jane who leased, are one and the same person. Wray, It hath been agreed here upon good advice and conference with grammarians, that Joan and Jane are but one name. And women because (Joan) seems to them a homely name, would not be called Joan but Jane; but admit that they were several names, then he and Gawdy were of opinion, it should not be good: but afterwards, it was said by Gawdy, that this action is not grounded meerly upon the indenture, but upon the demise, and that is the substance, and the indenture is but to enforce it, sci. the lease, 44 E. 3. 42. Another matter was moved here, the remainder was limited to Joan and Alice in fee, by which they are joint tenants, and then when one of them enters, the same vests the possession in them both; then by the demise of Joan a moyety passeth only to the plaintiff. Wray, Here the term is incurred, and the plaintiff is to recover damages only, and no title at all is found for the defendant, and so there is no cause but that judgment should be given for the plaintiff: and thereupon judgment was given for the plaintiff.

1 Cro. 176. 2 Roll. 42. 176.

TRIN. 31. ELIZ. IN THE KINGS BENCH.

CCV. READ AND NASHES CASE.

Use cannot rise out of a Power.

In an action of trespass by Read and his wife against Nash, for entring into a house called the Dayry-house, upon not guilty pleaded, the jury found this special matter, Sir Richard Gresham Knight, was seised in fee of the mannours of I. and S. and of diverse other lands mentioned in his will, and 3 Edw. 6. devised the same to

Sir Thomas Gresham his son for life, the remainder to the first son of the said Sir Thomas Gresham in tail, the remainder to the second son, &c. the remainder to the third son, &c. The remainder to Sir John Gresham his brother; proviso, that if his son go about or made any alienations or discontinuance, &c. whereby the premisses cannot remain, descend and come, in the form as was appointed by the said will, otherwise than for joyntures for any of their wives for her life only or leases for 21. years, whereupon the old and accustomed rent shall be reserved, that then such person shall forfeit his estate. Sir John Gresham dyed; Sir Thomas Gresham his son built a new house upon the land, and, 4 Mariæ, leased to Bellingford for one and twenty years, rendring the antient rent. And afterwards 2 Eliz. he levyed a fine of the said mannours and of all his lands: and 5 Eliz. he made a jointure to his wife in this manner, sci. he covenanted with certain persons to stand seised to the use of himself, and his wife for their lives, and afterwards to the use of his right heirs, and afterwards, 18 Eliz. he leased unto Read and his wife for one and twenty years to begin presently (which was a year before the expiration of the said lease made unto Bellingford;) which lease being expired, Read entred. It was argued by Cook, that here, upon the words contained in the proviso, Sir Thomas had power and authority, not being but tenant for life, to make a lease for years, or jointure, and that upon implication of the will, which ought to be taken & construed according to the intent of the parties; for his meaning was to give a power, as well as an estate, otherwise the word (otherwise) should be void; and it is to be observed, that the parties interessed in the said conveyance were knights, and it is not very likely, that the said Sir Richard Gresham did intend, that they should keep the lands in their own manurance as husbandmen, but set the same to farm for rent. And it is great reason, although he willed **[148]** that the order of his inheritance should be preserved, yet to make a provision for jointure; and it is great reason and cause to his family to enable and make them capable of great matches, which should be a strengthning to his posterity, which could not be without great jointures, wherefore I conceive it reasonable to construe it so, that here they have power to make jointures for their wives. It hath been said, that no grant can be taken by implication, as 12 E. 3. Tit. Avow. 77. land was given to I. and A. his wife, and to the heirs of the body of I. begotten: and if I. & A. dy without heir of their bodies, betwixt them begotten, that then it remain to the right heirs of I. and it was holden that the second clause did not give an estate tail to the wife, by implication being in a grant, but otherwise it is in case of a devise, as 13 H. 7. 17. (and there is no difference) as some conceive (when the devise is to the heir, and when to a stranger) but these cases concern matter of interest, but our case concerns an authority: and admit that Sir Thomas hath power and authority to make this lease, then we are to consider if the jointure be good, for if it be, then being made before the lease, it shall take effect before, and the woman jointress is found to be alive. But I conceive, that this jointure is void, and then the lease shall stand, for an use cannot rise out of a power, but may rise out of an estate of the testator, and out of his will, 19 H. 6. A man deviseth, that his executors shall sell his reversion, and they sell by word, it is a good sale, for now the reversion passeth by the will. But an use cannot be raised out of an use, and a man cannot bargain, and sell land to another use than of the bargainee. And it is like unto the case of 10 E. 4, 5. The disseisee doth release unto the disseisor rendring rent, the render is void, for a rent cannot issue out of a right, so an use cannot be out of a release by the disseisee, for such release to such purpose shall not enure as an entry and feoffment: also here after that conveyance Sir Thomas hath built and erected a new house, and no new rent is reserved upon it, and therefore here it is not the ancient rent, for part of the sum is going out of the new house. But as to that, it was said by the justices, do not speak to that, for it appears that the rent is well enough reserved. Another matter was moved for that, that a year before the expiration of the lease made to Billington, this lease was made to Read for 21 years to begin presently from the date of it; although by the same authority he cannot make leases in reversion, for then he might charge the inheritance in infinitum. But yet such a lease as here is he might make well enough, for this lease is to begin presently, and so no charge to him in the reversion, as in the case betwixt Fox and Colliers, upon the statute of 1 Eliz. A bishop makes a lease for three years before the expiration of a former lease, to begin

presently, it was holden a good lease to bind the successor, for the inheritance of the bishop is not charged above one and twenty years in toto. But if a bishop make a lease for years, and afterwards makes a lease for three lives, the same is not good, 8 Eliz. Dy. 246. Tenant in tail leaseth to begin at Michaelmas next ensuing, for twenty years, it is a good lease by the statute of 32 H. 8. so is a lease for 10 years, and after for eleven years, and yet the statutes are in the negative, but this power in our case is in the affirmative; and the inheritance is not charged in the whole with more than one and twenty years.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCVI. KINNERSLY AND SMARTS CASE.

Debt upon a usurious Contract.

In debt upon a bond, the plaintiff declared, that the bond was made in London; the defendant pleaded, that an usurious con-**[149]**-tract was made betwixt the parties at D. in Stafford-shire, & that the obligation was made for the same contract. The plaintiff by replication saith, that the bond was made bona fide, & non pro usura, and that issue was tryed in the county of Stafford, and was found for the plaintiff: and it was moved in arrest of judgment, that that issue ought to be tryed in London, where the contract was made. Gawdy conceived, that the tryal is well, as 8 E. 3. 8. In debt upon an obligation in London, the defendant pleaded, that the obligation was made by duresse at York, the same issue shall be tryed at York. At another day the case was put more certain, scil. that the contract was made at W. in Stafford-shire, by which it was agreed, that for a horse and two tun of iron, the plaintiff should have for them and the forbearing of the mony for such a small time fifty pounds; whereas in truth they were but of the value of forty pounds, and that the said bond was made for the payment of the said fifty pounds. Cook, the issue is well tryed, for the ground of the matter is the usurious contract, and those of Stafford-shire may better know it than they of London. And according to this tryal it hath been before adjudged. H. 28. Eliz. rot. 209. betwixt Sybthorpe and Turner. And P. 31. Eliz. rot. 303. betwixt Payne and Wilkenson, where the issue was, absque hoc, that it was a corrupt agreement, but the pleading was, ut supra. And afterwards judgment was given for the plaintiff.

1 Cro. 195.

TRIN. 36 ELIZ. IN THE KINGS BENCH.

CCVII. THE QUEEN AND BUCKBERDS CASE.

Quare Impedit. Damages in a Quare Impedit where by King, & e contra. Where only single damages. A man shall not assign for error, that which is for his advantage.

The Queen recovered against Buckberd in a quare impedit; and thereupon a writ of error was brought, and it was assigned for error, that the Queen, post tempus semestre, had judgment to recover damages for the value of the church for half a year. Cook, the same is no error, as it was adjudged, 7 Eliz. 236. See also 34 H. 6. 51. And these damages are not as damages, but as a penalty inflicted upon the disturbance. See Book of Entries, 483. The King in a quare impedit counted to his damage of forty pounds, and 484. 1000 li. and although, tempus semestre transierit, yet the King shall recover damages, but the value of the church for half a year, for the King at all times may present in his own right; for nullum tempus occurrit Regi. At another day it was moved by Fenner Serjeant, and he conceived, that here the Queen is not to recover damages, for she doth not present in her own right, for the incumbent had two benefices without qualifications, & therefore the first was void, and the lapse encurred, and therefore the Queen did present in the right of the Crown, and so is not verus patronus. 14 E. 3. Quare Impedit 54. The King shall not recover

damages, although he count of damages, 3 H. 6. Damages 17. And as to the case of 7 Eliz. it doth not appear there, that the King did present by reason of his prerogative, and he shewed divers presidents, that the King shall not recover damages in such case. P. 7. H. 5. rot. 402. 2 H. 6. rot. 316. For the statute was intended to give damages to the very patron, and not otherwise. Cook, where the King presents by lapse he is verus patronus hac vice, as grantee of the next avoidance: vide T. E. 1. Quare Impedit 181. The King recovered damages in the case of a prior. Godfrey said, he had searched the roll of 7 Eliz. and there is more reported in the book than is in the roll, for judgment is given for the presentee, but as for the damages, the Court would advise of it. Gawdy, it is clear, that the Queen shall not recover double damages, for she cannot lose her presentment, quia nullum tempus occurrit, and because eo quod tempus semestre transierit, but she shall have single damages, for they are **[150]** given for the wrong and disturbance, and not for the presentment; and therefore the damages are well awarded. Wray, if the King be not within one part of the statute (as it is agreed as to the double damages) it is hard that he be within the other branch.

Popham Attorney General, the Queen ought to recover damages, but only single damages, but not double damages; and the words of the statute are general, therefore the Queen shall have the benefit of it, and of all statutes made for the benefit of the subjects, the King shall take advantage: the Statute of Gloucester gives damages in a writ of cosinage, Aiel and Besail, and the King brings an action upon the seisin of his ancestors, he shall recover damages, and in construction of statutes, the opinions of them which were next to the making of them is to be much respected: vide 19 E. 2. Rot. 90. 19 E. 1. Rot. 255, 231, 136. And always the King counts to his damage, &c. and that should be in vain, if he should not recover damages: and as to the presidents shewed to the contrary, that was the default of those clerks which the King had presented; and when in a quare impedit the King had prevailed; they contented themselves with the incumbency without regard of the damages: but if damages be not to be given, yet the judgment to recover the presentment is not erronious. And the judgment only as to the giving of damages shall be reversed, and the defendant in the quare impedit here shall not assign the same for error, because no damages are given, for it is for his advantage. And always where it is found for the Queen in a quare impedit, they enquire of the value of the church, which should be a frivolous thing, if the Queen should not recover damages. Gawdy of things transitorie the Queen may be disturbed, and if she be, wherefore shall she not recover damages? but the doubt is, if the intent of the statute be, if the party shall have single damages in any case: and here in this case the judgment is one and entire, and if it be reversed in part it shall be reversed in the whole; as in dower, the tenant pleads, that he is always ready, &c. the demandant shall have judgment to recover her dower, and a writ shall issue forth to enquire of the damages. And see also 17 E. 3. In an assize of darrein presentment, the plaintiff had judgment to have a writ to the bishop: and the assize was taken after for the damages: and in the mean time the defendant brought a writ of error, and it was holden maintainable, for they are several judgments; but it is not so here, for the entry is, Quod querens habeat bre. episcopo, & quia nescitur quæ damna, &c. for it is one judgment.

Wray, it is but one statute, and therefore it shall be construed with one construction, and it should be a strange construction, that the King should be within one part of the statute, and out of the other. And 34 H. 6. 3. the Kings Attorney could not have damages, which is a great proof and authority, that the judgment for damages in such case is error: the experience and usage of law is sufficient to interpret the same to us, and from the time of E. 3. until now, no damages have been given in such case. Thrice this matter hath been in question, 1. 3 H. 9. and the justices there would not give damages, 34. H. 6. there the councel learned of the King, could not have damages for the King. And 7 Eliz. there was no damages: and whereas it hath been said, that a man shall not have a writ of error, where judgment is given for his benefit, that if judgment be entred that the defendant be in misericordia, where it ought to be, capiatur, yet the defendant shall have a writ of error. And he conceived also, that here is but one judgment: Clench, the first president after the making of that statute was, that damages were given for the King in such case; but afterwards the practice was always otherwise, and that the said statute could not be construed,

to give in such case damages, & the reason was because the justices took the law to be otherwise: and the King **[151]** is not within the statute of 32 H. 8. of buying of tythes, nor any subjects who buy any title of him: and here in our case, the Queen is not verus patronus but hath this presentment, by prerogative: and if title do accrue to the bishop to present for lapse, yet the patron is verus patronus.

At another day the case was moved, and it was said by Wray, that he had conferred with Anderson, Manwood, and Periam, who held, that the Queen could not have damages in this case, but Periam somewhat doubted of it. Gawdy, in 22 E. 4. 46. In dower the demandant recovered her dower, and damages by verdict, and afterwards for the damages the judgment was reversed, and stood for the lands. Clench, it shall be reversed for all, for there is but one judgment. And afterwards judgment was given, and that the Queen should have a writ to the bishop and damages. Popham, the Court ought not to proceed to the examination of the errors, without a petition to the Queen, and that was the case of one Mordant, where an infant levyed a fine to the Queen, and thereupon brought a writ of error, and afterwards by the resolution of all the Judges, the proceedings thereupon were stayed. See 10 H. 4. 148. a good case.

1 Cro. 162. 5 Co. 58.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCVIII. CHAPMAN AND HURSTS CASE.

Tythes.

Betwixt Chapman and Hurst, the defendant did libel in the Spiritual Court, for tythes against the plaintiff, who came and surmised, that whereas he held certain lands by the lease of Sir Ralph Sadler for term of years within such a parish, that the now defendant being farmor of the rectory there: the defendant, in consideration that the plaintiff promised and agreed to pay to the defendant ten pounds per annum, during the term, for his tythes, he promised, that the plaintiff should hold his said land without tythes, and without any sute for the same, and thereupon prayed a prohibition: and by Gawdy; the same is a good discharge of the tythes for the time, and a good composition to have a prohibition upon; and it is not like unto a covenant. See 8 E. 4. 14. by Danby.

TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CCIX. KIRDLER AND LEVERSAGES CASE.

Avowry.

In avowry the case was, that A. seised of lands leased the same at will, rendring rent ten pounds per annum, and afterwards granted eundem redditum, by another deed to a stranger for life, and afterwards the lease at will is determined. Periam was of opinion that the rent did continue; and although that the words be, eundem redditum, yet it is not to be intended, eundem numero, sed eundem specie, so as he shall have such a rent, scil. ten pounds per annum: as where the King grants to such a town, easdem libertates quas civitas Chester habet, it shall be intended such liberties, and not the same liberties, so in the principal case: also he held, that a rent at will cannot be granted for life, and therefore it shall not be meant the same rent: but it was afterwards adjudged, that the rent was well granted for the life of the grantee.

1 Cro. 241.

[152] TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CCX. HEAYES AND ALLEYNS CASE.

Cui in vita. Demand, and the manner of it, in a writ.

Heayes brought a sur cui in vita against Alleyn. And the case was this, the discontinuee of a messuage, had other lands of good and indefesible title adjoining

to it, and demolisht and abated the said house, and built another which was larger, so as part of it extended upon his own land, to which he had good title. And afterwards the heir brought a sur cui in vita, and demanded the house by the name of a messuage, whereas part of the house did extend into the land to which he had no right. And by Periam, the writ ought to be of a messuage with an exception of so much of the house which was erected upon the soil of the tenant, as demand of a messuage except a chamber: and it was argued by Yelverton, that the writ ought to abate, for if the demandant shall have judgment according to his writ, then it shall be entred quod petens recuperet messuagium, which should be erronious, for it appeareth by the verdict it self, that the demandant hath not title to part of it; and therefore he ought to have demanded it specially 5 H. 7. 9. parcel of land, containing 10 feet, 16 E. 3. Br. Mortdanc. of a piece of land containing so much in breadth, and so much in length. And the moyetie of two parts of a messuage, and 33 E. 3. br. Entrie 8. a disseisor of a marsh ground made meadow of it; now in a writ of entry it shall be demanded for meadow. Drue Serjeant contrary, and he confessed the cases put before, and that every thing shall be demanded by writ in such sort, as it is at the time of the action brought: as a writ of dower is brought of two mills, whereas during the coverture they were but 2 tofts; but at the day of the writ brought, mills; and therefore shall be demanded by the name of mills, 14 H. 4. 33. Dower 21. 13 H. 4. 33. 175. 1 H. 5. 11. Walmesly, part of a messuage may be demanded by the name of a messuage: and if a house descend to two coparceners, if they make partition that one of them shall have the upper chamber, and the other the lower, here if they be disseised, they shall have several assisses, and each of them shall make his plaint of a messuage; and by him a chamber may be demanded by the name of a house. And afterwards the writ was awarded good, but a special judgment was given, ita quod querens recuperet messuagium prædict. viz. so many feet in length, and so many in breadth, according to that which was found by the verdict.

1 Cro. 234. Poph. 13.

Trin. 31 Eliz. In the Common Pleas.

CCXI. Degory and Roes Case.

Debt. Deeds, when to take effect.

Degory brought debt upon an obligation against Roe, as heir to his ancestor, the defendant pleaded, that his ancestor by his deed did covenant with Sir W. Winter, and A. Marsh, to stand seised to the use of himself for life, and afterwards to the use of the defendant and his heirs, and so he had nothing by descent. The plaintiff replicando said, non convenit; and it was found by special verdict that such a deed of covenant was made by the ancestor of the defendant, but the first use was limited to the covenantor and his wife, for their lives, &c. And that he delivered the same to I. S. as his deed, to the use of the said Sir W. Winter, and the said Marsh, if the said Sir W. Winter would agree to the same, and take the charge of it upon him, and if he will not agree, that then it should not be his deed, and **[153]** further found, that Sir W. Winter died before any agreement; and it was moved by Periam, if the same be presently the deed of the ancestor, or if it do not take effect till the condition be performed, sci. until Sir W. Winter hath agreed to it. See 14 H. 8. 17, 18, 19, 20, 23. And by Walmesly, the same is not the deed of the ancestor until Sir William hath agreed; but by Anderson and Periam, although Sir William Winter doth not agree to it, yet it is the deed of Roe; for although a deed be upon condition, ut supra, yet because he delivered it as his deed, and the condition is subsequent to it, it shall be taken for his deed, and the condition after shall be void, because repugnant: for although that in estates limited to men, the estate may be precedent, and the condition subsequent, and the not performance of the condition may destroy the estate, for the estate is always subject to the condition, yet it is not so in deeds, for being once the deed of the party, it can never cease to be his deed, after it is once delivered as his deed. Owen, although the same be the deed of the party, yet it is not

well pleaded; & he conceived the issue is found against him, for the covenant is pleaded, to stand seised unto the use of himself for life, the remainder over: to which the plaintiff replicando saith, non convenit, so as the issue is, if any such deed of covenant was, and the jury find, that the covenant was to stand seised to the use of himself, and his wife, &c. so as it is not such a deed as the defendant hath pleaded, for other estates are limited by it, and therefore it shall not be intended the same deed. Periam, the same is not material, for the substance of the plea is, nothing by descent, &c. and it was adjourned.

TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CCXII. THE SCHOLARS OF ALL-SOULS IN OXFORD AND TAMWORTHS CASE.

Writ of Right.

In a writ of right by the Colledge of All-souls in Oxford against Tamworth: the writ was, Quod clamat tenere de nobis in liberam puram et perpetuam elemosinam. And exception was taken to it, because it ought to be in liberam eleemosinam, sans pura & perpetua, also it ought to be eleemosina, with a double e, and not elemosina, with a single e, but the exception was not allowed, for as to the first exception, it is but surplusage, and as to the other, it is the common course. Another exception was taken to the writ, because the words are quod clamat esse jus & hæreditatem suam, without saying in jure collegii. Anderson, the writ is good enough. If a parson plead that he is seised, he shall say in jure ecclesiæ, for he hath two capacities, and without such words here shall be intended seised in his own right; but if an abbot plead that he was seised, there needs not such words, for he hath no other capacity; so of dean and chapter, mayor and comminalty: and afterwards, the writ was awarded good, and that the tenant should answer over, &c. See Book Entries, 236, 237. It was also moved, if the colledge shall count of its seisin within 30 years, because that the corporation never dies, and then if he count of its own possession, the same is without limitation. And it was holden, that if the guardian of the colledge which now is, was ever seised, he ought to count upon a seisin within thirty years; but upon the seisin of his predecessor he ought to count of a seisin within 60 years as another common person; for the change of the teste of such a seisin, is as the dying seised, and descent of a common person.

1 Cro. 232.

[154] TRIN. 31 ELIZ. IN COMMUNI BANCO.

CCXIII. THE LORD BUCKHURST AND THE BISHOP OF WINCHESTERS CASE.

Quare Impedit.

The Lord Buckhurst brought a quare impedit against the Bishop of Winc. and counted, that he was seised of the manor of D. to which the advowson was appendant, and that the said church became void, and that he presented Maurice Sackvil. his clark. The defendant pleaded that he was seised of the said advowson, as in gross, and presented one Maurice Sackvil, absque hoc, that the advowson was appendant. It was moved, that the defendant ought to traverse the presentment, and not the appendancy, especially as the cause is here, where they both present one and the same person: to which it was said that that doth not appear, for the defendant hath pleaded, that he presented Maurice Sackvil, but doth not say, prædict. Maurice Sackvil. so as it may be he is not the same person, but another. See 10 H. 7. 27. The traverse is well taken; contrary where the plaintiff declares of an advowson in gross, and that he to the same presented, and the defendant pleadeth, that he is seised of such a manor to which the advowson is appendant, &c. without that, that the advowson is in gross, there he shall traverse the presentment, for the presentment shall make it in gross. See 13 H. 8. 12.

TRIN. 32 ELIZ. IN THE COMMON PLEAS.

CCXIV. JENNINGS AND WINCHES CASE.

Assumpsit.

In an action upon the case by Jennings against Winch. the plaintiff declared upon an assumpsit by the defendant, 1 Mali. 32. Eliz. and counted upon a mutuatus for twenty shillings, and an indebitatus for four pounds. The defendant pleaded, that he being endebted to the plaintiff in five pounds, and W. S. in another five pounds, they became bounden to the plaintiff in twenty pounds for the payment of ten pounds in satisfaction of the said sum of five pounds, and five pounds, and that the obligation was sealed before the day of the assumpsit supposed, and added, that the same is the same debt, and that the obligation was made for the same debt. And by the opinion of the whole Court, the same cannot be a good plea, for an obligation cannot deraign a contract or an assumpsit afterwards made. And the truth of the matter was, that the obligation was made after the assumpsit, although that the plaintiff declared of an assumpsit made after. And in that case it was holden, that the defendant might plead the special matter; that the obligation was made after the said assumpsit, absque hoc, that he assumpsit, &c.

TRIN. 32 ELIZ. IN THE COMMON PLEAS.

CCXV. HAWKINS AND LAWSE CASE.

Debt. Administration.

Hawkins brought an action of debt against Lawse, executor of one A. for rent reserved upon a lease for years made to the testator. The defendant pleaded, fully administred, and upon the evidence it appeared, that the said A. made the defendant his executor, and **[155]** that he did meddle with the possession of divers goods of the testator, and so administred, and afterwards refused in Court; and that the administration was afterwards committed to one B. and that the inventory of the goods of the testator came to one thousand pounds: and it was given in evidence for the defendant, that he himself had paid certain debts, and that divers persons have recovered against the administrator divers sums of money amounting to one thousand pounds, & ultra; and it was moved, if that evidence did maintain the issue for the defendant, because that the defendant had pleaded, plene adminstravit, which implies an administration by himself. And now upon the evidence it appeareth, that the greatest part of the goods of the testator were administred by the administrator.

Periam, if that administrator (who in truth is but a stranger) pay any debts with the goods of the testator without commandment of the executor, the same is not an administration, and the executor cannot give such matter in evidence, to prove his plea of fully administred. Drew Serjeant, if an executor of his own wrong, meddle with the goods of the testator, and afterwards the administrator meddle with the residue and administer them; in debt against the executor, who pleads fully administred, if he can prove that he himself hath administred part, and the administrator the residue, the same is good evidence to maintain his issue. Periam, it may be so there, but here in our case, the defendant is the very executor, and he hath administred, in which case afterwards he cannot refuse; and so the administration is not well committed, and is granted without cause; and he to whom the administration is committed is a mere stranger, and what he did was without warrant; and therefore it is no administration to prove the issue: and then the whole matter by direction of the Court was found by special verdict. And by Periam, in this case an action may be brought, either against the executor of his own wrong, or the administrator, but not against both of them joyntly. See 21 H. 6. 8. by Yelverton and Portington. Periam, if the testator mortgages a lease for years and dyes, and

the executors redeem it with their own monyes, the said lease shall be assets in their hands, for so much as the same is worth, above the sum which they have paid for the redemption of it.

3 Cro. 62, 63. 3 Cro. 62, 63.

TRIN. 32 ELIZ. IN THE COMMON PLEAS.

CCXVI. IVORY AND FRYES CASE.

It was ruled by the whole Court in this case: that if A. make B. his executor, and B. makes C. his executor and dieth, and a debt is due to A. the first testator, if C. bring an action of debt for the said debt, as executor to B. the writ shall abate: it was moved, if an infant within the age of one and twenty years be made executor, and administration is committed, durante minore ætate, in whose name the action shall be brought, in the name of the infant, or the administrator. Periam, if the will be proved before the administration be committed, the action shall be brought in the name of the infant executor.

TRIN. 32 ELIZ. IN THE COMMON PLEAS.

CCXVII. READ AND JOHNSONS CASE.

Assumpsit.

In an action upon the case betwixt Read and Johnson, the plaintiff declared that where the defendant was endebted to him, he assumed **[156]** to pay it: and upon non assumpsit pleaded, this special matter was found, that the plaintiff leased unto the defendant certain lands for years, rendring rent eight pounds per annum, and that the said rent was behind for three years, and that the defendant was not otherwise endebted to the plaintiff, nor made any other promise but the contract upon the reservation of the rent: and by the clear opinion of the whole Court, the action doth not lye, because he hath a proper action, scil. an action of debt, in which no wager of law lyeth.

1 Cro. 242.

TRIN. 32 ELIZ. IN THE COMMON PLEAS.

CCXVIII. WRIGHT AND THE BISHOP OF NORWICHES CASE.

Quare Impedit.

In a quare impedit betwixt Wright and the Bishop of Norwich, it was moved, if the King hath title to present for lapse, and presents; and his clerk is admitted and instituted, but not inducted, and dyeth before induction; if now the King shall present for the said lapse, because the church was not full against the King. And the justices were all clear of opinion, that the King might repeal such presentment before induction: and as to the principal matter, the Court seemed to incline, that the King might present again.

Dy. 348. 360.

MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS. INTRAT. TRIN. 30 ELIZ. ROT. 1160.

CCXIX. WHISKON AND CLEYTONS CASE.

Devises.

In an ejectione firmæ, upon a special verdict found, the case was this, that C. was seised in fee, and devised the same to Solomon Whiskon his god-son after the death

of his wife; and if he fail, then he willed all his part to the discretion of his father, and died; Solomon survived, the father being dead before without any disposition of the land. Gawdy was of opinion, that upon those words, that the father had a fee-simple, as, I will that my lands shall be at the disposition of I. S. by these words, I. S. hath a fee-simple, quod Periam concessit; and they amount to as much as, I will my land to I. S. to give and sell at his pleasure: and by Windham and Periam, there is no difference where the devise is, that I. S. shall do with the land at his discretion, and the devise thereof to I. S. to do with it at his discretion.

Post. 283.

CCXX. MICH. 31 ELIZ. IN THE COMMON PLEAS.

A. leased to B. for years, and before the expiration of the said term leased the same by indenture to a stranger to begin presently, and the first lessee committed wast. A. brought an action of wast against the second lessee, and declared upon a lease made for years without speaking of the indenture. And Gawdy Serjeant demanded the opinion of the Court, if the defendant might safely plead no wast? And they conceived, that it should be dangerous so to do. Then it was demanded if the defendant plead, that the plaintiff had nothing tempore dimissionis, whereof he had counted, if the plaintiff might estop the defendant by the indenture, although he had not counted upon it, and if such replication be not a departure. And it seemed to Periam, and Leonard, custos brevium, that it was not, for it is not contrary to the declaration, but rather doth enforce the declaration.

[157] CCXXI. MICH. 31 ELIZ. IN THE COMMON PLEAS.

Walmesley Serjeant demanded the opinion of the Court upon this matter. Land is given to husband and wife in special tail (during the coverture) they have issue, the husband is attainted of treason and dieth, the wife continues in as tenant in tail, the issue is restored by Parliament, and made inheritable to his father, saving unto the King all advantages which were devolved unto him by the attainder of his father, the wife dieth. And he conceived, that the issue was inheritable, for the attainder which disturbed the inheritance is removed, and the blood is restored, and nothing can accrue to the King, for the father had not any estate forfeitable, but all the estate did survive to the wife, not impeachable by the said attainder. And when the wife dieth, then is the issue capable to enherit the estate tail. Windham and Rhodes, prima facie, thought the contrary, yet they agreed, that if the wife had suffered a common recovery, the same had bound the King.

CCXXII. MICH. 31 ELIZ. IN THE COMMON PLEAS.

Assumpsit.

In an action upon the case the plaintiff declared, that he had delivered to the defendant, diversa bona ad valentiam 10 li. the defendant in consideration thereof did promise to pay to the plaintiff the debt owing, pro bonis prædictis, and did not shew, that the defendant bought the said goods of the plaintiff, and so it doth not appear that there was any debt; and then a promise to pay it, is meerly void, which was agreed by the whole Court.

MICH. 31 ELIZ. IN THE COMMON PLEAS.

CCXXIII. SEAMAN AND BROWNINGS CASE.

Debt.

George Seaman brought debt upon a bond against W. Browning and others, executors of one Marshal; the condition was, that where the said Marshal had sold

certain lands to the plaintiff, if the said plaintiff peaceably and quietly enjoy the said lands against the said Marshal, &c. and assigned the breach in this, that the said Marshal had entred upon him, and cut down five elms there, upon which the parties were at issue; and it was found, that A. servant of the said Marshal, by commandment of his said master, had entred and cut, &c. in the presence of his said master, and by his commandment, for he is a principal trespassor: and it was so holden by the Court.

CCXXIV. Mich. 31 Eliz. In the Common Pleas.

If the Kings tenant by knights service dieth, his heir within age, and upon office found the King seiseth the body and land, yet the heir during the possession of the King may sell the lands by deed enrolled, or make a lease of such land, and the same shall bind the heir notwithstanding the possession of the King; but if he maketh a feoffment in fee, it is utterly void, for the same is an intrusion upon the possession of the King; but where the King by office found is entituled to the inheritance, as that his tenant dieth without heir, whereas it is false, for which the King seiseth, in such case the tenant of the King, before his ouster le mayne, cannot make a lease for **[158]** years, or sell the land by deed enrolled: the case depended in London before the Judges of the Sheriffs Court. The King, by colour of a false office, which doth falsely entitle him to the inheritance, is seised of certain land; he who hath right, leased the same for years by deed indented; and then an ouster le mayne was sued, and he enfeoffed a stranger; and it was holden, that the lease should not bind the feoffee, although it was by deed indented, for the feoffee is a stranger to the indenture, and therefore shall not be estopped by it. 18 H. 6. 22. A stranger shall not take advantage of an estoppel, and therefore shall not be bound by it: as if one take a lease for years by indenture of his own lands, the same shall bind him, but if he dieth without heir, it shall not bind the lord in point of escheat.

8 Co. 172.

Mich. 31 Eliz. In the Common Pleas.

CCXXV. Gibbs Case.

Trover and Conversion.

Gibbs brought an action upon the case upon trover and conversion of a gelding; and the case was, that one P. had stolen the said horse, and sold the same unto the defendant in open market, by the name of Lister, and the said false name was entred in the toll-book. And it was holden clear by the Court, that by that sale the property was not altered.

1 Cro. 861. Owen. 27.

CCXXVI. Mich. 31 Eliz. In the Common Pleas.

Tenant in socage leased his lands for four years, and died, his heir within the age of eight years, the mother being guardian in socage, leased the land by indenture to the same lessee for fourteen years; it was holden by the Court, that in this case the first lease is surrendred, but otherwise upon a lease made by guardian by nurture.

Owen. 45. Hutton. 105. 1 Cro. 734. Post. 322.

Mich. 31 Eliz. In the Common Pleas.

CCXXVII. Kimpton and Dawbenets Case.

In trespass, the defendant did justifie by a grant of the land, where, &c. by copy: the plaintiff by replication saith, that the land is customary land (ut supra) and claimed

the same by a former copy: the defendant by rejoynder saith, that well and true it is, that the lord may grant copies in possession at his pleasure, and also estates by copy in reversion, with the assent of the copy-holder in possession, but all estates granted by copy in reversion without such assent, have been void. It was argued, that this custom is not good, for it is not reason, that the lord in disposing of the customary possessions of his manor should depend upon the will of his tenant at will; and the same is not like to the case of attornment, for there the attendancy is to be respited, which is not to be done here, for the copy-holder in possession shall continue attendant to his lord, notwithstanding such a grant in reversion: and see for the unreasonableness of the custom, 19 Eliz. 357. in Dyer, Sallfords case: it was moved on the other side, that the custom was good enough; and 3 H. 6. 45. was vouched, that every freehold of a manour upon alienation might surrender his land, &c. It was adjourned.

[159] MICH. 30 & 31 ELIZ. IN THE EXCHEQUER-CHAMBER.

CCXXVIII. MARRIOT AND PASCALLS CASE IN A WRIT OF ERROR.

Misnosmer of a Corporation.

Robert Marriot one of the Attorneys of the Court of Exchequer, brought an ejectione firmæ against Mary Pascal, and upon not guilty pleaded, the jury found a special verdict, containing this matter; viz. that King H. 7. the fourth year of his reign erected and founded an hospital, by the name of the Master and Chaplains of the Hospital of King Henry the seventh, de le Savoy: and afterwards in the time of Queen Mary, the said master and chaplains being seised, &c. leased the same to the defendant by the name of W. Holgil master of the hospital, Henrici nuper Regis Angliæ septimi vocat. Le Savoy & Capellani Hosspitalis prædict. And afterwards by the former name (which was in truth their very name) leased the same to Thomas Fanshaw, who leased the same to the plaintiff: and if the lease aforesaid made unto the defendant in form and by the name aforesaid, be a good lease, was all the question. And this matter was argued, and many times debated in the Exchequer, as well at the Bench as at the Bar. And it was agreed by Clerk and Gent, Barons there, that the said lease made to the defendant was utterly void by reason of the misnosmer. Manwood argued strongly to the contrary; and judgment was given for the plaintiff, according to the opinions of the said two Barons: upon which the defendant brought a writ of error in the Exchequer-chamber before the Lord Chancellor, Treasurer, &c. And now this term it was argued by Godfrey on the part of the defendant: three variances have been supposed in this lease from the original foundation of the hospital in the name of it. 1. The name of the foundation is the master of the hospital, &c. Et Capellani dict. Hospitii; so that in the lease rests part of the name (Capellani) as not immediately annexed to master, as it is in the name of the foundation. But as to that point, the justices assistants delivered Godfrey from the arguing of it, as of a variance not material: another variance hath been objected, because that in the foundation the words are Hospitalis Regis H. 7. and in the lease the words are, Hospitalis Henrici septimi nuper Regis Angliæ, so as this word (nuper) is surplusage, and ex abundant. But of that matter he was also discharged, because it is no variance in substance: but all the difficulty rested in this, that in the foundation the words are (de le Savoy) and in the lease (vocat. Le Savoy). And he put the case 4 Mar. Dyer. 150. The colledge of Eaton was incorporated by the name of Præpositi & Collegii regalis S. Mariæ de Eaton juxta Windsor, and a lease is made by the name Præpositi & Sociorum Collegii regalis de Eaton, and that was holden a void lease: and I confess that in the names of corporations, we ought to resort to the foundation of the corporations, for the name of a corporation is as a name of baptism, & ought to be as precisely observed, but that ought to be intended in matter of substance, and not otherwise, vide 10 Eliz. Dyer. 278. The Dean & Chapter of Carlile was incorporated by the name of Decanus & Capitul. Ecclesiæ Cathedralis Sanct. & individuæ Tri. Carl. and they make a lease by the name,

Decanus Ecclesiæ Cathedralis S. Trin. in Cant. et totum Capit. de Ecclesia prædict. And the same was holden a good lease, notwithstanding that variance, which is not in substance of the name. And the Dean and Chapter of Peterborow was incorporated by the name of Decanus et Capitul. Ecclesiæ Petriburgensis, and they made a lease by the name Decanus et Capitulum Ecclesiæ de Peterborow, and holden good enough, because the variance was not in any matter of substance: and he cited the case betwixt Croft and Howel, 20 Eliz. Plow. Com. 537. The Cooks of London were incorporated by the name of Masters, and Governors, **[160]** and Commonalty of the Mistery of Cooks, and they by the name of Master and Wardens of the said Craft and Mistery of Cooks made a conveyance, and it was holden that the variance assigned in the abundance of this word (Craft) in the conveyance, which was not in this corporation, was not any material variance, but only matter of surplusage, for (Craft) and (Mystery) are all one, and of one sense, &c. And so in the principal case, the Hospital de le Savoy, and the Hospital vocat. Le Savoy, sound the same, and in effect do not differ. And as it was said by the Lord Chief Baron in his argument in the Court of Exchequer, in this case, four things are only to be respected in the name of a corporation: first the name of the living persons who are the corporation, as in our case the master and chaplains: secondly, the house in which they are resident, and make their aboad: thirdly, the name of the founder: fourthly, the place upon which the place of their aboad is built and erected. And if these four matters are sufficiently set down, although not formally, it is good enough. It hath been objected, that the Hospital de le Savoy, and the hospital vocat. Le Savoy, do much differ, for de le Savoy, implieth the demonstration of the place, but vocat. Le Savoy, trencheth only to the name, as if the Dean & Chap. de Pauls in London. make a lease by the name of Dean and Chap. of St. Paul vocat. London, so if the Master and Fellows of Trinity Colledge; in Cambridge make a lease by the name of Master and Fellows of Trinity Coll. vocat. Cambridge, such leases are utterly void. I do well agree those cases, for the dean and chapter is not all London, but part of London, and therefore cannot be called or said London; and so Trinity Colledge is but part of Cambridge, and therefore cannot be called Cambridge; but here in our case, the hospital is not parcel of the Savoy, but the whole Savoy is the hospital, and there is not any part of the Savoy, which is not the hospital; but if Trinity Colledge in Cambridge make a lease by the name of Master and Fellows Collegii vocat. Trinity Colledge in Cambridge, it is a good lease: and he put a difference, where the word in the name of the corporation, which precedes (de) is all one and of the same nature with the word which follows (de) and where on the contrary, as in our case, the word which precedes (de) is hospital, and the words which follow (de) are Le Savoy, are all one and the same thing, so as the hospital and Savoy are all one and the same, and therefore may be well called Le Savoy, and also (de) and (vocat.) in construction are the same, & so our lease is good enough: and it is found by verdict, that this hospital was erected upon the manor of Savoy, and thereupon it is now commonly called Le Savoy, without any addition of hospital, for as it was called Savoy before it was erected into an hospital, so it is also called after the erection; and true it is that the misnaming of a corporation in any small thing shall abate a writ, for there is only delay, yet it is not of force in a conveyance, unless the misnaming be in a point material. Coke to the contrary, the variance from the true name of a corporation which shall prejudice a conveyance ought to be in matter of substance, for variance in matter of form and circumstance will not hurt it, sed parum differunt quæ reconcordant. And first it is to be confessed, that the name of a corporation is as the name of baptism, which admits of no variance, and therefore it is said 38 E. 3. 15. by Knivet, when a man founds a chantry or a house, &c. it ought to bear such a name as his founder hath given to it, for that is its proper name. And so it hath been reported by Bendloes, Serjeant, 4 and 5 Phi. and Mar. that it was holden for a positive law, by all the Judges of England, that the mistaking of the name of a corporation in any matter of substance, makes the conveyance utterly void, for a name is given to a corporation upon the foundation, and that by the same name they shall implead and be impleaded, but that ut idem nomen, et sub eodem nomine sint habiles ad perquirend. & concedend. to be impleaded, and to implead, but that is to be meant idem re, for **[161]** it is not necessary, that it be idem litera, for, qui hæret in litera hæret in Cortice, but if it be

idem re with the foundation it is well enough. And therefore it hath been adjudged, that where the colledge is incorporated by the name of Masters and Fellows Collegii St. & individ. Trin. in Cantabrig. and they make a lease by the name of Collegii Trin. this is good enough, for the word Trinity, implies, and imports St. & individ. And therefore such variance was holden not material. But here in our case is a variance in substance, betwixt the name given to the hospital upon the foundation, and the name usurped in the lease. And the same will clearly appear upon my argument, viz. if the name given to this hospital upon the foundation of it, and the name usurped in the lease be not unum in sensu. (not in your private understanding as private persons, but in your judicial knowledge upon the record quod coram vobis residet, as Judges of record) then this lease is void; for although you as private persons, otherwise than by record, know, that the Hospital of Savoy, and the hospital vocat. Le Savoy, are all one hospital; you ought not upon that your private knowledge to give judgment, unless also your judicial knowledge agree with it; that is, the knowledge which is out of the records which you have before you: but if the name given upon the foundation, and the usurped name be not idem sensu in your judicial knowledge; and you cannot otherwise conceive the identity of these two hospitals, nor make any construction to imagine it but by the record, for the record is your eye of justice, and you have no other eye to look unto the cause depending before you, but the record; and to this purpose he cited the case of 7 H. 4. 108. where a man killed another in the presence of a Judge travelling on the way where the murther was, and at the next assises in the said county before the same Judge, another man is indicted of the same murder, and arraigned, and convicted by verdict; in that case, the Judge he ought not to carry himself according to his private knowledge, which he hath of the said fact, sci. to acquit the prisoner, but all that he can do is to respite judgment against the party, because of the Judges knowing to the contrary, and to make further relation thereof to the King for his pardon of grace for the party. So in our case, it may be that you in your private knowledge know, that the Hospital de le Savoy, and the hospital vocat. Le Savoy, is all one, but that doth not appear unto you upon the record which is before you, but it may be for any thing that appears in the record, that they are diverse and several hospitals; therefore the lease is void. To prove my minor, I do say that this word (de) as here, de Savoy, designes a place, so as by this word (de) the place is become parcel of the name, but this word vocat. locum non denotat, but only the very name, and so here is a material difference and variance, for here by pretence of the name in this lease, there is not any place of the corporation in the name, but the corporation is transitory, which cannot be, for a corporation especial consisting of many persons, as corpus aggregatum ought to have a certain place of their abiding, or otherwise it cannot be discerned by the law, and it is but a mathematical thing, and nothing else but a fiction, and they cannot be otherwise considered in law, but as they are circumscripti within the bounds of their house, and they cannot appear but by attorney: and if a prebend consist upon a manor, & afterwards the manor by writ be demanded against the prebend, and he lose it, here he hath lost his name, because he hath lost that which giveth to him his name, by contrary by Blake, for his estate and place in the chapter, doth remain unto him: and secondly, for another cause here is a material variance, for this word (de) supposeth a place before the foundation, as the place upon which the hospital was erected was called Le Savoy before the erection of it; but these words (vocat. le Savoy) supposeth the same name Savoy was imposed upon the foundation. Thirdly, these words (de Le Savoy) do import the **[162]** hospital to be part of the place, which before the foundation, was called Savoy, but vocat. trencheth only to all the place called Savoy: fourthly, (de le Savoy) is matter of certainty and verity; (vocat.) but matter of reputation. And so for these four reasons, great difference in substance appeareth betwixt the very name of the hospital, and the name usurped in the lease. And he cited the case 29 Eliz. in the Kings Bench betwixt Hall and Wingat. King E. 4. did incorporate the Dean and Cannous of Windsor, by the name of Dean and Cannons of the King and Queens Free Chappel of Saint George the Martyr within his castle of Windsor; and made a lease by another name, viz. by the name of Dean and Cannons of the King and Queens Free Chappel there, and the same lease was made in the time of Queen Mary, and it was

holden that the same was a variance in substance. And he cited another case 30 Eliz. in the Kings Bench betwixt Fisher and Boys. A colledge in Oxford was by Act of Parliament incorporated by the name of Warden and Scholars, Domus sive Collegii Scholarium de Merton in universitate Oxoniæ, and they make a lease by the name Custus Domus sive Collegii de Merton in Oxonia, and Scholares ejusdum Domus, and the variance in that point, because in the very name of the foundation, Domus sive Collegii Scholarium de Merton, and in the usurped name in the lease Domus sive Collegii de Merton, was holden material, and the true name was de Merton, in universitate Oxoniæ, but in the lease, in Oxonia only, leaving out the word university, and the same was holden a variance in substance: for Oxford doth contain in it self the university, which is a thing of it self, and also the city is a thing by it self: and it may be that there is a colledge in the city called Merton Colledge, and also a colledge which is called by such name in the university: and so in our case, it may be that there is an hospital which is called the Savoy, and also another which is Le Savoy, and then the Court shall be enveigled, &c. And in the end of the argument, the Lord Treasurer, which was the Lord Burleigh, put this case, which was adjudged in his time. The Guild of Boston in Lincolnshire, was incorporated by the name of the Guild of St. Nicholas, and our Lady the Virgin Mary, &c. and they made a lease for years by the name of the Guild of our Lady the Virgin, and St. Nicholas, Religione quadam motus ut nomen Virginis Mariæ, in charta dimissionis, proponeretur nomini Sancti Nicholai; and it was adjudged a void lease for the variance aforesaid. And afterwards at another day, the matter was argued by Atkinson, on the part of the defendant. Starkey 21 E. 4. 56. saith, that the name of the corporation, by which it is incorporated, is as properly the name of a corporation, as the name of baptism is the name of a single and individual person, and yet there is a great difference in the misprision of them, for the name of baptism doth consist of one word, and therefore it cannot admit of any variance, but the name of a corporation doth consist of many words: in which case variance in words which are supplyed by other words, and not in matter of substance, shall not hurt; and that hearing is notably discussed in the case of the Cooks of London, cited before by Godfrey. Four things are to be considered in the name of a corporation, which are of the essence and substance of it: first, the persons incorporated, of which the corporation doth consist, as here the Master and Chaplains de Savoy: secondly, the quality of the corporation, as dean and chapter, mayor and commonalty: thirdly, the patron or founder, as, Merton Colledge; fourthly, the place whereupon the corporation is founded. As to this last point, see 31 E. 3. 28. and fo. 15 by Knivet; and see 6 Eliz. Dyer. King H. 8. erected the Dean and Prebend of Chester, by these words, scil. Decanus et Capit. Cathedralis Ecclesiæ Christi, et Sanctæ Mariæ Virginis Cestriæ. And afterwards by letters patents, gave to the said dean and chapter, certain manors, Decano et Capitulo Ecclesiæ Cathedralis Christi et Sanctæ Mariæ Virginis, by us before erected, and **[163]** that grant was holden void, because that the place where, &c. is not expressed in the said letters patents, for Cestria is the local place of the incorporation. And as to the objection made upon the word (de) that this word (de) goeth only to part, and (vocat.) goes to the whole, and so here is a great difference; the same is not any reason, for this word (de) extends as well to the whole as to part. As a rent granted percipiend. de manerio de D. the same shall go to the whole mannor, 5 E. 4, 5. ad respondendum I. Abbati Monasterii Sanctæ Mariæ Ebor. where the obligation was, Abbati Monasterii Sanctæ Mariæ Virginis extra Muros Ebor. and yet the writ was well enough, notwithstanding such variance, a fortiori, in the case of a conveyance and interest. And I conceive that it appeareth in the record, that the lease given in evidence of the part of the defendant, is a lease made by the master and chaplains of the Hospital of the Savoy, for it is found by verdict, that King Henry the eighth, upon the site of the manour of Savoy, betwixt the house of the Bishop of Worcester, and the house of the Bishop of Carlisle, and that it was incorporated by the name, &c. and that afterwards Q. Mary by her letters patents, reciting the foundation of the said hospital called the Savoy, and lamenting the ruin of it, being surrendred in the time of E. 6. did restore it, by which it appeareth, that the Hospital of the Savoy, and hospital called the Savoy is one and the same in respect of the bounds, foundation, and situation. And in the whole course of our books, no case can be found, that any

corporations have avoided their own acts, by such cause of misnosmer, nor of such matter, is any question moved in our books. And as to that which hath been objected, that although the Judges in their private knowledge well know, that the house de le Savoy, and the house vocat. the Savoy, be all one, yet they ought not to judge according to such their private knowledge, but according to their judicial knowledge, which they have out of the record. I conceive, that the Judges of necessity ought to use in such cases their private knowledge; as where misnosmer of a colledge was objected, viz. Trinity Colledge in Cambridge, where it was incorporated by the name of Masters, Fellows, and Scholars Collegii Sanctæ & individuæ Trin. and they made a lease by the name of Master, Fellows, and Scholars of the Colledge of Trinity, the same was holden a good lease, for the Judges knew well enough, that this word Trinity doth imply in it self sancta & individua, but by what knowledge? not by their judicial knowledge, but by their private knowledge; so in our case. Egerton the Queens Sollicitor to the contrary: It is a clear and plain rule in our law, that the name of a corporation is as a name of baptism to a natural man, and if there be any difference, I conceive, that the law requires more strict certainty in the name of a corporation than in the name of any particular person, for a name is more necessary to a corporation than to another, for when an infant is born, he is presently a perfect creature, before any name given him, and the giving of the name is not a matter of necessity, but of policy for distinction, &c. but in the case of a corporation, the name is the substance and essence of it, and it is not a body before a name be imposed upon it, and therefore in the charters of corporations there is always such a clause, per tale nomen implacitare, & implacitari, acquirere, &c. possint, and without their name, they are but a trunk: but contrary in the case of particular persons; land is given primogenito filio J. S. It is a good gift, although there be no name of baptism: lands given omnibus filiis J. S. is a good name of purchase, and if a man be bound in an obligation by a wrong or false name, and in an action brought upon the same, if it appeareth upon evidence, that he was the same person which sealed and delivered it, the same is sufficient, and the bond shall bind him. But contrary in the case of a corporation, and we cannot give any thing to a corporation by circumstances, inducing or imply-**[164]**-ing their true name. As land given to the first hospital which the Queen shall found, although that it sufficiently appear, that such a one was the hospital which the Queen first founded, yet the gift is void: and he denied, that the four things remembred before are necessarily required in the name of a corporation: for if the Queen will found a corporation, as an hospital by the name of Utopia, the same is well enough without any respect of persons, place, founder, &c. set forth in the charter. And also other things besides the said four things are sometimes necessary in a corporation; as if the Queen will found an hospital by the name, quod fundavimus ad roga. Christ. Hatton Cancel. Angliæ. all the same ought to be expressed in every grant made by, or to the said hospital; so quod fundavimus ad relevandum pauperes; and sometimes the number of the persons incorporated, if it be in the charter, it ought to be used in all acts made by or to them; as master and six chaplains; so as the said four things recited before, are not so necessary in the name of a corporation, but so far forth as they are parcel of the name given to them in the charter of the corporation: and in our case, 1. The place de le Savoy, is part of their name, set down in the charter of their corporation, and therefore the same ought to be precisely followed. And he relyed much upon the argument of Cook in noting material variances betwixt de le Savoy, and vocat. Le Savoy, as (de) signifies part (vocat.) the whole; (de) signifies the place de facto, vocat. implyes reputation only. There is a place near unto Whitehal called Scotland, because that the Kings of Scotland, when they came to our Parliament used there to reside, as the Lord Treasurer affirmed. There is also a place in England called Normandy, and another called Callais, and also a place here in Westminster called Jerusalem, but these, Scotland, &c. but by reputation, so as what difference is betwixt the very Scotland and Scotland here, &c. such and so much difference is there betwixt the Hospital de le Savoy, and the hospital vocat. the Savoy. And as to that which hath been objected by Atkinson, that that word (de) signifies as well the whole as part, as a rent granted percipiend. de manerio de D. I confess that this word (de) hath many significations, so that we ought not only to consider what (de) signifyes of it self, but rather to observe

what goes before, what follows; for, as saith Hillary, intelligentia verborum ex causa dicendi sumenda est. And this word (de) is a material word in the name of a man, therefore also in the name of a corporation, 26 H. 6. 31. Assise by I. de S. and it was found for him, and afterwards the tenant in the assise brought attaint, and in the rehersal of the assise in the writ of attaint he was named I. S. leaving out (de) and for that cause the writ did abate, 28 E. 3. 92. Debt brought by the executor of John Holbech, where the testament was John de Holbech, and for want of this word (de) in the writ, it was abated by award. And in a præcipe quod reddat against Mich. de Triage, he cast a protection for Michael Triage, leaving out (de) and for such variance the protection was disallowed, and a petit cape awarded. And although the Judges in their private knowledge know well enough, that the Hospital de le Savoy, and the hospital vocat. the Savoy, be all one, yet in point of judgment they ought not otherwise receive information, but out of the record, and therefore, if sufficient matter be not within the record to inform the Judges of the identity of the said two hospitals, their private knowledge shall not avail. And he cited the cause of the Lord Conniers, where the parties being at issue, and the jury charged for the trial of it; it was found by special verdict, that a fine was levyed of the lands in question, &c. but nothing found of the proclamations, whereas in truth, the proclamations were as well given in evidence as the fine, but found, quod finis levatus fuit prout per recordum finis ipsius, in evidenciis ostensum, plenius apparet, now in that case, although that the justices, knew well enough, that the proclamations were expressly given in evidence, yet be-**[165]**cause it did not appear unto them as Judges out of the record, they would not give judgment, according to the truth of matter, but according to the record, for they cannot take notice if the proclamations be in the chirographers office or not: but after it appeared unto them, that that defect was but a slip of the clerk, they commanded the record to be brought before them, and the proclamation to be inserted in the verdict; and then gave judgment according to the verdict reformed as aforesaid. And as to the case of Martin Colledge cited before, he said he was of councel in it, and he knew, that the judgment there was not given for the cause alledged by Cook, but because that this word, scholars, was left out in the lease. And he held, that if in the principal case, the lease had been, that the master and chaplains of the house called the Hospital of the Savoy, &c. it had been well enough, for there is, de le Savoy. See a good case 36 H. 6. fitz. brief. 485. by Danby a corporation cannot be tenants of lands, but according to their corporation, and their foundation, and their very name, nor they cannot be impleaded, nor take lands by a wrong name, nor purchase, nor dispose of their possessions, but by their true name. And afterwards the matter was compounded by the mediation of friends: and Fanshaw had the lease for a certain sum of mony. See now Cook 10 Report, the case of the Mayor and Burgesses of Lyn Regis: see also Cook 11 Report. 18. Doctor Arays case, to this purpose.

10 Co. 123. Post. 162, 164. Ante. 161, 162.

MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS.

CCXXIX. HUSON AND WEBBS CASE.

Debt lieth not against Executor of an Administrator.

Robert Huson brought an action of debt against Anne Webb, administratrix of Joan Webb, and declared of a contract without specialty, the defendant pleaded, that she had fully administred, and it was found against her. And now it was moved for the defendant, that upon the matter an action of debt doth not lye against the executor or administratrix; which was granted by the Court. But the doubt was, if now, forasmuch as the defendant by pleading the plea above, hath admitted the action, she shall now take advantage of the law in that point. For the reason why this action doth not lye against an executor or administrator is, because the testator himself might have waged his law, if he had been impleaded upon it; and by intendment of law the executor or administrator cannot have notice of such a debt, or of the discharge of it; but now by answering to the declaration as above, the defendant

hath taken notice of the debt, and in manner confessed it. And by Rhodes and Anderson, judgment shall be given against the plaintiff, because it is apparent to the Court, that the action doth not lye. And by Anderson, if judgment be entred against the administratrix, in such an action upon nihil dicit, the Court, ex officio shall give judgment against the plaintiff. Periam and Windham doubted at the first that the defendant by her plea had admitted the whole matter upon the specially administred, pleaded, and had taken notice of the debt, 41 E. 3. 13. 46 E. 3. 10, 11. 13 E. 4. 25. 13 H. 8. Fitz. Execut. 21. And afterwards Anderson, ex assensu of the other Judges, caused to be entred, querens capiat nihil per breve.

1 Cro. 121. Yel. 20. 9 Co. 87.

[166] MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS. INTRAT. MICH. 29 & 30 ELIZ.

CCXXX. HAMBLEDEN AND HAMBLEDENS CASE.

Devises.

The case was, William Hambleden the father of the plaintiff, and the defendant, was seised of the lands, &c. And by his will devised to his eldest son, Black Acre; to his second son, White Acre; and to his third Green Acre, in tail. And by his said will further willed, that in case any of my said sons do dye without issue, that then the survivor be each others heir, the eldest son dieth without issue, &c. It was moved by Gawdy Serjeant, that the second son shall have Black Acre in tail, and he cited the case 30 E. 3. 28. *propinquioribus hæredibus de sanguine puerorum*, for the construction of such devises. Walmesley argued, that both the surviving brothers should have the said Black Acre, for the words of the devise are quilibet supervivens, which amounts to uterque; and the Court was in great doubt of this point. And they conceived, that the estate limited in remainder to the survivor, &c. is a fee-simple by reason of the words, each others heir; and also they conceived, that both the survivors should not have the land, for the same is contrary to the express words of the devise, the survivor shall be each others heir, in the singular number; see 7 E. 6. Br. Devise 38. A man seised of land hath issue three sons, and deviseth part of his lands to his second son in tail, and the residue to his third son in tail: and willeth, that none of them shall sell the land, but that each shall be heir to the other, the second son dieth without issue, the same land shall not revert to the eldest son, but shall remain to the third son, notwithstanding the words each shall be heir to the other.

1 Cro. 163. 1 And. 381. Hob. 75. 3 Len. 262.

MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS.

CCXXXI. SLYWRIGHT AND PAGES CASE.

[S. C. Goldsb. 101. See *Kennedy* v. *Lyell*, 1885, 15 Q. B. D. 495.]

Maintenance.

An information was in the Common Pleas, by John Slywright against Page, upon the statute of 32 H. 8. of Maintentance; and declared that the defendant took a lease of one Joan Wade, of certain lands, whereas the said Joan was not seised nor possessed thereof according to the statute; and upon not guilty, the jury found this special matter, that Edmund Wade was seised, and made a feoffment in fee thereof unto the use of himself, and of the said Joan, who he then intended to marry, and the heirs of the said Edmund. The marriage took effect, Edmund enfeoffed a stranger, who entred, Edmund died, Joan not having had possession of the said land after the death of Ed. her husband nor being now in possession, by indenture demised the said land

to the defendant for years, without any entry or delivery of the indenture upon the land, the said defendant knowing the said Joan never had been in possession of the said land, and also the defendant being brother of the half blood of the said Joan. The first question was, if the lease being made by one out of possession, and not sealed or delivered upon the land, and so not good in law as to pass any interest, be within the statute aforesaid. And the whole Court was clear of opinion that it was: for by colour of this pretended lease, such might be undertaken & advanced to the trouble & disquiet of the possession, for amongst the vulgar people, it is a lease, & it is a lease by reputation: another matter was moved, because that the entry of the wife is now made lawful by 32 H. 8. and then she might well dispose of the land.

[167] But as to that, it was said by the whole Court, that the meaning of the statute was to repress the practises of many, that when they thought they had title or right unto any land, they for the furtherance of their pretended right conveyed their interest in some part thereof to great persons, and with their countenance did oppress the possessors: and although here the lease was made by the said Joan to her brother of the half blood, yet by the clear opinion of the Court the lease is within the danger of the statute, and yet in some case the son may maintain his father, & the kinsman his kinsman. And note in this case it was holden by the justices, that of necessity it ought to be found by verdict, that the defendant knowing that the lessor never had been in possession. And judgment was given for the plaintiff.

More. 266. 1 And. 201. Golds. 101, 102.

MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS.

CCXXXII. BROKESBY AGAINST WICKHAM AND THE BISHOP OF LINCOLN.

Quare Impedit.

In a quare impedit, the plaintiff counted, that Robert Brokesby was seise of the advowson, and granted the next avoidance to the plaintiff, and Humphrey Brokesby, and that afterwards the church became void, and after during the avoidance, Humphrey released to the plaintiff, and so it belongs to him to present. And upon this count the defendant did demur in law. For it appeareth upon the plaintiffs own shewing, that Humphrey ought to have joined with the plaintiff in the action, for the release being made after the church became void, is not of any effect, but utterly void. So is the grant of the presentment to the church where the church is void, for it is a thing in action. See the Lord Dyer, 28 H. 6. 26. 3 Ma. Dyer 129. 11 Eliz. Dyer 283. Walmsley Serjeant put this case, Two joint-tenants of a rent, the one may release to the other, but if the rent be behind, now the one cannot release his interest in the arrearages to the other. And afterwards in the principal case judgment was given that the release was void.

3 Len. 256. 1 Cro. 173. Owen 85, 86. Popham. 189.

MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS. INTR. TRIN. 29 ELIZ. ROT. 721.

CCXXXIII. SAMMES AND PAYNES CASE.

Tenant by the Curtesie.

In an ejectione firmæ the case was, That the mother being seised of certain lands, had issue two daughters, and by indenture covenanted with diverse persons to stand seised to the use of Eliz. her eldest daughter in tail, upon condition that the said Eliz. should pay to her other daughter within a year after the death of the mother, or within a year after the said other daughter should come to the age of eighteen years, 300l. And if the said E. should fail in the payment of the sum aforesaid, or should dye without issue before such payment, then to the use of the said second daughter in tail, the mother dieth, E. taketh husband, hath issue, & afterwards dieth without

issue before the day of payment. And if the husband shall be tenant by the curtesie or not, was the question, and by the Court cleerly, he shall be, for as to the condition of payment of the said sum, the same is not determined; for she died without issue before the day of payment, scil. before the second daughter came of the age of eighteen years; & as to that there is no condition broken; & as to the point of dying without issue, the same is not a condition **[168]** but rather a limitation of the estate, and the same is no more than what the law saith, and the estate tail in Elizabeth is spent and determined by the dying without issue; and doth not cease, or is cut off by any limitation; and afterwards judgment was given for the tenant by the curtesie. And by Anderson, if a feoffment be made to the use of I. S. and his heirs, until I. D. hath done such a thing, and then unto the use of I. D. and his heirs, the thing is done, and I. S. dieth, his wife shall be endowed.

1 And. 184. Goldsb. 81. 82. 8 Co. 34.

MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS.

CCXXXIV. BOWRY AND POPES CASE.

[See *Angus* v. *Dalton*, 1877-81, 3 Q. B. D. 89; 6 App. Cas. 740.]

Nusance.

Bowry brought an action upon the case against Pope, and declared, that in the time of E. 6. the Dean and Chapter of Westminster, leased two houses in Saint Martins in London to Mason for sixty years, the which Mason, leased one of the said houses to one A. and covenanted by the indenture of lease with the said A. that it should be lawful for the said A. his executors, and assigns to make a window in the shop of the house so to him assigned, and afterwards in the time of Queen Mary, a window was made accordingly, where no window was there before. And afterwards A. assigned the said house to the plaintiff. And now Pope having a house adjoining, had erected a new building super solum ipsius Pope ex opposito the said new window, so as the new window is thereby stopped. The defendant pleaded, not guilty, and it was found for the plaintiff; and it was moved for the defendant in arrest of judgment, that here upon the declaration appeareth no cause of action, for the window, in the stopping of which the wrong is assigned, appears upon the plaintiffs own shewing to be of late erected, scil. in the time of Queen Mary, the stopping of which by any act upon my own land, was holden lawful and justifiable by the whole Court. But if it were an antient window time out of memory, &c. there the light or benefit of it ought not to be impaired by any act whatsoever; and such was the opinion of the whole Court. But if the case had been, that the house & soil upon which Pope had erected the said building, had been under the estate of Mason, who covenanted as abovesaid, then Pope could not have justified the nusance, which was granted by the whole Court.

1 Roll. 676. Plow. Queries vers. finem.

MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS. INTRAT. MICH. 29 & 30 ELIZ. ROT. 1737.

CCXXXV. LEE AND MADDOXES CASE.

Covenant. Countermand. Request.

William Lee brought a writ of covenant against Richard Maddox, & Isabel his wife, and declared, that one Errington the first husband of the said Isabel was endebted to the plaintiff in 20l. and that one Georgy Ashley was also endebted to the said Errington, in the like sum of 20l. And also that the said Errington made and constituted the said Isabel his executrix, and died, and afterwards the said Isabel by indenture dum ipsa sola fuit, reciting that whereas her said late husband was endebted

to the plaintiff in the sum aforesaid, and whereas the said George Ashley was also endebted unto her said late husband in the like sum, now for the better satisfaction of the plaintiff for his said debt, she appointed and constituted the plaintiff, atturnatum suum irrevocabilem ad petendum, levandum, recuperand. & recipiend. ad usum suum proprium in nomine dict. Isabellæ de dicto Georgio, the said twenty pounds; and the said Isabel covenanted, quod ipsa ad requis. dict. quer. de tempore in tempus, adjuvaret, & manu teneret quamlibet & omnes sectam & [169] sectas quam vel quas dictus querens commensaret & prosequeretur in nomine dictæ Isabellæ, against the said George, to the use of the plaintiff non existendo non-suit voluntarie, or making any discontinuance, release, revocations, Anglice, countermand, without the assent of the plaintiff: and declared further, that the plaintiff had brought a suit against the said George for the said debt, and shewed all in certain. And that the said Isabel, depending the said suit, had taken to husband the defendant without the assent of the plaintiff: and if by this marriage the said suit be countermanded was the question. And first it seemed to the Court that the declaration was insufficient, because there is not any request surmised in the declaration, for the words of the covenant are, quod ipsa ad requisitionem, &c. So as it seemed to the justices, that the plaintiff ought to have notified to Isabel that he had commenced such suit, otherwise the action will not lye. And also the Court was of opinion, that here is not any countermand, for by the taking of the husband the writ is not abated, but only abateable; and therefore the plaintiff ought to have shewed, that by the taking of the husband, the writ by judgment was abated, otherwise it is not any countermand, and then no cause of action.

1 Roll. 781.

MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS.

CCXXXVI. SALWAY AND LUSONS CASE.

Writ of Right. Abatement of a Writ. Visne.

Matthew Salway brought a writ of right against Luson, and the writ was, messuag. & 200. acr. jampnor. & brueræ. And exception was taken to the writ, because jampnor. & brueræ, are counted together, where they ought to be distinguished severally, as so many acr. jampnor. and so many acr. bruer. although it were objected on the part of the demandant in the maintenance of the writ, that in the register the writ of right is reditu unius libræ of cloves and mace together, without distinction or severance. And it was said, that in a writ of right we ought to follow the register, and therefore a writ of right was abated, because this word (pomarium) was put in the writ, for in the register there is no such writ, because the word gardinum comprehends it: but in other writs as writs of entry, &c. it is otherwise. See the case of the Lord Zouch, 11 Eliz. 353, in a writ of entre sur disseisin mille acr. jampnor. & bruer. But this exception was not allowed, for it may be that jampnor. & bruer. are so promiscuous that they cannot be distinguished: vide 16 H. 7. 8. 9. The respect the justices had to the register, was such, as they changed their opinions and conformed the same to the register. Another exception was taken to the writ, because thereby the demandant doth demand duas partes custodiæ del Hay in the forrest of C. And the Court was of opinion that the writ ought to be officium custodiæ duarum partium de Hay, &c. and not duas partes custodiæ, as advocationem duarum partium ecclesiæ, and not duas partes ecclesiæ. Another exception, because the writ was, duas partes, &c. in tribus dividend. where it should be diviz. for dividend. is not in any writ, but only in a writ of partition; and by Windham the parts of this office are divided in right, which the Court granted. Another exception was taken, because that in the writ it is not set down in what town the forrest of C. is, so as the Court doth not know from whence the visne should come: for no venire shall be de vicineto forestæ, as de vicineto hundredi, & manerii; and the same was holden to be a material exception. Another exception was taken, because a writ of right doth not lye of an office: for at the common law an assise did not lye of it, but now [170]

it doth by the statute of West. 2. cap. 25. for it was not liberum ten, but the party grieved was put to his quod permittat: and of this opinion was the whole Court.
2 Len. 36. 1 Cro. 200.

MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS.

CCXXXVII. SMITH AND LANES CASE.

Copyholder determined by Acceptance of a Lease. Bargain and Sale, and Consideration of it.

The Queen was seised of a manor whereof Bl. acr. was holden by copy in fee; the Queen leased Bl. acr. to B. for one and twenty years, who assigned the same to the copyholder, who accepted of it. The Queen granted Bl. acr. to C. in fee, the term expired, C. entred, and his entry was holden to be congeable, for by acceptance of the sam term, the customary estate was determined, as if the copyholder had accepted it immediatly from the Queen: it was also holden by the Court, that a lease for years under the Seal of the Exchequer may be pleaded, and that without making mention of the commission, by which the Court of Exchequer is authorized to make such leases: and so are all the presidents as well in this Court as in the Court of Exchequer. And whereas the Court was upon the point of giving their judgment, it was objected by Shuttleworth Serjeant, that here is pleaded a bargain and sale of land, without, saying pro quadam pecuniæ summa: and he stood much upon the exception, and the Court also doubted of it, and demanded of the prothonotaries what is their form of pleading: and by Nelson Chief Prothonotary; these words pro quadam pecuniæ summa, ought to be in the pleading. Scot Prothonotary contrary. Anderson conceived it was either way good, but pro quadam pecuniæ summa is the best: and so Leonard custos brevium conceived. And the opinion of the justices was, that a bargain and sale for dives causes and considerations is not good without a sum of money. And by Windham, Bargain and sale pro quadam pecuniæ summa, although no money be paid, is good enough, for the payment or not payment is not traversable: and by Periam, If pro quadam pecuniæ summa, be not in the indenture of bargain and sale, yet the payment thereof is averrable. And for this exception the judgment was stayed.
2 Co. 16, 17. 1 Co. Mildmays case.

MICH. 30 & 31 ELIZ. IN THE EXCHEQUER CHAMBER.

CCXXXVIII. BEDEL AND MOORES CASE.

Action upon the Case for not performing an Award. Error. Damages.

Bedel brought an action upon the case against Moore in the Kings-Bench, and declared, that the defendant did assume to perform the award of J. S. and assumed also, that he would not sue execution upon a judgment which he had obtained against the plaintiff in an action of account, &c. And shewed further, that the award was made, &c. (which award in law was utterly void) and that the defendant had not performed the said award, and also that he had sued execution against the plaintiff. The defendant pleaded non-assumpsit, and it was found for the plaintiff, and judgment given accordingly. Upon which Moore brought a writ of error in the Exchequer-Chamber, upon the statute of 27 Eliz. and assigned error, because the plaintiff had declared upon two breaches, whereas for one of them there was not any cause of action, for the award is void in law, & then no breach could be assigned in that; and then when the jury hath assessed damages intirement for both breaches, whereas for one there was not any cause of action by the law, the verdict was void, & then the judgment given upon it reversable; for it is not reason that the plaintiff have damages for such matter for which the law doth not give an action.

[171] And if the jury had assessed damages severally, viz. for the not performance

of the award so much, and for the suing forth execution so much, then the judgment had been good, and the damages assessed for the not performance, &c. void. Manwood Chief Baron: The verdict is well enough, for here the whole assumpsit is put in issue, and there is but one issue upon the whole assumpsit, but if several issues had been joined upon these several points of the assumpsit, and both had been found for the plaintiff, and damages assessed entirely for both breaches, then was the judgment reversable, for being several issues the jury might have assessed the damages severally, scil. for each issue several damages, but here is but one issue, and it was the folly of the defendant that he would not demur in law upon the declaration for one part, scil. the not performance of the award, and traverse the other part, scil. the suing of the execution, or the assumpsit of it. And in our case, it may be that the jury did assess the damages for the suing of the execution without any regard had to the performance of the award: and note that the verdict for assessing of the damages was in these terms, scil. et assidunt damna occasione non performationis assumpsionis prædict. &c. And Cook who was of councel in this case, put this case. The late Earl of Lincoln, Admiral of England, brought his action of scandalis magnatum, and declared, that the defendant exhibited in the Star-Chamber against him a bill of complaint, containing diverse great and infamous slanders: viz. that the said earl was a great and outragious oppressour; and used outragious oppression, and violence against the defendant, and all the country also. The defendant pleaded, not guilty, and found for the plaintiff, and assessed damages, and it was moved in stay of judgment, first, that the plaintiff had declared upon matter of slander for part, for which an action lyeth, and for part not. For the oppression supposed to be made to himself, no action lieth, because every subject may complain for wrong done unto him, and although he cannot prove the wrong, an action will not lye. But as for the oppression done to others by the supposal of the bill an action lieth, for what is that to him, he hath not to do with it, for he is not pars gravata. But because the jury assessed damages entirement, the judgment was arrested, for the cause aforesaid. And afterwards in the principal case, the last day of this term, judgment was staied.

10 Co. 131. 5 Co. 108.

HILL. 31 ELIZ. IN THE KINGS BENCH.

CCXXXIX. PALMER AND THORPS CASE.

Betwixt Palmer and Thorpe, the case was this, a man demised his manour of M. for thirty-two years, and the day after let the same manour for forty years, to begin from Michaelmas, after the date of the first lease, and the tenant attorned. And by Cook the same is a good grant, although to begin at a day to come, for it is but a chattel; and so was the opinion of Wray Chief Justice, for a lease for years may expect its commencement, as a man seised of a rent in fee grants the same for twenty years from Mich. following, and good, for no estate passeth presently, but only an interest. See 28 H. 8. 26. Dyer.

1 Cro. 152.

[172] HILL. 31 ELIZ. IN THE KINGS BENCH. ROT. 668.

CCXL. SIR ANTHONY SHIRLEY AND ALBANYES CASE.

Assumpsit. Suspension of Rent.

In an action upon the case, upon assumpsit by Sir Anthony Shirley against Albany, the plaintiff declared, that he was seised of the manor of Whittington for the term of his life, the reversion to the Earl of Arrundel in fee, and so seised, surrendered all his estate to the said earl, who afterwards by his deed granted a rent-charge of 40l. per annum out of the said mannor to him, and afterwards conveyed the manor to the defendant in fee. And afterwards, 27 Maii 22. Eliz. upon a communication betwixt

the plaintiff and the defendant concerning the said rent; the defendant did promise to the plaintiff, that if the plaintiff would shew unto the defendant any deed, by which it might appear that he ought to pay to the plaintiff such a rent, he would pay that which is due, and that which should be due from time to time. And further declared, that 27 April 27 Eliz. he shewed unto the defendant a deed, by which it appeared that such a rent was granted, and due; and for eighty pounds due for the two last years, he brought the action. The defendant pleaded, that after the said promise, and before the shewing of the said deed, scil. 14 Jan. 22 Eliz. the plaintiff entred into the said land, and leased the same for three years. The plaintiff replicando said, that 1 Decem. 27 Eliz. the defendant did re-enter, upon which they were at issue, and it was found for the plaintiff. It was moved by Glanvil Serjeant, that by the entry the promise was suspended, and being a personal thing once suspended, it is always extinct. Wray, The action is brought for the arrerages due the two last years, and so at the time of his re-entry the plaintiff had not cause of action, and therefore it could not be suspended. Gawdy, When the plaintiff sheweth the deed, the defendant is chargable to arrerages due before and after the promise; wherefore if the entry maketh a suspending of the rent, the suspension doth continue: but I conceive here is not any suspension, for this promise is a meer collateral thing, and so not discharged by the entry into the land, for it is not issuing out of the land. But if the plaintiff before the deed shewed had released all actions, the same had been a good bar; and I conceive that the deed was not shewed in time, for it ought to be shewn before any arrerages due after the promise, but here it is shewn five years after: but that was not denied by all the other justices. Another exception was taken, that where the promise was, that if the plaintiff shewed any deed by which it might appear, that the defendant should be charged with the said rent, and the declaration is, by which it might appear, that the plaintiff ought to have the rent, &c. so as the declaration doth not agree in the whole. See 1 Ma. 143. in Browning and Bestons case, the condition of the lease was, if the rent should be arrear, not paid by two months after the feast, &c. and the rejoynder was by the space of two months, &c. And the pleading holden insufficient, for per duos menses doth not affirm directly post duos menses, but by implication and argument: and here it was holden, that the condition was a good consideration. Another exception was taken, because the promise is layed, all the rent ad tunc debitum aut deinceps debend. It was holden, that this word (ad tunc) doth refer to the time of the shewing of the deed, and not to the promise. And as to the last exception but one, it was resolved, that the declaration, notwithstanding the same, was good enough (scil.) ostendit factum per quod apparet quod redditus prædict. solvi deberet in forma prædict. Another exception was taken, because here no breach of the promise is **[173]** alledged, for it is pleaded, that eight pounds de annuali redditu arrer. fuer. but it is not said, de redditu prædict. 8l. ergo it may be another rent, and then the promise, as to this rent, is not broken. Wray, Although the word (prædict.) be wanting, yet the declaration is well enough, and it shall be intended the rent mentioned before. See 21 H. 7. 30. b. Where (Villa West.) shall be intended Villa prædict. 19 E. 4. 1. In a quare impedit the plaintiff doth entitle himself by grant of the next avoydance cum acciderit, and doth not shew in his count that the same was the next avoydance, and yet the count was holden to be good, for so it shall be intended; so here: and he said, it is not necessary that a declaration be exactly certain in every point, but if one part of it expound the other, it is well enough: and although the identity of the rent doth not appear by the word prædict. yet it appeareth by other circumstances, as by the days of payment, &c. and no other rent can be intended. And now, this exception is after verdict, and therefore favourably to be taken: and afterwards judgment was given for the plaintiff.

1 Cro. 150. Ante 110.

HILL. 31 ELIZ. IN THE KINGS BENCH.

CCXLI. MUSTED AND HOPPERS CASE.

Assumpsit. Verdict. Consideration.

In an action upon the case, the plaintiff declared, that where he and one Atkinsal, were joyntly and severally bounden by obligation in fifty pounds, to a stranger, for the only debt of the said Atkinsal, which Atkinsal died, and the defendant married afterwards his wife, and so the goods of Atkinsal came to his hands; yet the plaintiff, the first day of May after, which was the day of payment of the money, paid five and twenty pounds for avoiding the forfeiture of the penalty. The defendant as well in consideration of the premisses, as in consideration that he might peaceably enjoy the goods of the testator promised to pay the said sum, cum inde requisitus fuer. And upon non assumpsit, the jury found the payment of the said sum, and all the precedent matter: and that the defendant in consideration præmissiorum, promised to pay the said sum if he might peaceably enjoy the goods of the said testator. It was moved in arrest of judgment, that although here the jury have found sufficient cause of action, yet if the declaration be not accordingly, the plaintiff shall not have judgment. And here the plaintiff hath declared upon two considerations, and the jury hath found but one, scil. if he peaceably enjoy the goods of the testator. Also the plaintiff declared of a simple promise, and the jury have found a conditional, si gaudere potest, &c. And so the promise set forth in the declaration, is not found in the verdict.

Gawdy was of opinion, that the first consideration is good, for the plaintiff entred into bond at the request of the defendant, and then the promise following is good: but the second consideration is void, scil. that the defendant shall enjoy the goods of the testator, &c. as if it had been that he should enjoy his own goods. And all the justices were clear of opinion, that the promise found by the jury is not the promise alledged in the declaration, and so the issue is not found for the plaintiff, and so the judgment was stayed.

1 Cro. 149.

[174] TRIN. 30 ELIZ. IN THE KINGS BENCH. ROT. 568.

CCXLII. CRECKMERE AND PATTERSONS CASE.

Devise conditional.

Upon a special verdict, the case was this, Robert Dookin was seised of certain lands in fee, and having issue two daughters, devised the same to Alice his eldest daughter, that she should pay forty pound to Ann her sister at such a day; the money is not paid, whereupon Ann entreth into the moiety of the land: and it was holden by the whole Court, that the same is a good condition, and that the entry of Ann was lawful. It hath been adjudged, that where a man devised his land to his wife, proviso, My will is, that she shall keep my house in good reparations, that the same is a good condition. Wray, A man deviseth his lands to B. paying 40l. to C. it is a good condition; for C. hath no other remedy, and a will ought to be expounded according to the intent of the devisor.

1 Cro. 146. 1 Roll. 410. 1 Inst. 236. b.

HILL. 31 ELIZ. IN THE KINGS BENCH.

CCXLIII. DOVE AND WILLIOTS AND OTHERS CASE.

In an ejectione firmæ, upon a special verdict, the case was, that W. was seised of the land, where, &c. and held the same by copy, &c. and surrendred the same unto

the use of E. for life, the remainder to Robert and A. in fee, Robert made a lease to the defendant; E. Robert, & A. surrendred the said land, scil. a third part to the use of Robert for the life of E. the remainder to the right heirs of Robert, and of another third part to the use of Robert for life, the remainder to E. the remainder to Richard, &c. and of another third part to the use of A. and his heirs. After which partition was made betwixt them, and the land where, &c. was allotted to Richard, who afterwards surrendred to the use of the plaintiff. It was holden, that judgment upon this verdict ought not to be given for the plaintiff, for the lessee of Robert had the first possession, and that lease is to begin after the death of E. who was tenant for life, and when E. and he in the reversion joyn in a surrender, thereby the estate for life in that third part is extinct in Robert, who hath the inheritance, and then his lease took effect for a third part. So that the parties here are tenants in common, betwixt whom trespass doth not lye.

1 Cro. 160. 1 Inst. 200.

Hill. 31 Eliz. In the Kings Bench.

CCXLIV. Bulleyn and Graunts Case.

Copyhold. Devise. Copyhold Estate.

Upon evidence to a jury, the case was, that Henry Bulleyn the father, was seised of the land being copyhold, and had issue three sons, Gregory, Henry, and Thomas, and afterwards surrendred to the use of the last will, and thereby devised the said land to Joan his wife for life, the remainder to the said Henry, and the heirs of his body begotten: Joan died, after admittance, Henry died without issue, and afterwards the lord granted it to Thomas and his heirs, who surrendred to the use of the defendant then his wife for life, and afterwards died without issue: Gregory eldest son of Henry Bulleyn entred, &c. Coke, When the father surrendreth to the use of his last will, thereby all passeth out of him, so as nothing accru-[175]-eth to the heir, nor can he have and demand any thing before admittance. Wray, The entry of Gregory is lawful, and admittance for him is not necessary, for if a copyholder surrendereth to the use of one for life who is admitted, and dieth, he in the reversion may enter without a new admittance. It was moved by Coke, if this estate limited to Henry be an estate tail, or a fee conditional, for if it be a fee-simple conditional, then there cannot be another estate over: but yet in case of a devise an estate may depend upon a fee-simple precedent, but not as a will, but as an executory devise. Wray, It is not a conditional estate in fee, but an estate tail. Coke, They who would prove the custom to entail copyhold land within a manor, it is not sufficient to shew copies of grants to persons and the heirs of their bodies, but they ought to shew that surrenders made by such persons have been enjoyed by reason of such matter. Wray, That is not so, for customary lands may be granted in tail, and yet no surrenders have been made within time of memory.

1 Cro. 148.

Mich. 31 Eliz. In the Kings Bench.

CCXLV. Matthew and Hassals Case.

Error.

In an ejectione firmæ, betwixt Matthew and Hassal, the plaintiff had judgment to recover, and the defendant brought a writ of error, and assigned error in this, that the judgment was entred, quod querens recuperet possessionem, &c. where it should be (terminum) vent. in ten. prædict. See 9 Eliz. Dyer 258. Coke contrary, that the judgment is good enough, for the writ of execution upon it is habere facias posses-

sionem, and in a real action the writ is, quod petens recuperet sesinam, and not terram. And afterwards judgment was affirmed.

1 Cro. 144.

HILL. 31 ELIZ. IN THE KINGS BENCH.

CCXLVI. TEMPEST AND MALLETS CASE.

In nullo est erratum.

In an action of trespass by Tempest against Mallet, judgment was given, and eror brought, and assigned for error; that whereas the action was brought against four, one of them died, meine betwixt the award of the Nisi Prius, and the inquest taken: and it was said on the part of the defendant in the writ of error which was entred upon the record, that the plaintiff shewed unto the Court the death of one of the defendants, and prayed judgment against the others. See 4 H. 7. 2 Eliz. 175. And there is a difference, where in an action of trespass there is but one defendant, and where many. Another error was assigned, the defendant obtulit se per Higgins Attornat. suum, without shewing his Christian name, as John, or William; for Higgins only without the Christian name, is not any name, for it is but an addition to shew, which John, or William. Coke. The same is helped by the statute of 32 H. 8. cap. 30. where it is enacted, that after verdict, judgment shall be given notwithstanding the lack of warrant of attorney of the party against whom the issue shall be tried, or any default or negligence of any the parties, their counsellors or attorneys; and of necessity this default here in the Christian name ought to be the fault of one of them. See also 18 Eliz. cap. 14. for want of any warrant of attorney, &c. Glanvil, The statute provides for default of warrant of attorney, &c. Then (Coke) to what end was the statute of 18 Eliz. made? for the statute of 32 H. 8. provides for defects of warrants of attorney. Glanvil, The first statutes for warrants of attorneys of such persons a-**[176]**-gainst whom the issue was tryed, but the later stat. is general. Another error was assigned, quod defendens capiatur, where the offence, & so the fine is pardoned by Parliament, and therefore the entry of the judgment ought to be, et de fine nihil, quia perdonatur. Coke, The judgment is well enough, for in every general pardon some persons are excepted; and it doth not appear if the defendant here were one of them, and then the fine is not pardoned, for the Court cannot take notice of that, as it was holden in Serjeant Harris case: but if the defendant be charged with the fine, then he ought to plead the pardon, and to shew that he was not any of the persons excepted. And afterwards at another day the defendant did alledge, that there was a warrant of attorney in the Common Pleas. And also it appeareth upon record, that the defendant did appear upon the supersedeas by attorney, who had his full name, and therefore prayed a certiorari de novo, to certifie the same matter, vide 9 E. 4. 32. Wray, A case here greatly debated betwixt the Lord Norris and Braybrook, and upon advice such a writ of certiorari was granted after the plaintiff had pleaded in nullo est erratum; for this plea, in nullo est erratum, goes but to that which is contained within the body of the record, and not unto collateral matter, scil. warrant of attorneys: and afterwards the writ of error was allowed, and upon the day of return thereof, it appeared upon the record of supersedeas, that the defendant did appear by such a one his attorney: but it was said by the Court, that there ought to be two appearances, the one upon the supersedeas, and the other when the plaintiff declares. See as to the name of the attorney, Tirrells case, 1 Mar. Dyer 93.

1 Cro. 153, 145. 1 Cro. 768. 778. 3 Cro. 22.

HILL. 31. ELIZ. IN THE KINGS BENCH.

CCXLVII. PALMER AND KNOWLLIS CASE.

Execution. Capias after Elegit.

Palmer recovered debt against Knowllis, and sued execution by elegit, upon which the sheriff returned, that he had made execution of the lands of the defendant by the

oath of twelve men, but he could not deliver it to the party, for it is extended to another upon a statute, upon which the plaintiff sued a capias ad satisfaciendum. And now came the defendant by his counsel, and moved that after elegit returned, the plaintiff could not resort to the execution by capias, and therefore prayed a supersedeas, because the capias erronice emanavit. But the whole Court was clear to the contrary; for upon nihil returned upon elegit, the plaintiff shall have a capias, 17 E. 4. 5. See 21 H. 7. 19. A man shall have a capias after a fieri facias, or elegit, 34 H. 6. 20. and here the special return doth amount to as much, as if the sheriff had returned nihil: also the statute of West. 2. which giveth the elegit, is not in the negative, and therefore it shall not take away the execution which was at the common law. And here is no execution returned, for after the former extent ended, he ought to have a new elegit; which Wray granted: and afterwards the said Knowllis was taken by force of the capias satisfaciend. and came into Court in the custody of the sheriff, and the case was opened, and in the whole appeared to be worthy of favour; but by the law he could not be helped, and although he instantly prayed a supersedeas, yet the same was denied unto him.

1 Cro. 160.

[177] HILL. 31 ELIZ. IN THE COMMON PLEAS.

CCXLVIII. THE CHURCH-WARDENS OF FETHERSTONES CASE.

Church-wardens.

An action of trespass was brought by the church-wardens of Fetherstone in the county of Norfolk, and declared, that the defendant took out of the said church a bell, and declared, that the trespass was done 20 Eliz. And it was found for the plaintiffs. And now it was moved by Godfrey in arrest of judgment, that it is apparent upon the declaration, that the trespass was done in the time of their predecessors, of which the successor cannot have action; and actio personalis moritur cum persona. See 19 H. 6. 66. But the old church-wardens shall have the action. Cook contrary, And that the present church-wardens shall have the action, and that in respect of their office, which the Court granted. And by Gawdy, Church-wardens are a corporation by the common law. See 12 H. 7. 28. by Frowick, That the new church-wardens shall not have an action upon such a trespass done to their predecessors, contrary by Yaxley. See by Newton and Paston, That the executors of the guardian in whose time the trespass was done, shall have trespass.

1 Cro. 145. 179.

PASCH. 31. ELIZ. IN THE KINGS BENCH.

CCXLIX. HAUXWOOD AND HUSBANDS CASE.

Prescription.

In an action upon the case, the plaintiff declared for disturbing of him to use his common, &c. and shewed, that A. was seised of certain lands, to which this common was appendant, for the term of his life, the remainder to B. in tail, and that the said A. and B. did demise unto him the said lands for years, &c. Pepper, The declaration is not good, for it is not shewed how these particular estates did commence. See 20 E. 4. 10. By Piggot, Lessee for life and he in the remainder, cannot prescribe together; and he in the remainder cannot have common. Also he declares, that tenant for life, and he in remainder demised to him, whereas in truth it is the demise of tenant for life, and the confirmation of him in the remainder; also he doth not aver the life of tenant for life. Popham, He needs not to shew the commencement of the particular estates, for we are a stranger to them, the prescription in them both is well enough, for all is but one estate, and the lease of both. See 27 H. 8. 13. The lessee for life, and he in the reversion made a lease for life, and joyned in an action of wast, and

there needs no averment of the life of the tenant for life, for he in the reversion hath joyned; which Gawdy granted as to all. And said the particular estates are but as conveyance unto the action. Wray conceived the first exception to be material, &c.
1 Cro. 153.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCL. SWEEPER AND RANDALS CASE, ROT. 770.

Surrender.

In an action of trespass for breaking of his close, and carrying away his goods, by Sweeper against Randal, upon not guilty pleaded, the jury found, that one John Gilbert was seised of the land, where, &c. and leased the same to the plaintiff at will, who sowed the land, and afterwards the plaintiff agreed with the said Gilbert, to surrender to him the said land, and his interest in the same; and the said Gilbert entred, and leased to the defendant who took the corn. It was **[178]** moved, if these words, I agree to surrender my lands, be a present and express surrender. Gawdy, It is not any surrender, for tenant at will cannot surrender, but it is but a relinquishing of the estate, if it be any thing; but in truth it is not any thing in present, but an act to be done in future. Wray, I agree. A. demised the manor of D. at will, it is no lease, no more shall it be here any surrender, or any relinquishing of the estate. Clench conceived, that the intent of the party was, to leave his estate at the time of the speaking, otherwise those words were void, for he might leave it at any time without those words. Gawdy, If such was his intent, the jury ought to find it expressly; and afterwards judgment was given for the plaintiff.
1 Cro. 156.

TRIN. 31. ELIZ. IN THE KINGS BENCH.

CCLI. WARD AND BLUNTS CASE.

Trover and Conversion.

In an action upon the case of trover of certain loads of corn at Henden in Middlesex, and the conversion of them; the defendant pleaded, that before the conversion, he was seised of certain lands called Harminglow in the county of Stafford, and that the corn whereof &c. was there growing, and that he did sever it, by force of which he was possessed, and the same casually lost; and that the same came to the hands of the plaintiff, and the plaintiff casually lost the same, and the same came to the hands of the defendant at Henden, aforesaid, and he did convert the same to his own use, as it was lawful for him to do: upon which the plaintiff did demur in law. Atkinson, The plea is good, for the conversion is the point of the action, and the effect of it. For if a man take the same, and do not convert, he is not guilty. And here the defendant doth justifie the conversion, wherefore he cannot plead, not guilty. The general issue is to be taken where a man hath not any colour, but here the defendant hath colour, because the corn whereof, &c. was growing upon his land, which might inveigle the lay people, and therefore it is safest to plead the special matter. But admit, that it doth amount but to the general issue; yet there is not any cause of demurrer, but the plaintiff ought to shew the same to the Court, and pray that the general issue be entred; and the Court ex officio ought to do it. Egerton, the Queens solicitor, contrary, The plea in bar is not good; the plaintiff declares of a trover of his goods, ut de bonis suis propriis, and the defendant pleads, that he took his own goods, which is not any answer to the plaintiff. See 22. E. 3. 18. In trespass of taking and carrying away his trees, the defendant pleads, that they were our trees, growing in our own soil, and we cut them and carryed them away, and the plea was challenged, wherefore the defendant pleaded over, without that that he took the trees of the plaintiff. So 26 Ass. 22. and 30 E. 3. 22. Another matter was, the plea in bar is, that before the time of the conversion, the defendant

was seised of the land, and sowed it; and that after the corn was severed, (but he doth not say that he was seised at the time of the severance) and then it might be that he had severed the corn of the plaintiff, &c. and that was holden by the Court to be a material exception, wherefore judgment was given for the plaintiff: but as to the first exception, the same was disallowed, for the Court ex officio, in such case ought to cause the general issue to be entred, but the plaintiff ought not to demur upon it.

1 Cro. 146.

[179] TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCLIV. CHEINY AND LANGLEYS CASE. HILL. 31 ELIZ. ROTT. 638.

Leases. Covenant.

The case was, that tenant for life of certain lands leased the same for years by indenture, with these words; I give, grant, bargain, and sell my interest in such lands for twenty years, to have and to hold, in such manner, and form as I my self did hold the same, and no otherwise: tenant for life died within the term, and he in the reversion entred, and the lessee brought an action of covenant. Godfrey, The action doth not ly, for here is not any warranty, for the plaintiff is not lessee, but assignee, to whom this warranty in law cannot extend; but admit that the warranty doth extend to the plaintiff, yet it is now determined with the estate of the tenant for life, and so the covenant ended with the estate. See 32 H. 6. 32. by Littleton 9. Eliz. Dyer 257. And if tenant in tail make a lease for years (ut supra) and afterwards dieth without issue, the covenant is gone, and after judgment was given against the plaintiff.

1 Cro. 157.

TRIN. 31. ELIZ. IN THE KINGS BENCH.

CCLV. FISH, BROWN AND SADLERS CASE. INTRAT. MICH. 29. ELIZ. ROT. 606.

Action upon the Case. Assumpsit and Consideration. Covin.

An action upon the case was brought by Fish and Brown against Sadler, Hill. 29 Eliz. rot. 606. and they declared, that they were proprietaries of certain goods, which were in the possession of one A. against which A. Sadler one of the defendants had commenced a feigned and covenous suit in the Ecclesiastical Court in the name of one Collison, to the intent to get the said goods into his possession, of which the plaintiffs having notice, and to the intent that the said plaintiffs should suffer the defendant to recover and obtain the said goods by the said suit, the defendant did promise to the plaintiffs to render to them a true accompt of the said goods; and shewed further, that by the said suit the defend. did obtain the said goods by sufferance of the plaintiff. Tanfield, It is a good consideration, the plaintiffs were not parties or privies at the beginning of the suit, & it is not like Onlies case in 19 Eliz. Dyer 355. where in an action upon the case Onlie declared, that the defendant countess, &c. being a widow, had divers suits and businesses, and that the plaintiff at her request had bestowed great labour and travail, and had expended circa the affairs of the said countess 1500l. Whereupon she promised to the plaintiff to pay all the said expences, and such a sum above, for that matter which is the ground of the action, is maintenance, and malum prohibitum, but such matter is not here; for it is lawful for a man to use means to get his goods. Gawdy; All covins are abhorred in law, and here the plaintiffs are privies to the wrong, and therefore, it cannot be any consideration. Wray, Although that the suit at the beginning was wrongful and covenous, yet when the plaintiffs who were owners of the said goods do assent to such proceedings, now the suit is become just and lawful ab initio, and so no wrong in the consideration, but all the wrong is purged by the agreement. If any covin be, the same is between Sadler and him who is sued, to whom the plaintiffs are not privies. Clench, If this privity betwixt the plaintiffs and Sadler had been before the said suit; then the con-

sideration is without any fraud. Cooper Serjeant conceived here is not any good consideration, upon which the promise of the defendant may be [180] grounded, for the defendant hath not any benefit by it, and he cited the case between Smith and Smith 25 Eliz. Egerton, Here the consideration is good enough, for the plaintiffs forbear their own suit, which was a hinderance unto them. Clench was of opinion, that the plaintiff should not have judgment, for that suit was begun by Sadler in the name of Collison without his privity, and therefor it was unlawful, and the same was for the goods of another man, which is unlawful also, and then when the unlawful act is begun, the illegal agreement afterwards that they shall proceed is unlawful also, and therefore there cannot be any consideration: and as to the covin, it is not material, for without that the matter is illegal enough. Also the declaration is not good in this, because it is not shewed in what Court the suit did depend, so as it might appear unto us, that they had power to hold plea of it. Gawdy agreed with Clench in the first point, and also in the last; and by him, in the assumpsit, the plaintiff declares, that a suit was depending betwixt the defendant and another, and where the plaintiffs if they were produced might have given strong witness against the defendant, the said defendant in consideration that the plaintiffs would not give testimony against him, promised to give to the plaintiff 20l. the same consideration will not maintain this action; because it is unlawful for any man to suppress testimony in any cause. Wray, Here is a consideration good enough, for where Sadler should lose costs upon the first suit, now upon this promise upon his account he shall be allowed the same, the which is a benefit unto him: and as to the shewing in what Court the suit doth depend, that needs not by way of declaration, but the same shall be shewed by way of evidence, and it is not traversable, and it is but inducement to the action. And as to the covin, that is not here, for covin is always to the prejudice of a third person, but so it is not here; but in truth this suit was unlawful, for Sadler so to sue in the name of another, and therefore it cannot be a good consideration. And for that cause it was awarded, quod querens nihil capiat per billiam.

1 Cro. 337.

Trin. 31 Eliz. In the Kings Bench.

CCLIV. How and Conneys Case.

Trespass.

In an action of trespass by How against Conney, the case was, that one Smith was seised of two houses, and leased one of them to his brother for life, and afterwards by his will devised, viz. I give to my executors, all my lands and tenements free and copy, to hold to them, and they to take the profits of them for ten years, and afterwards to sell the said lands and tenements; and afterwards died, his brother died before the quarter of a year after: and it was found, that the executors entred into the house undemised, and took the profits, but not into the other, and that at the end of the said ten years, they sold the whole. Godfrey, The house only which was in possession, shall pass by the will. (To hold unto them) doth imply matter of possession, so as nothing passeth but that whereof they may take the profits, the which cannot be of a bare reversion; also by this devise, the executors have not interest in the thing devised but for ten years, whereas the brother of the testator had an estate for life, which by possibility might continue above twenty years, and to prove that, the meaning of the devisor to be collected upon the words of the will ought to direct the construction of the will, he cited Chicks case, 19 Eliz. 357 and 23 Eliz. 371. Dyer. At another day it was argued by Cook, that both the houses pass, and the words (take the profit) do not restrain the general words before, (viz. All my lands and tenements) but rather expounds them, sci. such profits that they might [181] take of a reversion, cum acciderit, for it may be that the brother shall die within ten years. And he cited the case 34 H. 6. 6. A man seised of diverse reversions upon estates for life, devises them by the name of omnium terrarum & tenementorum, which were in his own hands, and by those parols the reversion did

pass; and yet the reversion (to speak properly) was not in his hands: and if the brother had died in the life of the devisor, they had clearly passed, and then his death or life shall not alter the case. And he resembled the case to the case in 39 E. 3. 21. The King grants to the Abbot of Redding, that in time of vacation the prior and monks shall have the disposition of all the possessions of the said abbey ad sustentationem prioris & monachorum, and if in the time of vacation they shall have the advowsons, was the question, for it was said, that advowsons could not be to their sustentation: but yet by the better opinion the grant of the King did extend to advowsons, for it shall be intended such sustentation as advowsons might give. Godfrey, Our case is not like to the case of 34 H. 6. for there the devisor had not any thing in possession, and therefore if the reversion did not pass, the devise should be utterly void. Gawdy conceived that the house in possession only passed, for the devise extends to such things only, whereof the profits might be taken, but here is not any profit of a reversion. Clench, and Wray contrary, the intent of the devise was to perform the will of his father, and also of his own will; and in case the house in possession was not sufficient to perform both the wills, all shall pass, and therefore the devise by favorable construction is to be taken largely, so as the wills might be throughly performed; and also the devise is general, and further all his lands and tenements, which are not refrained by the subsequent words (to take the profits) for to have and to hold, and to have and to take the profits is all one.

1 Cro. 159. Plow. 66. Shep. 437. 3 Cro. 290.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCLV. SLUGGE AND THE BISHOP OF LANDAFFS CASE.

Prohibition. Trial.

Slugge libelled against the Bishop of Landaff in the Ecclesiastical Court, because where he was presented by the Dean and Chapter of Gloucester to the Church of Penner, the bishop did refuse to admit him, and now the bishop sued a prohibition, and shewed, quod non habetur talis rectoria cum cura animarum in eadem diocesi, sed perpetua vicaria. And by Popham a prohibition doth not lye, but the matter ought to be determined in the Ecclesiastical Court, and when he who is presented to the same church, whether it be a church or not, shall be tried in an action of trespass; and the like matter was ruled, Mich. 14 Eliz. betwixt Weston and Grendon, who was presented by the Queen, and it was holden, that because institution and admission do belong to the Ecclesiastical Court, and not to the Kings Court, that no prohibition should lye, and therefore he prayed a consultation. And note, that the defendant in the prohibition did not demur formally upon the suggestion; for the Judges use, if the suggestion be not sufficient to maintain the prohibition, to grant a consultation without any formal demurrer upon the suggestion, if the insufficiency of the suggestion be manifest; which was granted by the whole Court. Cook, That a consultation ought not to be granted, for whether there be such a rectory or not shall be tried here. So 2 H. 4. 30. Prior or not prior, 49 E. 3. 17, 18. Wife, or not wife, but never accoupled in loyal matrimony by the bishop, 44 E. 3. So within or without the parish, 50 E. 3. 20. So, 45 E. 3. Quare Impedit, 138. In a quare impedit, no such church within the county. Afterwards, at another day, Popham put the case, Slugge was presented to the vicaridge of Penner, the bishop refused to admit him, and admitted one Morgan Bletthen unto the parsonage **[182]** of Penner, at the presentment of the Lord St. John; Slugge sued the bishop for contumacy, per duplicem querelam, the bishop said, Non habetur talis vicaria, upon which matter he sued a prohibition, and he conceived, that the prohibition did not ly, for a vicar is but he that gerit vicem personæ, to supply his place in his absence, so as the same is a spiritual matter which ought not to be tried here: also the libel is, to have admission and institution, and the other matter ariseth by their plea, sci. quod rectoria de Penner est ecclesia cum cura animarum, absque hoc quod habetur talis vicaria, and so it is but an incident to the principal matter, wherefore it shall be tried there, and he prayed a consultation. Cook, We have shewed, that in the time of E. 3. one L. was seised

of the manour of Penner, to which the church of Penner is appendant; and we alledge presentments from that time, and we convey it to the Lord St. John, which now is, and they would now defeat us by this surmise, that there is no such church with cure of souls, which is triable here. Popham, The libel doth contain nothing but contumacy in the bishop, in that he hath not admitted Slugge, and the other matter comes in the replication, and afterwards by assent of the parties a consultation was granted, quoad institutionem of Slugge only, but that they should not proceed further.

Ante. 53. 54.

PASCH. 31 ELIZ. ROT. 154. IN THE KINGS BENCH.

CCLVI. FENNICK AND MITFORDS CASE.

The case was, a man seised of lands in fee, levieth a fine to the use of his wife for life, the remainder to the use of his eldest son, & the heirs males of his body, the remainder to the use of the right heirs of the conusor, the conusor makes a lease for a thousand years to B. the eldest son dieth without issue male, having issue a daughter, the conusor dieth, the wife afterwards dieth, the eldest son enters and leaseth the lands to the plaintiff. Atkinson, That upon this conveyance a reversion was left in the conusor, although by the fine all is conveyed out of the conusor; and so (as it hath been objected) the use limited to the right heirs of the conusor, is a new thing: for it is to be observed, when a man is seised of lands, he hath two things, the land, or the estate, and secondly the use which is the profits; and if he make a feoffment without consideration, by that the estate and possession passeth, but not the use, wherefore the use descends after to the son and heir. And in our case if the wife and son had died without issue in the life of the father, all should be in the father and his heirs. And if a man make a feoffment in fee, unto the use of his last will, it shall be unto the use of the feoffor and his heirs, and in our case, this limitation to the right heirs of the conusor is, as if no mention had been made of it, and then it should be to the father, and his heirs. And afterwards it was adjudged, that it was a reversion, and no remainder, and by Gawdy, this limitation, to his right heirs, is meerly void. Wray, As if he had made a feoffment to the use of one for life, without further limitation.

More 284. 2 Co. 91. Co. Inst. 22. b. Post. 88.

[183] HILL. 31 ELIZ. ROT. 723. IN THE KINGS BENCH.

CCLVII. HOLLAND AND FRANKLINS CASE.

Replevin. Averment. Relation of Records and Deeds.

In a replevin, the defendant made conusans as bailiff to Thomas Lord Howard, and shewed, how that the prioress of Holliwel was seised of the manor of Prior in her demesne as of fee, &c. and 4 Nov. 19 H. 8. by deed enrolled sold unto the Lord Audley, the said manor, who died having issue a daughter, who took to husband Thomas late Duke of Norfolk, who had issue the said Lord Howard, and that after their death the said manor descended, &c. The plaintiff in bar of the conusans shewed, that the said deed was primo deliberatum, 4 Nov. 30 H. 8. And that mean betwixt the date and the delivery, scil. 12 October, the said prioress leased the said manor to one A. for ninety nine years, and conveyed the term to the plaintiff, absque hoc, that the prioress bargained and sold the said manor to the Lord Audley, ante dimissionem prædict. dicto. A. fact. upon which there was a demurrer. Cook, This averment of another delivery than the deed doth purport against the deed enrolled, shall not be received, no more than a man may aver, that a recognizance was acknowledged at another day, &c. for every record imports a truth in it, and express averment shall not be received against it, but a man may confess and avoid; see 7 H. 7. 4. It cannot be assigned for error, that in a redisseisin, the sheriff non accessit ad tenementa, as he

hath retorned, for that is against his retorn which is recorded, and the date of the record is the principal part of it, which see 37 H. 6. 21. by all the justices, that matter of record hath always relation to the date, and not to the delivery, contrary of a deed which is not of record, for the same shall have relation always to the delivery; and see 39 H. 6. 32. by all the justices, averment against a deed enrolled that it was not delivered shall not be received; so in the case betwixt Ludford and Gretton, 19 Eliz. Plowd. 149. It is holden by all the justices, that the Kings charter hath relation to the time of the date, because that matters of record carry in them by presumtion of law for the highness of them, truth, and therefore one cannot say, that such a charter was made or delivered at another day, than at that at which it bears date; so of a recognizance, statute, &c. but against letters patents a man may say, non concessit, for perhaps nothing passeth thereby, and then it is not contrary to the record. Atkinson contrary, I confess that the party himself (whose deed it was) cannot take a direct averment against a deed enrolled, but he may confess and avoid it, so as he leave it a record, as if a fine were levyed by another in my name of my land, I am bound by it; but if the fine were levyed by another in my name I am not bound, for I may confess and avoid it, and yet leave the record good; but here the plaintiff is a stranger to his deed enrolled: and some records shall bind all persons, as certificates of bastardy, &c. for all may give evidence in such case, 2 H. 5. Estoppel 91. A. makes a feoffment in fee, and afterwards before the Coroner confesseth a felony supposed to done before the feoffment, the feoffee shall have an averment against it. Egerton the Queen's solicitor, contrary, Matter of record cannot be gainsaid in the point, or in matter of implication, and therefore against that he cannot say, non est factum, 16 E. 3. Abb. 13. A deed enrolled in pais, cannot be denyed, 24 E. 3. 64. A deed enrolled is not a record, but a thing recorded, which cannot be denyed. And here this plea is a violent averment against the deed, for it amounts to as much as if he had said, not his deed at the time of the enrollment: but I confess that such a deed may be avoided by a thing which stands with the deed by matter out of the deed. It hath been objected, that this acknowledging of the deed ought to be made by Attorney, **[184]** and therefore made in person it is not any acknowledgment, and so against such acknowledgment, non est factum may be pleaded, and a fine or confession in a writ of annuity upon prescription, or in assise shall bind the house, see 16 E. 3. Abb. 13. That a fine, recognizance, and covenant of record shall bind the house in such case. And the acknowledgment of the prioress alone will serve in this case, for the nuns are as dead persons: and posito, that a Master of the Chancery comes into the chapter-house, and receives such an acknowledgment, I conceive that it is good enough. It hath been objected, that here the plaintiff is not estopped to take the averment, because we have not pleaded our matter by way of estoppel; certainly the same needs not here, for the record itself carries the estoppel with it, and the truth appeareth by the record, and the Court ought to take hold of it. Godfrey contrary, A deed enrolled may be avoided by matter, which is not contrary to the record, as 19 R. 2. Estoppel 281. in sur cui in vita, a release of the mother of the demandant with warranty was pleaded in bar, and that enrolled, to which the demandant said, that at the time of the release supposed to be made, our mother had a husband one F. and so the deed was void, and so avoided the deed by matter dehors scil. coverture; so of enfancy, but not by a general averment: a man not lettered shall avoid a deed enrolled by such special matter; so an obligation made against the statute of 23 H. 6. and these special matters shall utterly avoid the deeds against whom they are pleaded; but in our case we do confess the deed to be good to some intent, scil. after our lease expired, for which our case is the better case. And at another day it was objected, that the deed could not be acknowledged without a letter of attorney, being a corporation, which consisted upon divers persons, as prioress and covent, and they are alwaies to be intended to be in their chapter-house, and cannot come into Court to acknowledge a deed: to which it was answered by Cook, that this acknowledgment being generally pleaded, it shall be intended, that it was done by a lawful means, and there is no doubt, but that such a corporation may levy a fine, and make a letter of attorney to acknowledge it, and see, 2 Ma. Fulmerstones case 105. It was further objected, that this deed was enrolled the same day that it beareth date, for the pleading is per factum suum gerens Datum, 2 Novemb. 29 Hen 8. et iisdem

die & anno irrotulat. And by the statute such a deed ought to be enrolled within six months next after the date, so as the day of the date is excluded, and so it is not enrolled within six months: as to that it was answered by Cook, that the time of computation doth begin presently after the delivery of the deed, as in the common cases of leases, if a man makes a lease for years to begin from the day of the date, the same is exclusive; but if it be to have and to hold from the date of the deed, it shall begin presently. And an ejectment supposed the same day is good, and then here, this enrolment is within the six months; and yet see 5 Eliz. 128. Dyer, Pophams case. It was also objected, that it is alledged in the conusans, that the manor was sold to the Lord Audley, and that the deed of bargain and sale was acknowledged and enrolled in the Chancery, the said lord being then Lord Chancellor, and he cannot take an acknowledgment of a deed, or enrolment of it to himself, for he is the sole Judge in the said Court, so as the deed is acknowledged before himself, and enrolled before himself, and that is good enough, for here we are not upon the common law, but upon the statute, and here the words of the statute are performed. And the enrolment of the deed is not the substance of the deed, but the deed it self. Also the acknowledgment of the deed, after it is enrolled is not material, for he is estopped to say that it is not acknowledged. And as to the matter it self, a man shall not have averment against **[185]** the purport of a record, but against the operation of a record, as not put in view, not comprised, partes ad finem nihil haberunt, &c. And against letters pattens of the King, non concessit, is a good plea, which see 18 Eliz. for by such plea it is agreed, that it is a record, but that nihil operatur.

Owen 138, 139. 2 Len. 121. 3 Len. 175. Co. 3. Inst. 230, 231. 3 Len. 84. 2 Inst. 674. Dyer 220. b. 1 Cro. 717.

HILL. 31 ELIZ. IN THE KINGS BENCH. ROT. 258.

CCLVIII. OSBORN AND KIRTONS CASE.

Debt. Protection.

In debt upon an obligation, the defendant cast a protection, upon which the plaintiff did demur. Tanfield, The protection is not good, for the defendant is let to bail, and so is intended always in prison, for so the record makes mention, and then the protection quia moratur in portubus Zeland is against the record, and the Court ought to give credit to records especially. Secondly, the words of the protection are, that Kirton is imployed in obsequio nostro, which is no cause of protection, for the usual form (and so is the law) that such a person be imployed in negotio regni, for the defence of England, &c. for if the King will give aid unto another princes subjects employed in such service, he shall not have protection. And afterwards variance was objected betwixt the bill and declaration, and the protection: for the bill is against John Kirton of A. gentleman, and the protection is John Kirton only: but the same was holden no such variance being only in the addition, for before the statute 1 H 5. additions were not necessary in any actions.

MICH. 30 ELIZ. ROT. 156. IN THE KINGS BENCH.

CCLIX. BOYTON AND ANDREWS CASE.

Debt.

In debt upon an obligation, the condition was, to make sufficient assurance of certain lands to the obligee before the tenth day of March 17 Eliz. And if it fortune the said obligee be unwilling to receive, or mislike such assurance, but shall make request to have one hundred pounds for satisfaction thereof, then if upon such request the obligor pay one hundred pounds within five months, that then the obligation shall be void. And at the day, the obligee doth refuse the assurance, and afterwards 27

Eliz. request is made to have the hundred pounds, it was the clear opinion of the whole Court, that the said request was well enough for the time, and he might make it at any time during his life, and he is not restrained to make it before the day in which the assurance is to be made, and afterwards judgment was given for the plaintiff.

1 Cro. 136.

MICH. 29 & 30 ELIZ. ROT. 546. IN THE KINGS BENCH.

CCLX. KNIGHT AND SAVAGES CASE.

Error.

A writ of error was brought upon a judgment given in Leicester in debt: Tanfield assigned error, because in that suit there was not any plaint, and in all inferior Courts, the plaint is as the original at the Common Law, and without that no process can issue forth. And here upon the record nothing is entred but that the defendant summonitus fuit, &c. and therefore the first entry ought to be A. B. queritur adversus, C. &c.

[186] Clench, A plaint ought to be entred before process issueth, and the summons which is entred here, is not any plaint, and for that cause the judgment was reversed: it was said, that after the defendant appeared, a plaint was entred, but it was said by the Court, that that shall not mend the matter, for there ought to be a plaint out of which the process shall issue, as in the Courts above out of the original writs.

2 Cro. 206. 2 Cro. 109, 654. Sty. 91 Yel. 164, 165. Post. 302.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCLXI. KIRBY AND ECCLES CASE.

In an action upon the case the plaintiff declared, quod cum quædam communicatio fuisset betwixt the plaintiff, and one Cowper, that Cowper should mast certain hogs for the plaintiff, the defendant did promise, that in consideration, that the plaintiff promised give unto the defendant three shillings and four pence, for the fatting of every hog, that the said hogs should be redelivered to him well fatted; to which promise and warranty, the plaintiff giving faith, delivered to the said Cowper one hundred and fifty hogs to be masted; and that one hundred of them were delivered back, but the residue were not: it was moved, that here is not any consideration for which the defendant should be charged with any promise: but it was argued, on the other side, that the promise was the cause of the contract, and being made at the time of the communication and contract, should charge the defendant; but if the promise were at another time, it should be otherwise. There was a case lately betwixt Smith and Edmunds, two merchants, being reciprocally endebted the one to the other, agreed betwixt themselves to deliver all their bills and bonds into the hands of one Smith, who promised that he would not deliver them to the parties until all accounts were ended betwixt them; and yet he did deliver them, and for that an action brought against him was adjudged maintainable: yet there was not any consideration, nor was it material, for the action is grounded upon the deceit, and so is it here, upon the warranty: and of that opinion were Clench and Wray, Justices; but Gawdy was of a contrary opinion.

1 Cro. 137.

HILL. 30 ELIZ. ROT. 699. IN THE KINGS BENCH.

CCLXII. WOODSHAW AND FULMERSTONES CASE.

Obligation.

Woodshaw, executor of Heywood, brought debt upon a bond against Richard Fulmerstone, and the writ was dated October Mich. 29 & 30 Eliz. and the condition

of the bond was, that if Fulmerstone died before his age of one and twenty years, and before that he had made a joynture to A. his wife, daughter of the testator Heywood, then if the said defendant caused one hundred pounds to be payed to the said Heywood, within three months after the death of the said William, that then the bond should be void; and the said William Fulmerstone died 30 September 30 Eliz. which matter he is ready, &c. The plaintiff doth traverse, absque hoc, that the said Heywood died intestate. Tanfield, It appeareth of record that the plaintiff hath not cause of action, for this one hundred pounds, was to be paid within three months after the death of William Fulmerstone, as the defendant hath alledged, which is also confessed by the plaintiff, and this action is entred Mich. October 30 Eliz. scil. within a month after the death of William Fulmerstone, and so before the plaintiff hath cause of action, and therefore he shall be barred. Gawdy, Where it appeareth to the Court, that the **[187]** plaintiff hath not cause of action, he shall never have judgment, as in the case betwixt Tilly and Wordy, 7 E. 4. But here it doth appear that the plaintiff hath cause of action, for where a man is bound in an obligation, the same is a duty presently, and the condition is but in defeazance of it, which the defendant may plead in his discharge.

1 Cro. 271, 325, 565.

Trin. 31 Eliz. In the Kings Bench.

CCLXIII. Windham and Sir Edward Cleers Case.

Action upon the Case of Sclander.

Roger Windham brought an action upon the case against Sir Ed. C. declared that the said Ed. being a justice of peace in the county of N. and where the plaintiff was a loyal subject, and of good fame all his life time, nor ever touched, or reproched with any offence of robbery, &c. the defendant, malitiose & invide machinans ipsum Rogerum, de bonis, nomine, fama et vita deprivare, directed his warrant to divers baylifs and constables of the said county to arrest the said plaintiff: and it was alledged in the said warrant, that the plaintiff was accused before him of the stealing of the horse of A. B. by reason of which the plaintiff was arrested, and so detained until he had entred into a bond for his appearance, &c. whereas in truth, he was never accused thereof, nor ever stole such horse; and whereas the defendant himself knew that the plaintiff was guiltless; by reason of which, he was greatly discredited, &c. And it was found for the plaintiff; and it was moved, that upon this matter an action doth not lye, for a justice of peace if he suspect any person of felony, or other such offence may direct his warrant to arrest him. 14. H. 8. 16. Gaudy and Clench, If a man be accused to a justice of peace for felony, for which he directs his warrant to arrest him, although the accusation be false, the justice of peace is excused, but if the party in truth was not accused before the justice, it is otherwise: it was a case lately betwixt the Lord Lumley and Foord, where Foord in a letter written by him, had written, it is reported, that my Lord Lumley seeketh my life: if it was not reported, an action upon the case lieth, but if reported, no action lieth: so here, if he was accused no action lieth, but if not, an action lieth: and afterwards in the principal case, judgment was given for the plaintiff.

1 Cro. 130.

Trin. 31 Eliz. In the Kings Bench.

CCLXIV. Isleys Case.

Isley and others were plaintiffs in an ejectione firmæ, and upon the general issue it was found for the plaintiffs, and 4 days after the verdict given, was moved in stay of judgment a special matter in law, whereof the justices were not resolved for the law, but took advisement and gave day over; and in the mean time one of the plaintiffs died, which matter the defendant shewed to the Court in further stay of the judgment:

but by Coke, the same is not any cause, for the postea came in Quindena Pasch. which was 16 Aprilis, at which day the Court ought to have given judgment presently, but took time to be advised, and the 19 of April, one of the plaintiffs died; and the favour of the Court ought not to prejudice us; for the judgment here shall have relation to the 16 of April, at which time he was alive; and it was so of late adjudged in the case of Derick James, who died the day after the verdict, and yet judgment was not stayed, for the Court after verdict cannot examine surmises, and they have not a day in Court to plead, and in our case, it was but a day of grace, and no entry is **[188]** made of it; although no plea can be now pleaded after verdict, yet as amicus curiæ, one may inform us of such matter: and sometimes in such case, judgment hath been stayed, as 9 Eliz. and sometimes notwithstanding such exception, as 2 Eliz. So as I conceive the matter is much in the discretion of the justices. And because the same was a hard verdict, and much against the evidence, it is good discretion upon this matter to stay judgment, and such was the opinion of the Court.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCLXV. STEED AND COURTNEYS CASE.

Error. Prescription to levy a Fine, not good.

Error was brought upon a fine levied upon a plaint in a writ of covenant in the City of Exceter. And two errors were assigned: first, the plaint was, quod teneat convent. de duobus tenementis. Whereas in truth, the word tenement doth not comprehend any certainty, for in the word (tenement) is understood, messuage, land, meadow, pasture, &c. and whatsoever lyeth in tenure: and 11 H. 6. 18. by grant of lands and tenements, rent of common shall pass. And an ejectione firmæ doth not lye of a tenement, nor a forcible entry supposed in a tenement, 11 H. 7. 25. & 38. H. 6. 1. Another error was, because the fine was levyed in the Court of the City of Exceter: which see 44. E. 3. 37, 38. Those of Exceter can prescribe to have the conusans: but the same ought to be by special charter of the King by express words. Egerton the Queens solicitor, who sate under the justices, and was not of counsel in the case said, that he was of counsel in a case betwixt Bunbery and Bird, where such a fine levyed in Chester by prescription was in question, was by a writ of error reversed: and afterwards in the principal case the fine was reversed for the first error.

1 Cro. 116. Owen 93. More. 691. 2 Inst. 515. 1 Roll. 489.

CCLXVI. TRIN. 31 ELIZ. IN THE KINGS BENCH.

Devises.

The case was this, grandfather, father and son: the grandfather seised of a house called the Swan in Ipswich, devised the same to his eldest son for life, the remainder to A. son of his eldest son, and the heirs males of his body, the remainder to the right heirs of the devisor, and to the heirs males of his body, and died. The father and son died without issue male, the son having issue a daughter, who entred and assured the land unto one Hawes, and covenanted, that she was seised of the said messuage of a certain and sure estate in fee-simple. Godfrey, That the daughter shall take the last remainder, as right heir at the time that it ought to be executed, & to the heirs males of her body, as if it had been devised to her by her proper name, so she hath but an estate tail, and so the covenant is broken. Cook contrary: At the time that the devise took effect by the death of the devisor, the father was his right heir, so as the remainder vested in him immediately, and shall not expect in abeyance until the father and son dye without heir male of the son, for the father is a person able to take, so that upon the death of the devisor, the father is tenant for life, the remainder to the son, and the heirs males of his body, the remainder to the father in

tail ut supra, the reversion to the father in fee, and the daughter hath the same reversion by descent after the entayls spent; all which Wray Justice granted.

1 Cro. 96, 97. Antea 182.

[189] MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS, INTRAT. TRIN. 31 ELIZ. ROT. 1529.

CCLXVII. GALLIARD AND ARCHERS CASE.

Trover and Conversion.

Galliard brought an action upon the case against Archer; the plaintiff declared, that he himself was possessed of certain goods, which by trover came to the hands of the defendant, who hath converted them to his own use: the defendant pleaded, that before the trover supposed, one A. was possessed of the said goods as of his proper goods, and sold them to the defendant, and that he had not any notice that the said goods were the goods of the plaintiff, upon which the plaintiff did demur in law. And by Anderson the plea is not good, for the plaintiff may chuse to have his action against the first finder, or against any other, which gets the goods after by sale, gift, or trover; and by some, the defendant having the goods by sale, might traverse the finding: see contr. 27 H. 6. 13. a. And see by some, in detinue, where the plaintiff declares of a bailment, the defendant may say, that he found them, and traverse the bailment, 39 H. 6, 37. by Moile; and by Windham Justice, the defendant may traverse the property of the goods in the plaintiff, 12 E. 4. 11.

Postea. 221. Postea. 253.

MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCLXVIII. EDWARDS AND TEDBURIES CASE.

Bailment of Goods to a Carrier. Attachment of Goods.

Edwards of London was endebted unto one A. of the same city, and Edwards delivered goods to one Tedbury carrier of Exceter, who went to him to carry for him certain wares to be carried to Exceter, to certain tradesmen there, the said goods to be delivered to them, &c. And so the said goods, wares, and merchandizes, being in the possession of the defendant Tedbury to be carried to Exceter, the said A. caused them to be attached in the hands of the said carrier, for the debt of the said Edwards, the said carrier being then priviledged in the Common Pleas, by reason of an action there depending. And by the clear opinion of the whole Court, the said attachment ought to be dissolved. For the carrier for the reason aforesaid is priviledged in his person, and his goods, and not only in his own goods, whereof the property belongs to him, but also in such goods in his possession for which he is answerable to others, &c. And so it was adjudged.

MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCLXIX. COCKSHAL, AND THE MAYOR, &C. OF BOALTONS CASE.

Conspiracy.

Henry Cockshal brought an action upon the case against the mayor, town-clark, and goalor of Boalton, in the county of L. and declared, that where he himself had affirmed a plaint of debt in the Court of the said town, before the said mayor, &c. against I. S. and thereupon had caused the said I. S. to be arrested, the said

defendants did conspire together to delay the plaintiff of his said suit, in peril of his debt, had let the said I. S. go at large without taking bail. Periam Justice, conceived, that upon that matter, the action doth not lye, for the not taking of bail is a judicial act, for which he shall not be impeached: but all the other justices were strongly of opinion against him, for the not taking of bail is not the cause of the action, but the conspiracy.

[190] MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCLXX. ERBERY AND LATTONS CASE.

In a replevin, the defendant doth avow because he is seised of such a manor within which there is a custom, that the greater part of the tenants at any court within the said manor holden appearing may make by-laws, for the most profit and best government of the tenants of the said manor, &c. and that such by-laws should bind all tenants, &c. and shewed further, that at such a court holden within the said manor the homage there, being the greater part of tenants of the manor aforesaid, at the court aforesaid appearing, made this by-law, scilicet, that no tenant of the said manor should put into such a common any steer being a year old or more, upon pain of six pence for every such offence, and that it should be lawful to distreyn for the same: and the court was clear of opinion, that the by-law was utterly void, for it is against common right, where a man hath common for all his cattel commonable, to restrain him to one kind of cattel, &c. But if the by-law had bin, that none should put in his cattel before such a day, the same had bin good, for such by-law doth not take away, but order the inheritance; for the nature of a by-law is to put order betwixt the tenants concerning their affayrs within the manor which by law they are not compellable to do: and by Periam, The avowant ought to have averred, that this by-law was for the common profit of the tenants: see the Lord Cromwells case. 15 Eliz. Dyer 322, and afterwards in the principal case, judgment was given against the avowant.

1 And. 234.

MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCLXXI. WICKS AND DENNIS CASE.

Replevin. Demand of Rent-charge during the Possession of the King; good.

Wicks brought a replevin against Dennis, who avowed, that one Dennis his father was seised of the manor, &c. and granted out of it to the avowant a rent of twenty pounds per annum, and further granted, that if the said rent be arrear unpaid six days after the feasts, &c. wherein it ought to be paid, si licite petatur, that then it should be lawful to distrein; the grantor afterward by indenture covenanted with the Lord Treasurer and others, to stand seised of the same manor, unto the use of himself and his heirs, until he or his heirs have made default in they payment of one hundred pounds per annum, until three thousand pounds be paid, and after default of payment, to the use of the Queen and her heirs, until the sum of three thousand pounds should be paid and levied; the grantor afterwards levied a fine to the said Lord Treasurer and others to the uses aforesaid, the rent is arrear; default of the payment of the hundred pounds is made, office is found, the Queen seised the land, the avowant during the possession of the Q. demanded the rent, and the arrearages thereof, the Queen granted over the manor to W. & B. & D. the grantee did distrain for the rent, & arrearages demanded, ut supra. It was moved by H. Serjeant that this demand of several sums payable at several days before, is not good; for every sum ought to be severally demanded when it was first due, scil. si licite petatur, scil. within the six days; for otherwise without such demand, distress is not lawful, and he resembled it to the case of Sir Thomas Gresham 23. Elizabeth Dyer, 372 of several

tenders. Periam **[191]** conceived that the demand ought to be several. Anderson, That the demand is good enough. And as to the demand made during the possession of the Queen, it was holden by the whole Court to be good enough; for although the possession of the Queen be priviledged, as to the distress, yet the demand is good, without any wrong to her prerogative; for the rent in right is due, and the possession of the Queen is in right charged with it, and the rent is only recoverable by petition, as it was by way of distress; and if the partie sueth to the Queen by petition for the said rent, he ought to shew in his petition, that he hath demanded the rent, for if the possession had bin in a common person, he could not distreyn before demand, nor by consequence have assise: and the rent, notwithstanding the possession of the Queen, is demandable and payable for to entitle the party unto petition against the Queen, and to distress against the subject when the possession of the Queen is removed. And see 7 H. 6. 40. disseisee may make continual claym, although the possession of the land of which he is disseised be in the King. And 34 H. Br. seisin 48. If the heir at full age intrude upon the possession of the King, and pays rent to the lord of his land holden of a subject, the same is a good seisin, and shall bind the heir after he hath sued his livery 5 E. 4. 4. and see 13 H. 7. 15. That distress taken upon the possession of the King is not lawful, but seisin obtained during it, is good. So in 21 H. 7. 2.

MICH. 31 & 32 ELIZ. IN THE COM. PLEAS. INT. M. 30 & 31. ROT. 458.

CCLXXII. ASHEGELLS AND DENNIS CASE.

Quare Impedit.

Ashegel brought a quare impedit against Dennis, and the plaintiff counted that the defendant had disturbed him to present ad vicariam de D. and shewed that the Queen was seised of the rectory of D. and of the advowson of the vicaridge of D. and by her letters patents gave unto the plaintiff rectoriam prædictam cum pertinentiis, & etiam vicariam ecclesiæ prædict. And it was holden by the whole Court, that the advowson of the vicaridge by these words doth not pass; nor so in the case of a common person, much less in the case of the King: but if the Queen had granted ecclesiam suam of D. then, by Walmesley Justice, the advowson of the vicaridge had passed.

1 Cro. 163. Hob. 304.

MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCLXXIII. COLLMAN AND SIR HUGH PORTMANS CASE.

Ejectione firmæ. Surrender of Copy-holder.

In ejectione firmæ by Collman against Sir Hugh Portman it was found by special verdict, that the lands where were holden by copy of the manor of D. whereof Sir H. Portman, was seised, and that the plaintiff was copyholder in fee, and further found, that the said Sir H. pretending the said copy-hold lands to be forfeited, entred into communication with Collman touching the same, upon which communication it was agreed betwixt them, that the said Collman should pay to the said Sir Hugh five pounds, which was paid accordingly, & that in consideration thereof, Collman should enjoy the said customary lands, except one wood called Combwood for his life, and also of Alice his wife, durante sua viduitate, and that Collman should have election whether the said lands should be assured unto him and his said wife by copy, or by bill, &c. & he chose by bill, which was made accordingly; and further found, that the said Sir H. held and enjoyed in his possession the said wood, &c. & upon this matter, the Court was clear in opinion, that here is a good surrender of the said lands, and that for life only, and that the said Sir Hugh had the wood discharged of the customary interest.

[192] MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCLXXIV. THETFORD AND THETFORDS CASE.

Debt.

In an action of debt for rent, the plaintiff declared, that land was given to him, and to T. his wife, and to the heirs of their bodies, and that his wife leased the lands to the defendant, and that the donees were dead, and that the plaintiff as heir, &c. for rent arrear, &c. and upon non demiserunt, the jury found that the husband and wife demiserunt, by indenture, and afterwards the husband died, and the wife entred, and within the term died: now upon the matter it seemed clear to Anderson, that the jury have found for the defendant, scil. non demiserunt, for it is now no lease ab initio, because the plaintiff hath not declared upon a deed. 1 Ma. Dyer 91. and also the wife by her disagreement to it, and the occupation of the land after the death of her husband, hath made it the lease of the husband only.

Hutt. 102. Dy. 91. 2 Co. 61.

MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCLXXV. ROCKWOOD AND ROCKWOODS CASE.

Assumpsit.

In an action upon the case, the case was this. The father of the plaintiff and defendant being sick, and in danger of death, and intending to make his will, in the presence of both his sons the plaintiff and defendant, declared his meaning to be, to devise to the plaintiff his younger son a rent of 4l. per annum, for the term of his life out of his lands, and the defendant being the eldest son (the intention of his father being to charge the land with the said rent) offered to his father and brother, that if the father would forbear to charge the land with the said rent, he promised he would pay the 4l. yearly to his brother during the life of his brother, according to the intention of his said father; whereupon the father asked the plaintiff if he would accept of the offer and promise of his brother: who answered, he would; whereupon the father relying upon the promise of his said eldest son, forbore to devise the said rent, &c. so as the land descended to the eldest son discharged of the rent: and the opinion of the whole Court in this case was clear, that upon the whole matter the action did well lye.

1 Cro. 163.

MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCLXXVI. PETTY AND TRIVILIANS CASE.

Livery of Seisin.

Humphrey Petty brought second deliverance against William Trivilian, and upon special verdict the case was, that A. was seised of certain land, and leased the same for years, and afterwards made a deed of feoffment unto B. and a letter of attorney to the lessee, C. and D. conjunctim vel divisim in omnia & singula terras et tenementa intrare et seisinam inde, &c. secundum formam chartæ, &c. Lessee for years by himself makes livery and seisin in one part of the land, and C. in another part, and D. by himself in another part; it was first agreed by the justices, that by that livery by lessee for years his interest and term is not determined, for whatsoever he doth, he doth it as an officer, or servant to the lessor. Secondly, it was agreed, that these several liveries were good and warranted by the letter [193] of attorney, especially

by reason of these words, In omnia & singula, &c. So as all of them, and every of them might enter and make livery in any and every part. And so it was adjudged.

MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCLXXVII. RIGDEN AND PALMERS CASE.

Replevin. Avowry.

Rigden brought a replevin against Palmer, who avowed for damage feasant in his freehold: the plaintiff said, that long time before that Palmer had any thing, he himself was seised, until by A. B. and C. disseissed, against whom he brought an assise, and recovered, and the estate of the plaintiff was mean between the assise, and the recovery in it: the defendant said, that long time before the plaintiff had any thing, one Griffith was seised, and did enfeoff him; absque hoc, that the said A. B. and C. vel eorum aliquis aliquid habuere in the lands, at the time of the recovery. Walmsley Justice was of opinion, that the bar unto the avowry, was not good, for that the plaintiff hath not alleged, that A. B. and C. ter-tenants tempore recuperationis, and that ought to be shewed in every recovery, where it is pleaded. And then when the defendant traverseth that which is not alledged it is not good. Windham contrary: for the assise might be brought against others as well as the tenants; as against disseisors: but other real actions ought to be brought against the ter-tenants only, and therefore it needs not to shew, that they were ter-tenants at the time of the recovery; and also the traverse here is well enough; another exception was taken, because the avowry is, that the place in which, conteineth an 100 acres of land, the plaintiff in bar of the avowry saith, that the place in which, &c. conteins 35 acres, &c. but that exception was not allowed, for it is but matter of form, and is helped by the statute of 27 Eliz. Another exception was taken, as to the hundred of cattel, and doth not shew in certain, if they were ewes, or lambs, or how many of each: which also was disallowed, for the sheriff upon returno habendo may enquire what cattel they were in certain, and so by such means the avowry shall be reduced to certainty.

Sty. 71. 264.

MICH. 31 & 32 ELIZ. IN THE EXCHEQUER CHAMBER.

CCLXXVIII. RUSSELL AND PRATS CASE.

Error. Writ of Enquiry of Damages. Action, de bonis Testatoris.

Rusell brought an action upon the case against Prat, and declared, that certain goods of the testator casually came to the defendants hands; and upon matter in law judgment was given for the plaintiff, sed quia nescitur quæ damna, &c. Ideo a writ of enquiry of damages issued, and now Prat brought a writ of error in the Exchequer Chamber upon the statute of 27 Eliz. cap. 8. But note, that the judgment was given before the said statute, but the writ of enquiry of damages was retorned after the said statute, the said statute doth not extend but to judgments given after the making of it. And it was moved, that the said judgment is not to be examined here; but by the clear opinion of Anderson, Manwood, Windham, Walmesley, Gent, and Clark, Justices of the Common Pleas, and Barons of the Exchequer, the writ of error lyeth here by the statute, for in an action of trespass (as this case is) full judgment is not given, until the writ of damages be retorned; and if before the retorn of it any of the parties dieth, the writ shall abate: and the first judgment which is given before award of the writ is not properly a judgment, but rather a rule, and order, and so in a writ of accompt, where **[194]** judgment is given that the defendant computet cum querente, he shall not have error upon that matter, for it is not a full judgment. See 21 E. 3. 9. So as to the judgment in a writ of trespas, scil. that no writ of error lyeth before the second judgment after

the return of the writ of enquiry of damages are given: and also it was holden by all the said Justices and Barons, that an executor shall have an action upon the case de bonis testatoris, casually come to the hands and possession of another, and by him converted to his own use in the life of the testator, and that by the equity of the statute of 4 E. 3. 7. de bonis asportatis in vita testatoris.

1 Cro. 235.

MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCLXXVIII. ARRUNDEL AND THE BISHOP OF GLOUCESTERS AND CHAFFINS CASE.

Quare Impedit. Writ to the Bishop.

Sir John Arrundel brought a quare impedit against the Bishop of Gloucester, and Chaffin, and counted upon a disturbance to present 1 Novembris. Chaffin, as incumbent pleaded, that 1 Maii next after the said 1 Novemb. he himself was presented to the church by the Queen, the presentment to the said church being devolved unto her by lapse. Upon which the plaintiff did demur in law: and the plea was holden insufficient, for the plaintiff counted upon a disturbance to him 1 Novem. and the defendant entitleth himself to an incumbency 1 May after, in which case the disturbance set forth in the count is not answered by traverse, nor confessed, nor avoided: and of that opinion was the whole Court: for the disturbance, of which the plaintiff hath declared, is confessed. And afterwards, it was moved by the Queens serjeants, that the Queen might have a writ to the bishop, for the title of the Queen appeareth to be by lapse which is confessed, but the whole Court were clear of opinion against it: for although it appeareth that he was lawfully presented to the said church, and so once lawful incumbent, yet it appeareth also, that the title of the Queen is once executed, and so gon, and nothing remains in the Queen, and now when the defendant hath lost his incumbency by ill pleading (as he may) as well as by resignation or deprivation, yet the same shall not turn to the advantage of the Queen, for where the Queen presents for laps, and her clark is instituted and inducted, the Queen hath no more to do, but the incumbent must shift as well as he can for the holding of it, for by what manner so ever he loseth his incumbency the Queen shall not present again; otherwise it had been, if the Queen be patron, and afterwards the plaintiff had a writ to the bishop.

MICH. 31 & 32 ELIZ. IN THE EXCHEQUER CHAMBER.

CCLXXIX. THE LORD PAGETS CASE, IN A MONSTRANS DE DROIT, THE CASE WAS.

Declaration of Uses. Use cannot rise out of a Possibility. Use what it is.

Thomas Lord Paget, father of William Paget, was seised of the mannor of Burston, and divers other mannors in three several counties in his demesne as of fee, and so seised by indenture, between the said lord of the one part, and Trentham and others on the other part, and in consideration that the said Trentham and others, with the profits of the said mannors should pay his debts, and such sums of money which were contained in such a schedule, and which he should appoint by his last will, covenanted to stand seised of the said mannors **[195]** to the use of the said Trentham of one Eusal, &c., for the term of four and twenty years, and after the expiration or end of the said term of twenty four years, unto the use of the said William Paget, his son in tail, with diverse remainders over: and afterwards the said Lord Paget was attainted of high treason. It was here holden and agreed by all the justices, and by the council of both sides, that the uses limited to Trentham, and others are void, for here is not any consideration sufficient to raise an use, for the mony which is appointed for the payment of his debts is to be raised of the profits of

the lands of the said lord, which is not any consideration on the part of Trentham and others: but if the consideration had been, that they with the profits of their own lands should pay the debts, &c., it had been a good consideration. It was agreed also, that the term for twenty four years to Eusal is void for want of sufficient consideration: and then it was moved, if this lease being void, the use limited to the said William Paget, son of the said Lord Paget should begin presently upon the death of the Lord Paget, or should expect until the twenty four years were encurred after the death of the Lord Paget, or not at all. And it was argued, that an use to be raised upon an impossibility should never rise, as if I covenant to stand seised to the use of B. and his heirs, after the end of the term for years, which I. S. hath in the mannor of D. whereas in truth, I. S. hath not any term in it, the said use shall never rise: so here, no use to the son can rise, for the lease for twenty four years shall never end, for it never can begin for want of sufficient consideration as is aforesaid; and if the said use in tail should at all rise, it should not rise before the expiration of the said twenty four years. As if I covenant to stand seised of certain lands to your use when my son and heir shall come to the age of one and twenty years, now if my son dieth before such age, the use shall not begin before the time in which my son (if he shall live) should attain unto his said age. Egerton the Queens solicitor, Uses may be limited to begin at times certain before which they shall not begin: and so in our case, the use in tail is limited to begin when the term of twenty four years, is ended, and therefore until the term be ended no use shall rise: and the use is limited to rise upon the end of the time or term of four and twenty years, and not upon the end of the estate, and so William Paget hath begun his monstrans de droit before his time. The Lord Paget had but an estate for life; and if so, then the remainders are not contingent uses, but vest presently: as if a man covenant, that after his death his son and heir shall have his lands, now the father hath but an estate for life, and the inheritance is vested in the son. Cook, I covenant, that after twenty four years ended, I and my heirs shall stand seised to the use of my son, &c. there the use in fee doth vest in my son presently: so I covenant, that after my death, I and every one who shall be seised, &c. shall be seised of the said land to the use of my brother, the said use shall rise to my brother presently: I devise, that after the death of such a monk, I. S. shall have the land, nothing passeth to I. S. till the death of the monk; but if the land be devised to a monk for life, and afterwards to another in fee, the devisee in fee shall have the land presently. Manwood, A devise or use limited to one for life, the remainder in tail, the first devisee doth disagree. Cook, The remainder doth vest presently. Manwood, I devise lands unto one until my son comes of full age. Cook, The remainder doth vest presently. Manw. A use limited to one to begin at Mich. next, the remainder over, if in the mean time the lessee obtain the good will of I. S. which he cannot obtain, the same remainder is not good. And if one covenant to stand seised to the use of Salisbury Plain, for the life of I. S. and after the remainder to A.; it is a plain case, that he in the remainder shall take presently, 37 H. 6. 36. Cestuy que use willed, that his feoffees should make an estate to A. for life, the remainder to C. in fee, & A. would not take the estate, C. shall **[196]** have a subpœna against the feoffees after the death of A. See there the case; and if land devisable, be devised to one for life, the remainder over to another in fee, and the devisee for life doth refuse; quære, if the devisee in remainder shall enter presently, see Fitz. subpœna; and also he put the case, where land is devised to a monk for life, the remainder over to another in fee, he in the remainder shall enter presently, see the same case in Perkins 108, for the monk never took any thing by the devise, and notwithstanding that there is not any particular estate upon which a remainder can depend, yet the intent of the devisor shall be observed in as much as it may, and the particular estate limited to the monk is meerly void, of which every stranger shall take advantage, &c. And it was resembled to a case in Baintons case, where an use in remainder limited upon good consideration shall be good in law, although the particular use be not grounded upon good consideration, & so faileth: and he urged a case alleadged by Popham in the case of the Earl of Bedford, that if in Cranmers case, the estate for years limited to the executors, had been limited to administrators, it had been meerly void, and the use in tail limited in tail should begin presently, & that was by

reason of the interval betwixt the death of Cranmer, & the taking of the letters of administration, in which mean time there is not any person capable, and therefore the remainder shall vest presently, which is a fit case to prove the case at bar; and he remembered that in the argument of Cranmers case, Lovelace Serjeant, would have an occupancy in the case of such a term limited to administrators, quod omnes justiciarii negaverunt: and in the said case of Cranmer, it was holden that the lease for years being void, the estate in the remainder did begin presently, without expecting the effluxion of the years, &c. And truly, a term imports in itself an interest, but if the limitation had been after the term of twenty four years, &c. the same implyeth but a bare time: and to that purpose he cited the case 35 H. 8. Br. Exposition, 44. A. leaseth to B. for ten years, & it is covenanted betwixt them, that if B. pay unto A. within the said ten years one hundred pounds, that then he shall be seised to the use of B. in fee. B. surrenders his term to A. and within the said ten years pays the one hundred pounds to A. here B. shall have fee, for the years are certain; contrary, if the covenant had been, if he pay within the term.

Popham Attorney General contrary, The use shall not go beyond the contract, & here the term doth not vest, in that it was limited for want of sufficient consideration, of the Lord Paget, & the intent was not that his son should have possession of the land before the term of 24 years expired.

A use is a thing in conscience, according to confidence to be guided by the intent of the parties: & upon such case at the common law W. Paget should not have a subpœna before the years expired, and this word (term) doth not alter the case; and there is a great difference betwixt an use raised by feoffment and an use raised by covenant, for in the first case the feoffor doth dipossess himself utterly, & if it takes not effect to one purpose it shall take effect to another purpose: but in the case of a covenant it is otherwise, for the use riseth according to the contract & not otherwise, & here the contract is, that W. Paget shall have the land not immediately after the death of his father, but after the 24 years expire.

Owen Serjeant, It hath been agreed of both sides, that every use shall go according to the intent of the parties, and here it appeareth, that it was the intent of the Lord Paget, to put all the use out of himself, and I see not any difference betwixt an use raised by covenant and a use raised by feoffment, for a use limited utrovis modo to Pauls steeple for the life of A. and after to the use of B. in fee, the first use is void, but the second good; and here the meaning of the Lord Paget plainly appears, for there is a proviso in the indenture, that after the said debts and legacies paid, the use limited for 24 years shall cease, and **[197]** it is expressly averred, that they are paid 11 H. 4. A. leaseth for life, the remainder in tail to himself, the remainder over to a stranger in fee, the mean remainder limited by A. to himself is void, and the remainder over shall be immediate to the estate for life. Egerton, The words of the indenture, and the intent of the parties are the rules of uses. The first use is void, for the intent of the Lord Paget was void, because contrary to the law, and Eusal, to whom the use for years was limited, could not take presently, for his estate is limited to begin after the death of the Lord Paget; and there is a great difference betwixt uses raised by covenant, and by feoffment, for when a use is raised by feoffment, there all is out of the feoffor, the land is gone, the use is gone, the trust is gone, nothing remaineth but a bare authority to raise uses out of the possession of the feoffees, & being new uses; there although some of them be void, yet the other shall stand; but where a use is raised by way of covenant there the covenantor continues in possession, there the uses limited, if they be according to law, shall raise & draw the possession out of him, but if not, the possession shall remain in him, until a lawful use shall arise, which before its time shall not rise for any defect in the precedent use. And here is no term, therefore no end, for that which hath not a beginning hath no ending, and if there be no estate, then no term, & if there be so, then it is to be taken for the time of 24 years, which is not as yet expired, and then was there in the Lord Pawlet an estate descendable for 24 years, which by the attainder doth accrue unto the Queen. And he cited the case of 13 Eliz. Dyer. 300. Feoffment to the use of himself for life, and afterwards to the use of a woman which he entendeth to marry, until the issue which he should beget on the said woman should come unto the age of 21 years, and then to the use of the woman during her

widow-hood; they are married, the husband dieth without issue, the wife shall hold the land: but by him, if this use had bin raised by way of covenant it should be otherwise. Coke, Admit that all the uses be good, yet his meaning was, that the debts and legacies being paid W. Paget should have his land, for it is provided by the indenture, that when the debts & legacies are paid, the estate for 24 years shall cease. Manwood, The payment of the debts cannot end that which never was, and as to the two first estates, they were never out of him, therefore they came unto the Q. by his attainder. Coke, After debts and legacies paid all other estates but the estate of W. Paget cease, therefore William Paget shall have the land. And the rule of Shelly 35 H. 8. 56 is worthy to be received, scil. that learning is honest, & wished to be used, that every man learned in the law, do construe deeds according to the meanings of the makers. Manwood, A feoffment to the use of Salisbury Plain for the life of I. S. the remainder over, the same use shall come into possession presently, for there is not any person capable of the particular estate, but where the first use is limited to a bastard, the remainder over, there, the remainder shall not come into possession presently, for the bastard is a person capable, but not by such form of conveyance in consideration of natural affection. Popham, in the case of bastard, there was an estate for life executed to the father in possession, & then a remainder to a bastard, the remainder to the sons lawfully begotten; but here in our case no estate is created to precede the estate of William Paget, upon which the remainder can depend.

At another day, it was argued by Coke, It is to be agreed on both sides, that the estate for four and twenty years is meerly void, and also the first use limited to Trentham and others, and it is not reason, that the use limited to William Paget, should expect until the four and twenty years be expired by effluxion of time, and to that purpose he cited Cranmers case, where an estate in use was limited to Cranmer for life, the remainder to his executors for one and twenty years, the remainder over in tail to his son **[198]** and heir, &c. Cranmer is attainted of treason and heresy, so as he could not make a will, or executors, there it is holden, that the term is void, because no executors, and that the remainder in use should vest presently, and should not expect until the said number of years expire by effluxion of time. And difference hath been put betwixt the case of Cranmer, and the case at bar, because in Cranmers case there was a possibility at the beginning that the term for years might be good, for the term became void by matter ex post facto, sci. by the attainder of him, which disabled him to make executors, but in the case at bar, the term for twenty four years was expressly void ab initio: but that difference is without reason, for what reason is there, that the remainder should be further off the possession when the estate for years is originally void, than when it becomes void by matter ex post facto? Suppose that the Lord Paget had by indenture covenanted as above for the two first uses (being in truth void in law) and afterwards by another indenture, reciting, that whereas he had covenanted, that in consideration, that A. with the profits of his lands should pay his debts, &c. to stand seised of the said lands for his own life: now he covenants, to stand seised to the use of William Paget, and his heirs, should not he presently be seised to the use of Willlam Paget, and his heirs, although the words be, that then and from thenceforth? For I hold it a clear case, that his estate begins presently, being limited, to begin upon a void estate, although the limitation be by words de futuro. And to this purpose he cited the case 3 E. 6. Br. Lease 62. A man leaseth for years, habendum post dimissionem inde fact. to J. S. finitam, where no such demise is made, the same lease shall begin presently: If an indenture be made to a monk, and another, habend. to the monk for one and twenty years, and after the end of that, to the other for one and twenty years, the other shall have it presently. And he put a case 7 E. 3. in the new impression 19. and in the old impression 317. Where one Maud brought a formedon in the remainder, and counted that one Hamond was seised, and gave the said tenement to one Robert, &c. in tail, and that for want of such issue, that the tenements should return to the said Hamond for life, the remainder to the demandant in fee, and counted further, that Robert is dead without issue, and that Hamond is also dead, &c. It was holden, although that the remainder reserved to the donor, be void, yet the remainder over in fee is good, &c. And in that case although that the remainder in fee was future, sci.

after the death of Hamond, & the estate reserved to Hamond meerly void, & that originally, & not by matter ex post facto, yet the remainder in fee was good, and should begin presently upon the death of Robert without issue, and should not expect the death of Hamond. Mr. Attorney hath given a rule, that the intent of the parties is the direction of uses, as also of wills, and therefore I will put one case of wills, 37 H. 6. 17. If a man devise lands to a monk for four and twenty years, and after the same ended to another in fee, here the monk being a dead person cannot take the estate limited to him, and therefore it is void: but the fee limited to the other is good, and shall take effect presently: if it be so in a will, why not so also in uses? For the intents of the parties to direct the constructions of both: and our case here is a stronger case than the case cited 37 H. 6. 36. for there where land is devised to a monk for life, there may be colour of an occupant during the life of the monk, who might take it, although the monk himself cannot take it, and so the remainder doth not take effect presently as to the possession, but shall stay till after the death of the monk; but here is not any colour of an occupancy, for the estate here is a lease for years, which cannot admit an occupant. And see also 37 H. 6. 36. If a man devise that his feoffees shall make an estate to I. S. for life, the remainder over to C. in fee, and I. S. will not take his estate, C. shall **[199]** have a sub-pœna against the feoffees to make an estate to him, leaving out I. S. and see Amy Townsends case in the Commentaries, where the husband seised in the right of his wife, makes a feoffment in fee to the use of himself, and his wife for their lives, the remainder over to another, the husband dyeth, the wife refuseth the estate limited to her by the husband, she brings sur cui in vita, not against the heir, but against him in the remainder, to whom the land doth accrue by the refusal of the wife; not against the heir of the feoffor; and I grant, that where an estate in use, or otherwise is to begin upon a condition precedent which is impossible, or against the law, the estate shall never rise or begin. And here the case of the Lord Borroughs, 35 H. 8. Dy. 55. was cited, where the father covenanted in consideration of marriage of his son, that immediately after his death his eldest son shall have the possession or use of all his lands according to the same course of inheritance, as then they stood, and that all persons now seised, or to be seised, should be seised to the said use and intent, and it was holden, that upon that matter no use is changed: but if the words had bin immediately after his death, they should remain, then although the words of the limitation be in futuro, the use of the fee shall rest in the son presently; and the words in futuro ought not to be interpreted, but in benefit of him to whom the use, and estate is limited, 9 Eliz. Dyer. 261. A. leaseth for thirty years, and four years after the beginning of the said term he makes another lease for years by these words, Noverint, &c. dictis 30 annis finitis & completis, demisisse omnia præmissa, to the said, &c. habendum & tenendum a die confectionis præsentium, termino prædict. finito, usque ad finem 30 annorum. And by the opinion of all the justices, this new lease shall commence in possession at the end of the former term, and not before, and if it should not be expounded, the second lease should be in effect an estate, but for ten years, which was not the intent of the parties, and every grant shall be expounded most strongly for the grantee, and to his advantage, to which purpose he said he had vouched this case. Also by him there is not any difference, where the use is limited by way of covenant, or upon a feoffment: and if a man enfeoffeth B. upon condition that he shall enfeoff C. now if he offer to enfeoff C. and he refuseth, the feoffor may re-enter. But if the condition were to give to C. in tail, then upon such refusal of C. the feoffor shall not re-enter. See 2 E. 4. 2. 19 H. 6. 34. Et si equitas sit adhibenda in coustruction of conditions a multo fortiori in case of uses: a feoffment in fee upon condition, that the feoffee shall grant a rent charge to J. S. who doth it, but J. S. refuseth, the feoffor shall not re-enter, for that was not the intent of the condition: if in the principal case, the limitation of the use had been after the expiration of twenty four years, then no use should rise before the twenty four years expire, but where, not the time, but the estate is material, there if the estate be void, the use shall go to him in the remainder presently, and shall not stay the time, &c.

Egerton solicitor, first it is to see, if the use limited to William Paget be good; secondly, if William Paget doth not come before his time to shew his right: if this use limited to William Paget be a remainder or an estate to begin upon a contingent,

or a present estate, the estates formerly limited being void, and he conceived, that it is not a remainder, for there is not any estate upon which it may depend; and the words are after the estate for twenty four years ended or expired, that then and from thenceforth to the use of William Paget, &c. so that no use is limited to him before the particular estate is ended, therefore no remainder, for a remainder ought to begin when the particular estate begins. Without doubt that was not the intent that William Paget should have the land during the life of his father, and yet the use limited during the life of his father, was void, and if the remainder should take effect during the said twenty four years against Eusall **[200]** and his companions, wherefore should it not also take effect against Trentham and the others, to whose use it was limited during the life of the Lord Paget: and here, the use limited to William Paget is to begin upon a collateral contingent, upon which if it cannot rise, it shall not rise at all, and I conceive that the use limited to William Paget, shall never rise, or begin, for it is limited to begin when the term of twenty four years is ended, and that is never, for that which cannot begin, cannot end, and this term is meerly void, ergo, it cannot begin, ergo, it cannot end, then this thenceforth cannot be, and so this contingent can never fall. H. 6. & 7. E. 6. A lease was made for years upon condition, that if the lessee do not pay such a sum of money, that he should lose his indenture, the meaning and sense of these words is not that he should lose the indenture in parchment, but that he should lose his term: the judgment in an eectjone firmæ, is, quod querens recuperet terminum suum, that is to be understood, not the time, but his interest in the land for the term (and Coke secretly said, that in that case there is not any contingent, for the estates precedent never began). And as to the case cited before by Coke, Br. Leases 62. if the last lease be made by indenture, reciting the former lease, certainly the second lessee shall not be concluded to claim the land demised presently, but shall tarry until the years of the first term be expired by effluction of time. And as to Mawnds case cited before, there is an estate upon which a remainder may depend, scil. the estate tail alledged to Robert, &c. If such as now is limited to William Paget had been limited at the Common Law to a younger son, the eldest brother should have the land in the interim discharged of any use, and now after the statute no use limited to William Paget, before the contingent; where, therefore, is it in the mean time: in the Lord Paget, who being attainted, it accrues to the Queen; and out of the possession of the Queen, this use shall never rise, although that the contingent be performed, for now the use is locked up; a use doth consist in privity of the estate and confidence of the person, if these be severed, the use is gone: and here, if the possession be in the Queen, she cannot be seised to another use. Note by Godfrey, that the opinion in Baintons case, 8 Eliz. Dyer 37. is not law, and so hath the law been taken of late. Popham contrary; If before the statute of 27 H. 8. the father covenant in consideration of advancement of his son to stand seised to the use of I. S. for life, and after the death of I. S. to the use of my son in fee, here the estate of I. S. in the use is void, and yet the estate in the use limited to my son, shall not take effect before the death of I. S. for the estate of my son is not limited to take effect till after the death of I. S. and therefore the possession of the father is not charged with the use during the life of I. S. But if by way of feoffment I. S. had refused, the son should have it presently, and the father should not have it, for he by his livery hath put all out of him, and it was not the intent of the feoffment, that the feoffee should have the land to his own use. Popham allowed the difference mentioned before out of 2 E. 4. & 19. H. 6. betwixt a feoffment upon condition to enfeoff a stranger, and to give in tail to a stranger, and that is grounded upon the intent of the parties. And Owen Serjeant put the case cited before 13 Eliz. Dyer 330. A feoffment is made by the husband to the use of himself for life, and afterwards to the use of one Ann, whom he intended to marry, for, during, and until the son which he should beget on the body of the said woman had accomplished the age of thirty one years, and after such time that such son should come unto such age unto the use of the said woman, quamdiu she should live sole, they entermarry, the husband dyeth without issue, the wife entreth immediately, and continues sole, and her entry was adjudged lawful, and the estate in remainder good, although she never had any son, and thereupon a writ of error was brought, and the first judgment was af-**[201]**-firmed (& note by Tanfield, and others

at the bar, that that was the most apt case to the purpose in the law) and the reason of such judgment was, because they took it, that deeds ought to be expounded according to the meaning of the parties, and estates in possession: I grant there ought to be a particular estate, upon which a remainder may depend, but the same is not necessary where the conveyance is by way of use. And if I covenant that A. shall have my lands to him & his heirs, to pay my debts and legacies, the same is by way of bargain and sale, and nothing passeth without enrolment. And here the attainder doth not prevent the use, as it hath been objected by Master Solicitor, for the use doth rise before the attainder, for William Paget had a remainder in tail, in the life of his father, upon the first limitation, &c. Periam Justice, I lease my lands to you, to begin after the expiration of a lease, which I have made thereof to I. S. and in truth he hath not any lease, the same lease shall never begin. Manwood Chief Baron, I lease my lands to you, or grant a rent to you to begin after the death of Prisoit Serjeant at Law, when shall that begin? Coke, Presently. Manwood, Cujus contrarium est lex.

More 193, 194. 1 Co. 154. 1 And. 259. 2 Len. 5. 6. Post. 266. 1 Co. 154.

MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS. ROT. 1832.

CCLXXX. THE QUEEN AGAINST THE ARCH-BISHOP OF CANTERBURY, FANE, AND HUDSON.

Quare Impedit.

The Queen brought a quare impedit against the Arch-Bishop of Canterbury, the Bishop of Chichester, Fane and Hudson, and counted that John Ashburnham was seised of the advowson of Burwash, & was outlawed in an action of debt, during which out-lawry in force, the church voided, for which it belongs to the Queen to present. The arch-bishop and bishops plead, that they claim nothing but as metropolitan and ordinary. Fane pleaded that King E. 4. ex gratia sua speciali, &c. and in consideration of faithful service, &c. did grant to the Lord Hastings the castle and barony of Hastings, and hundred, &c. Et quod ipse haberet omnia bona & catalla tenentium, residentium & non residentium, & aliorum residentium quorumcunque hominum, de & in castro baronia, &c. or within the same, pro munero debit. &c. tam ad sectam regis, &c. quam, &c. Ut legatorem, & quid ipse faceret, per se vel per his sufficient deputies, &c. And from him derived to the now Earl of Huntington as heir; and the said earl so seised, and the said Ashburnham seised of the advowson as appendant to the manor of Ashburnham, holden of the said barony, the church aforesaid during the out-lawry aforesaid, became void, for which the said Fane, ad dictam ecclesiam usurpando presentavit the said Hudson, who was admitted and instituted, &c. with this, that idem T. C. verificare vult, that the said church of Burwash is, and at the time of the grant was, within the precinct, liberty, and franchise aforesaid, and that the said manor of Ashburnham, at the time of the grant aforesaid was holden of the said barony: and the incumbent pleaded the same plea: & if by that grant of King Edward the fourth, to the Lord Hastings, scil. omnia bona & catalla, &c. The presentment to the church should pass or not, was the question. Shutleworth Serjeant, argued for the Queen, he confessed that the King might grant such presentment, but it ought to be by special and sufficient words, so as it may appear by them, that the intent of the King was to grant such a thing, for the general words (omnia bona & catalla) will not pass such special chattel in the Kings grant: and he conceived that by the subsequent words, no goods or chattels shall pass by such grants, but such which may be seised, which **[202]** the avoidance of a church cannot be, & quod ipse liceret, per se vel ministros suos ponere se in seisinam, 8 H. 4. 114. 15. the King granted to the Bishop of London, that he should have catalla felonum & fugitivor. de omnibus hominibus & tenentibus de & in terris & feodis prædict. and of all resiants within the lands and fees aforesaid, ita quod, si prædict. homines, tenentes & residentes de & in terris & feodis prædict. seu aliqui eorum, seu aliquis alius infra eadem terra & feodis pro aliqua

transgressione, &c. vid. librum, &c. and by Tirwit, by that grant the goods of those who are put to pennance shall not pass; so of the goods of one felo de se, vid. 42 E. 3. 5. One being impanelled on the grand enquest before the justices of oyer and terminer, pleaded the charter of the King of exemption from enquests, and because in the said charter was not this clause, licet tanget nos & hæredes nostros, upon challenge, it was rejected, and the party charged and sworn: and if the King grant to me to appropriate an advowson, which in truth is holden of the King, such a grant is void, if there be not special words by which it might appear that the King had notice of it, and that his intent was that the grant should extend unto it, 16 E. 3. Grants 58. & 33 E. 3. Grants 103. So here the presentment is a special chattel, and is not usually intended or thought upon, when men speak generally of goods and chattels. But admit that it be, yet the plea doth not lye in the defendants to plead, for they do not derive any interest under this grant, but are meer strangers to it, and therefore they shall not take any advantage, by laying this grant in the Queens way, for the Q. hath good title against all persons but those who claim under the grant, but that is nothing to the defendants, for one cannot cross the title of the King, if he do not make a title to himself, as 39 E. 3. 18. 37. E. 3. 11. If the title of the King be found by a false office, the party grieved cannot traverse the Kings title without making title to himself found by office, and then the King may choose whether he will maintain his own title found by office, or traverse the title of the other. Walmesley, contrary: This title of presentment is a chattel, rex habebit omnia catalla felonum, &c. A term of years is a chattel, so the issues and profits of the lands of men outlawed for felony, so a right of action for goods; therefore a title to present, and if such a title accrue to the King, by such general words they shall pass from the King. And as to that which hath been objected, that the grant of King Edward the fourth doth not extend but only to such goods and chattels which may be seised, he cited the case of 39 H. 6. 35. b. Where the grantee of a rent for term of years granted omnia bona & catalla sua, tam viva quam mortua, the rent doth pass, and yet the grantor cannot put him in seisin of it, but ought to expect the day of payment of it. And this title to present is not a thing in action, for if no disturbance be made, the party may have the benefit of it without any action. Anderson conceived, that this title to present cannot pass by those general words (bona & catalla) for they do not extend to rights, or things in action, for such things only which are commonly known and understod, shall pass by such words: by grant of goods, chattels real will not pass; for when men speak of goods, household-stuff, mony, and such personal things only are understood: so a man cannot be said to have a chattel but where he is possessed of it, and here this interest is but jus præsentandi.

[203] Periam, this interest is a chattel, for if the church become void, and before presentment the patron dieth, the executors shall have the presentment, for it was a chattel vested in the testator: it was adjorned.

4 Len. 107. Hob. 303. 175 Owen. 155. More. 126.

Hill. 31 Eliz. Rot. 1527. In the Common Pleas.

CCLXXXI. Jones Case.

Hen. Jones had stolen the plate of Trinity Colledge in Oxford, and by mediation of his friends it was concluded and agreed, that no evidence should be given against him at the sute of the colledge, and that the colledge should be recompenced for the losse, and two of his friends, Brien and Brice were bound unto Doctor Underhil, Rector of Lincoln Colledge in Oxford (but unto the use of the master and scholrs of Trinity Colledge) upon condition that if the said obligor paid forty pounds within six months after, the said Hen. Jones should be acquitted & released of the troubles wherein he now is, with the safety of his life, that then, &c. In debt upon the obligation the defendants pleaded that he was indicted at the Assises at Ox. & arraigned upon it scil. for the stealing of the said plate, and found guilty thereof, and had his clergy, and was burned in the hand, & he demanded judgment of this

action, upon which there was a demurrer: Wind. If the words had been to pay the money, after that Henry Jones should be released and acquitted of the troubles in which he now is without any more, the defendants had been bounden to pay the mony. Periam, If the words of the condition had been, that after Henry Jones should be acquitted of the felony, then no mony payable, but here the words are with safety of his life: but here he conceived, that the intent of the obligation was that no evidence should be given, and so to save his life from the gallows, for which the defendants might have shewed the special matter, and averred that the obligation was made for the discharge of a felon, and so against the law, &c. but now, they cannot take advantage of it, and afterwards judgment was given for the plaintiff.

Ante. 73.

PASC. 31 ELIZ. IN THE COMMON PLEAS.

CCLXXXII. CASTLE AND OLDMANS CASE.

Debt.

Castle brought debt against Oldman for a pain assessed in a court baron, and declared that the defendant was presented at the court baron for such an offence, and if he did not amend it before the next court, he should pay such a pain: and at the next court it was presented, that the defendant had not amended it, and so he had incurred the pain upon which the action is brought, and now the defendant would wage his law, and it was much doubted whether wager of law lay in the case. Shutleworth, 13. H. 7. 31. Upon a recovery in a court baron, wager of law lyes not, by Conisby, which Periam denyed; and by him upon an account by another hand, it doth not lye, for it is a matter of which the country may have conusance; so here the matter is notorious, whith lyeth in the knowledge of all the jurors who presented it: and by him, the pain ought to be afferred, which Anderson denied. For there is a difference betwixt an amercement and a pain, which Windham granted. And see for the amerciament in the Leet, 10 H. 6. 7. 12. R. 2. Ley. 43. But in a Court baron, because it is not a Court of Record; so in debt upon an arbitrament, the law lyeth. And Waler one of the secondaries shewed unto the Court a president, 6 Eliz. **[204]** where debt was brought by Sir Thomas Tyndal, upon a pain forfeited for the breaking of a by-law in a Court baron against Tyler; and the party was received to wage his law.

2 Roll. 106. 3 Cro. 79. 2 Inst. 143.

PASCH. 31 ELIZ. IN THE COMMON PLEAS.

CCLXXXIII. THETFORD AND THETFORDS CASE.

Partition.

In wast the plaintiff declared, upon the demise of the moyety of the manor, whereof part of the tenants were copy-holders, and part freeholders, and that A. was seised of the manor, and had issue two daughters, and dyed seised, the daughters entred, and made partition of the demeans only, but the services of the free-holders and copy-holders did remain in common; one of the daughters took husband the husband and the wife make a lease of the moyety of the manor to the plaintiff for years by word, rendring rent, the lessee entred into the demeans allotted to the wife of the lessor. The husband died, and the wife brought an action of wast. Anderson, By the partition the demeans are now become in gross, and severed from the manor; and if partition be made of a manor, so as the demeans be allotted to one sister, and the services to the other, now the mannor is dissolved, yet if the other sister dieth without issue, and her part descendeth to the other, now it is become a manor again, which Windham and Periam granted, see 12. H. 4. 271. And Anderson was of

opinion, that the moyety of the demeans did not pass by the words of the moyety of the manor, as if one seised of a manor maketh a feoffment in fee of part of the demeans, and afterwards re-purchaseth them, and then makes a feoffment of the whole manor, the demeans repurchased will not pass thereby, for they were once severed from the manor, and not re-united by the purchase. Periam, Although that in truth it is not a manor nor any part of a manor, yet if it hath been reputed the moyety of the manor, it shall pass by such name, which Anderson granted, but it is not like to our case. Periam, This is an ancient partition, as appeareth by the verdict, ten years past, and also it hath been reputed the moyety of the manor, therefore it shall pass. Windham concessit Periam, The intent of the grantor is the best interpreter of these words, without relying strictly upon the words. Anderson, If we shall take the intents of men for law, we shall fall into many confusions in our proceedings, but the law is to judge of the meanings of men by their words. Ever in the constructions of wills, the intent of the testators have not had further favour than the words have given leave. As to the other point: it was argued by Walmsley, that the lease made by the husband and wife without deed was void, see 1 Ma. Dyer. 91. And if the wife after the death of her husband accepts the rent upon such a lease reserved, it shall not bind her, for the consent of the wife ought to be at the beginning of it, which cannot be without deed. Anderson conceived that the lease is not meerly void, see 15 Eliz. Smith & Stapletons Case, Plowd. 431. Periam, The matter is clear, for although the plaintiff declares generally of a lease made by the husband & wife, yet the jury hath found, that it was by indenture, and that is pursuant enough. And if the husband and wife make a feoffment of the wives land, it is the feoffment of both of them; which Walmesley granted: it was adjorned.

6 Co. 64.

[205] TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CCLXXXIV. SMALWOOD AND OTHERS, AGAINST THE BISHOP OF LICHFEILD AND OTHERS, QUARE IMPEDIT.

Quare Impedit.

Humphrey Smalwood, Richard Say, and Thomas Say, executors of William Say, brought a quare impedit against the Bishop of Coventry and Lichfeild, and M. incumbent, quod permittat præsentare ad Archidiaconatum de Derby, which was void, et ad præsentationem testatoris in vita sua, & nunc in retardationem executionis testamenti, did belong to the executors: exception was taken because these words (in retardationem executionis testamenti) could not be applied to a disturbance in the life of the testator. Windham, There is not any writ in the register of quare impedit, upon a disturbance made to the testator. Anderson, What then? therefore no remedy because no writ according to his special matter, 25 E. 3. 25. Goods are taken out of the possession of the testator, upon which the executors brought trespass, in retardationem executionis testamenti, writ abated, for it ought to be where the executors themselves were possessed. Periam, The advowson it self is valuable, not the presentment, therefore it cannot be said in retardationem. Periam, Before the statute of 4 E. 3. 73. In case were damages were only to be recovered, the action moritur cum persona, but where the thing it self was to be recovered, there the action accrued to the executors. Anderson, 7 H. 4. 73. Ejectione firmæ of an ejectment made unto the testator was maintained by the executors be equity of the statute of 4 E. 3. cap. 6. And by the opinion of the whole Court, the executors might have a quare impedit upon a disturbance made to the presentment: it was objected also, that a quare impedit doth not lye of an archdeaconry-ship, for it is not local, nor any indenture made of it, but is only a matter of function, but it was not allowed, for an archdeacon hath locum in coro: and by the statute a quare impedit lyeth of a chappel, and by the equity of it, of a prebend, &c. See the statute of West. 2. Quare impedit of a chappel, prebend, &c. It was moved, if the executors had presented after the death of the testator, whether the archdeacon ought to receive the clark of the testator, or of the executors, and the opinion of the Court was, that the bishop should have

election therein: and afterwards judgment was given, that the writ should abate, for the disturbance to the testator cannot be supposed new matter (in retardationem executionis testamenti). But yet it was agreed, that the executors might have their special writ upon their case for the said disturbance.

1 Cro. 241.

TRIN. 31 ELIZ. IN COMMUNI BANCO.

In an action brought against one as executor, who pleaded that he refused, upon which the parties were at issue: the bishop did certifie, quod non recusavit, whereas in truth he had refused before the commissary: Fenner Serjeant moved, to have the advice of the Court upon that matter, and argued that the Court ought to write to the commissary: which was denyed by the whole Court, for he is not the officer unto the Court to that purpose, but the bishop himself is the officer: and the party cannot aver against the certificate of the bishop, no more than against the retorn of the sheriff: the Court was also of opinion, that the only remedy for the defendant was by action upon the case against the bishop for his false certificate: but it was moved, that the issue joyned upon the refusal ought to be try-[206]-ed by jury, and not by the certificate of the bishop, and so was the opinion of Windham and Walmesley. Periam, Where the issue is whether the executor did refuse before such a day, or after, there the tryal shall be by jury; contrary where the issue is upon refusal generally, because the refusal is before him as a Judge, as also is resignation.

1 Cro. 81. 397. 2 Len. 180.

MICH. 31. ELIZ. IN THE COMMON PLEAS.

CCLXXXVII. SUTTON AND HOLLOWAY AND DICKONS CASE.

Estoppel.

In an ejectione firmæ by Richard Sutton against Robert Holloway, and Thomas Dickons, upon not guilty pleaded, the jury found this special matter, scil. that the said Thomas Dickins had not any thing in the lands in question at the time of the making of the lease, upon which the action is brought, scil. who leased by indenture to the plaintiff for certain years, who entred, and afterwards the said Thomas Dickins, contra indenturam suam prædictam intravit upon the plaintiff, and, if the same should be a good lease by estoppel was the question; the jury having found the truth of the matter, scil. that the lessor had not any thing at the time of the demise; Walmesley objected, that the jury ought not to find the indenture, because it was not pleaded, for the plaintiff doth not declare upon any indenture; but the exception was not allowed, but in old time the law was such, 22 E. 3. but at this day the law is otherwise, See Scholastica's case, 14 Eliz. Plowd. 411. But where a release or other writing ought to be pleaded, there it ought to be shewed to the Court. Walmesley, In rei veritate, the lease is void, for a man cannot let land in which he hath not any thing: but in respect of the parties themselves, the lessors and lessee both are concluded to say, that is no lease, for none of them can say to the contrary: but here the jury which is a third person, is not estopped to say the truth, but they may find the special matter and the truth of the case, and the estoppel hath not place there; but the truth of the matter appearing to the Judges, the Judges ought to adjudge upon the same, scil. if a man may make an effectual lease of lands, in which he hath not any thing. At another day it was moved by Shutl. Although that the jury be not estopped, yet the parties themselves are estopped, for the law makes the estoppel betwixt the parties, and the law will not permit a man to say any thing against his own deed being indented, nor any matter contained in it. Periam and Anderson clearly for the plaintiff, that it is a lease by estoppel; and by Periam, It hath been adjudged in the Kings Bench, that the jury in such case are compellable upon pain of attaint to find the estoppel: Walmesley, Here the estoppel is out of doors, for the truth of the matter disclosed by the verdict, not by the parties only maketh the estoppel, & he

much replied upon the case of Littleton, 149. a. A woman seised of lands in fee, taketh a husband, who alieneth to another in fee, the alienee leaseth to the husband and wife for their lives, now the wife is remitted, and seised in fee as before, here if the alienee, i.e. the lessor, brings an action of wast against the husband and wife, the husband cannot bar the plaintiff by the truth of the matter; scil. the remitter of his wife; for he is estopped to say against his own feoffment, and his retaking of the particular estate to himself and his wife: but if in an action of wast, the husband make default at the grand distress, and the wife prayeth to the received, she may well shew the whole matter: so here the jury: Windham, The plaintiff ought to have demurred upon the evidence: Periam, What if the defendant will not joyne with the plaintiff in the demurrer? Windham, There the Court ought to over-rule them, & if **[207]** the parties had demurred upon the evidence, we should have adjudged upon that evidence, that a man cannot lease lands in which he hath not any thing: and here, the estoppel could not be pleaded, for the defendant hath pleaded the general issue, but if he had pleaded non demisit, then the estoppel should have holden place.

Savil. 99. Owen. 96. Co. 1 Inst. 227. a. 3. Cro. 77. Hob. 227.

PASCH. 31 ELIZ. IN THE COMMON PLEAS.

CCLXXXVII. MILLS AND SNOWBALLS CASE.

Priviledge of Exemption from Juries. Livery of seisin.

A jury did surmise at the bar, that he was a tenant in ancient demesne, and had his charter in his hand, and prayed to be exempted from the jury and discharged, but the Court did not regard it, but caused him to be sworn. And Windham said, that he might have his remedy against the sheriff; and Nelson Prothonotary said, if he had made default and lost issues, he might shew his charter in the Exchequer upon the amercement estreated, and there he should be discharged: in that case, it was holden by the Court, that if a feoffment be made of a house, and the deed be delivered in the house without other circumstance, the same doth not amount to a livery of seisin, but if he do any act by which the intent of the feoffor appeareth that the feoffee should have livery and seisin; as if the parties go of purpose to the place intended to pass, to the intent that the deed may be delivered in that kind, the same doth amount to a livery, by Anderson, and the whole Court.

1 Cro. 142.

MICH. 32 & 33 ELIZ. IN COMMUNI BANCO.

CCLXXXVIII. BRADSTOCKS CASE.

Estates. Conditions.

Robert Bradstock seised in fee of certain lands, made a feoffment in fee to the use of himself in tail, and for want of such issue to the use of John Bradstock, his brother in tail, and for want of such issue to the use of Henry Bradstock, another brother in tail, provided always, that if the said John or Henry do go about to avoid any estate or demise by copy, made or to be made of the premisses, or any part thereof, that then his estate should cease. Robert died without issue, John entred and levyed a fine, sur conusans de droit come ceo, &c. of the land: and the opinion of the whole Court was, that this fine was not any offence against the said proviso; for these words (made or to be made) do not extend to estates made or limited by the said feoffment, but only to estates before made, and to be made afterwards.

MICH. 32 & 33 ELIZ. IN COMMUNI BANCO.

CCLXXXIX. LONG AND HEMMINGS CASE.

Quare Impedit.

In a quare impedit by Long against Hemming and the Bishop of Gloucester, of the church of Frombillet, upon the pleading the issue was, if Tho. Long father of the plaintiff did enfeoff the plaintiff of the manor of From. to which the advowson of the said church was appendant before he granted the advowson to one Strengtham who granted it to the def. or not. And the jury gave a special verdict, scil. that the Abbot of S. was seised of a capital messuage in Frombillet, & of one hundred **[208]** acres of land there, and that there was a tenancy holden of the said capital messuage by such services, and that the said capital messuage had been known time out of mind, by the name of the manor of Frombillet, and that the advowson was appendant to it, and conveyed the said capital messuage and advowson to the King by the dissolution, and from the King, to the said Thomas Long, who so seised, without any deed did enfeoff the plaintiff of the said manor, and made livery and seisin upon the demesnes, and that the said Thomas Long by his deed made a grant of the said advowson, to the said Strengham, and afterwards the free-holder attorned to the plaintiff: and by the clear opinion of the whole Court, here is a sufficient manor to which an advowson may be well appendant, and that in law the advowson is appendant to all the manor, but most properly to the demesnes, out of which at the commencement it was derived, and therefore by the attornment afterwards, within construction of the law shall have relation to the livery, the advowson did pass included in the livery: and the grant of the advowson made mesne between the livery and the attornment was void; and afterwards judgment was given, and a writ to the bishop granted for the plaintiff.

1 Cro. 209.

CCXC. MICH. 32 & 33 ELIZ. IN COMMUNI BANCO.

Debt.

A. made a bill of debt to B. for the payment of twenty pounds at four days, scil. five pounds at every of the said four days, and in the end of the deed, covenanted and granted with B. his executors and administrators, that if he make default in the payment of any of the said payments, that then he will pay the residue that then shall be un-paid; and afterwards A. fails in the first payment, and before the second day B. brought an action of debt for the whole twenty pounds, it was moved by Puckering Serjeant, that the action of debt did not lye before the last day encurred; and also if B. will sue A. before the last day, that it ought to be by way of covenant, not by debt: but by the whole Court, the action doth well lye for the manner, for if one covenant to pay me one hundred pounds at such a day, an action of debt lyeth, a fortiori, when the words of the deed are covenant and grant, for the word covenant sometimes sounds in covenant, sometimes in contract, secundum subjectum materiæ.

Sty. 31. 32. 1 Cro. 797. Owen. 42. 1. 2 Rol. 523.

MICH. 32 & 33 ELIZ. IN COMMUNI BANCO.

CCXCI. LANCASTERS CASE.

An information was against Lancaster for buying of pretended rights and titles upon the statute of 32 H. 8. and upon not guilty pleaded, it was found for the plaintiff, & it was moved in arrest of judgment, because the informer had not pursued the statute, in this, that it is not set forth, that the defendant nor any of his ancestors, or any by whom he claimed, have taken the profits, &c. and the same was holden a

good, and material exception by the Court: & although it be layed in the information, that the plaint. himself hath been in possession of the land by twenty years before the buying of the pretended title, for that is but matter of argument, & not any express allegation, for in all penal stat. the plaintiff ought to pursue the very words of the stat. and therefore by Anderson, It hath been adjudged by the Judges of both benches, that if an information be exhibited upon the Stat. of Usury, by which the defendant is charged for the taking of twenty pounds for the loan and forbearing of one hundred pounds for a year, there the information is not good, if it be not alledged **[209]** in it, that the said twenty pounds was received by any corrupt or deceitful way or means: and in the principal case, for the cause aforesaid, judgment was arrested.

Roll. Tit. Covenant pl. 72.

MICH. 32 & 33 ELIZ. IN THE COMMON BENCH.

CCXCII. BAGSHAW AND THE EARL OF SHREWSBURIES CASE.

Annuity.

Bagshaw brought a writ of annuity against the Earl of Shrewsbury, for the arrerages of an annuity of twenty marks per annum, granted by the defendant to the plaintiff, pro consilio impenso & impendendo. The defendant pleaded, that before any arrerages incurred, he required the plaintiff to do him service, and he refused: the plaintiff by replication said, that before the refusal, such a day and place the defendant discharged the plaintiff of his service, &c. And the opinion of the Court was, that the plea in bar was not good, for he ought to have shewed for what manner of service to do, the plaintiff was so retained, and for what kind of service the annuity was granted; and then to have shewed specially what service he required of the plaintiff, and what service the plaintiff refused. Another matter was moved, if the discharge shall be peremptory, and an absolute discharge of the service of the plaintiff, and of his attendance, so that as afterwards the defendant cannot require service of the plaintiff. And by Walmesly Justice, it is a peremptory discharge of the service, for otherwise how can he be retained with another master; and so he should be out of every service. Windham contrary, For here the plaintiff hath an annuity for his life, and therefore it is reason that he continue his service for his life, as long as the annuity doth continue, if he requireth: but where one is retained but for one or two years, then once discharged, is peremptory and absolute.

MICH. 31 & 32 ELIZ. IN THE COMMON BENCH.

CCXCIII. MATHESON AND TROTS CASE.

Devises. Descent, where takes away entire.

Betwixt Matheson and Trot the case was, Sir Anthony Denny seised of certain lands in and about the town of Hertford, holden in socage, and of divers mannors, lands, and tenements in other places holden in chief by knights-service, and having issue two sons, Henry and Edward, by his last will in writing, devised the lands holden in Hertford to Edward Denny his younger son in fee, and died seised of all the premises, Henry being then within age: after office was found without any mention of the said devise; the Queen seised the body of the heir, and the possession of all the lands whereof the said Sir Anthony died seised, and leased the same to a stranger, during the minority of the heir; by force and colour of which lease the lessee entred into all the premises, and did enjoy them according to the demise. And the heir at his full age sued livery of the whole, and before any entry of the said Edward in the land to him devised, or any entry made by the said Henry, the said Henry at London, leased the said lands by deed indented to I. S. for years, rendring rent, by colour of

which the said I. S. entred, and paid the rent divers years to the said Henry: and afterwards by casualty the said Henry walked over the grounds demised by him, in the company of the said I. S. without any special entry or claim there made, I. S. assigned his interest to I. D. who entred in the premisses, and paid the rent to the said Henry, who died, and afterwards the rent was paid to the son and heir of Henry: and after four and twenty years after **[210]** the death of the said Sir Anthony, the said Edward entred into the land to him devised by the said devise; and leased the same to the plaintiff, &c. And it was moved here, if this dying seised of Henry of the lands in Hertford, and descent to his heir, should take away the entry of Edward the devisee. And by Anderson cleerly, If here upon the whole matter be a descent in the case, then the entry of Edward the devisee is taken away, although that the devisee at the time of the descent had not any action or other remedy, for it shall be accounted his folly that he would not enter, and prevent the descent. But Windham, Periam, and Walmesly Justices, were of a contrary opinion, for a devisee by a devise hath but a title of entry, which shall not be bound by any descent, as entry for mortmain, for condition broken. And after long deliberation they all agreed that there was not any descent in the case, for by the devise, and death of the devisor, the frank-tenement in law, and the fee was vested in the devisee Edward: and then when the Queen seised, and leased the same during the nonage of Henry, and the lessee entred, he did wrong to Edward, and by his entry had gained a tortious estate in fee, although he could not be said properly a disseisor, nor an abator: and afterwards when Henry after his full age, when by his indenture he leased without any special entry, ut supra, and by colour thereof of the lessee entred, now he is a wrong-doer to Edward the devisee and by his entry had gained a wrongful possession in fee: and then the paying of the rent to Henry, nor the walking of Henry upon the land without any special claim, did not gain any seisin to him: and so he was never seised of the land, and could never die seised, and then no discent; and then the entry of Edward was lawful, and the lease by him made to the plaintiff was good: and so judgment was given for the plaintiff.

2 Len. 190. 2 Len. 147. 1 Cro. 920. 3 Cro. 145. Owen. 96.

MICH. 32 & 33 ELIZ. IN THE COMMON BENCH.

CCXCIV. GREENWOOD AND WELDENS CASE.

Replevin.

In a replevin between Greenwood and Welden; the defendant made conusans as bayliff to John Cornwallis, & shewed how that seven acres of land called Pilles, is locus in quo: and at the time of the taking were holden of the said Cornwallis by certain rent, and other services: and for rent arrear he made conusans, as bayliff to Cornwallis. The plaintiff pleaded out of the fee of Cornwallis, upon which they were at issue: and it was found that the plaintiff is seised of seven acres called Pilles, holden of Cornwallis, ut supra: but the jury say, that locus in quo doth contain two acres, which is called Pilles, and these two acres are, and then were, holden of Agmondesham of the Middle-Temple: and if upon the whole matter, videbitur curiæ, &c. And by the opinion of the whole Court, out of his fee upon that matter is not found, for although it be found, that the two acres be holden of Agmondesham, yet it may be that they are within the fee of Cornwallis, for it may be that Cornwallis is Lord Paramount, and Agmondesham mesne, and then within the fee of Cornwallis: and therefore for the incertainty of the verdict, a venire facias de novo was awarded.

MICH. 32 & 33 ELIZ. IN THE COMMON BENCH.

CCXCV. BISHOP AND HARECOURTS CASE.

Assumpsit.

In an action upon the case, the plaintiff declared, that the 5 Junij, 30 Eliz. the defend. (in consideration that the plaintiff the same day and year, sold and delivered to the defend. a horse) did promise to pay the **[211]** plaintiff a hundred pounds in Trinity Term then next ensuing, and shewed that the term began 7 Junij after: and upon non assumpsit pleaded, it was found for the plaintiff. And it was moved in arrest of judgment, that it appeareth upon the declaration, that the plaintiff hath not cause of action, for the Trinity Term intended is not yet come, for the day of the assumpsit is the fifth of June, and the fourth day was the first day of the said term, scil. the day of essoins, and the seventh day 4. die post, and then the promise being made at the day aforesaid, after the commencement of the said term, the same is not the term intended, but the plaintiff must expect the performance of the promise until a year after: and of that opinion was Anderson, but the three other justices were strongly against him to the contrary, for by common intendment amongst the people, the term shall not begin until 4. die post, and so it is set down usually in the almanack; and afterwards judgment was given for the plaintiff.

1 Cro. 210.

CCICVI. MICH. 32 & 33 ELIZ. IN THE COMMON BENCH.

Common Recovery suffered by an Infant by his Guardian.

Cooper Serjeant came to the bar, and shewed that A. tenant in tail, the remainder over to B. in fee. A. for a great sum of mony sold the land to I. S. and his heirs, and for assurance, made a feoffment in fee, and levied a fine to the said I. S. to the use of the said I. S. and his heirs: and note that by the indenture of bargain and sale, A. covenanted to make such further assurance within seven days, as the said I. S. or his heirs, or their council should devise: and shewed, that before any further assurance was made, the said I. S. died, his son and heir being within age: and now by advise of council, and of the friends of the infant, it was devised that for such further assurance and cutting off the remainder, a common recovery should be suffered, in which the said infant should be tenant to the præcipe, and should vouch the vendor, and because that the said term of seven years is almost expired, and that the said recovery is intended to be unto the use of the said infant and his heirs, it was prayed that such a recovery might be received and allowed. And two presidents in such case were shewed in the time of this Queen: one the case of the Earl of Shrewsbury, and the other one Wisemans case: but the justices were very doubtful what to do; but at last upon good assurance of people of good credit, that it was unto the use of the infant and upon the appearance of a good and sufficient guardian for the infant in the recovery, who was of ability to answer to the infant if he should be deceived in the passing of that recovery; and upon consideration had of the two presidents, and upon affidavit made by two witnesses, that the said intended recovery was to the use of the infant, the recovery was received, and allowed.

Co. 2 Inst. 483. 484. 1 Cro. 323. 471. 567. Hob. 196. 3 Cro. 224.

MICH. 32 & 33 ELIZ. IN THE COMMON BENCH.

CCICVII. COTTONS CASE.

Fines levied to use. Estates. Tails.

It was found by special verdict, that Berwich and Tesdel seised of certain lands, conveyed the same to Sir Thomas Cotton for life, the remainder to Wil. Cotton, & primogenito filio suo, & hæredi masculo, & sic de primogenito ad primogenitum dict.

William, the remainder to the right heirs of the body of Sir Tho. Cotton, and Wil. Cotton lawfully issuing, the remainder to the right heirs of Sir Tho. Cotton: Wil. had issue a son born here in Eng. and went beyond the sea to Antwerp, and there continuing, and his son being within age in England, Sir Thomas Cotton [212] levied a fine of all the land, sur conusans de droit come ceo, &c. And afterwards by indenture covenanted to stand seised to the use of himself for life, and afterwards to the use of Robert Cotton his son in fee: William died at Antwerp, his said son being within age in England, Sir Tho. Cotton died, Robert entred, and leased the lands for years to Sary, and the infant son and heir of William leased the land to one Chewn at will, who entred and ousted Sary, who thereupon brought ejectione firmæ. It was here holden by the Court, that Sir Tho. Cotton was tenant for life, the remainder to William for term of his life, the remainder to the heirs of both their bodies issuing: so as unto one moyety Sir Thomas Cotton had an estate tail dependant upon the said estates for life; and so the fine levied by him was a bar to the issue of William for a moyety. And as to the other moyety they held that the said fine was not any bar, but that the party interessed at the same time might avoid the fine at any time during his nonage, & five years after, for Wil. his father was not bound by the statute of 4. H. 7. because at the time of the fine levied, he was beyond the seas, and although he never returned but died there, yet by the equity of the statute his issue shall have five years after his death to avoid the fine, if he were of full age, and if he were within age, then during his nonage, and five years after. At another day the case was argued and put in this manner, viz. lands were given to Sir Thomas Cotton for life, without impeachment of wast, the remainder over to Cheny Cotton his eldest son, & primogenito filio & hæredi masculo, of the said Cheny, & sic de primogenito filio in primogenitum filium, the remainder to the heirs males of the body of the said Cheny, & for want of such issue, the remainder to Wil. Cotton his second son, & primogenito filio, in primogenitum filium, the remainder over to the said Sir Thomas, and the said William, and the heirs males of their bodies lawfully begotten. Cheny Cotton died without issue, William having issue, went beyond the sea, Sir Thomas Cotton, 19 Eliz. levied a fine with proclamation, and afterwards William the father died in Antwerp, his son being within age, Sir Thomas by indenture limited the use of the fine to himself for life, the remainder over to Robert Cotton his third son in tail, Sir Thomas died (but it doth not appear at what time) William the son being yet within age entred (but non constat quando) and 31 Eliz. leased the lands to the defendant at will. Drue Serjeant argued for William Cotton. And he conceived, that William the father had an estate-tail, and then the entry of William the son was congeable for the whole: but admitting that it is not an estate-tail in William the father for the whole, yet he hath by the second remainder an estate-tail in the moyety, and then his entry good as to one moyety; and then Robert being tenant in common of the other moyety, his lessee without an actual ouster cannot maintain an ejectionæ firmæ against the lessee of his companion. And he conceived here is a good estate-tail in William Cotton by virtue of the limitation to William, & primogenito filio & hæredi masculo ipsius Guliel. & sic de primogenito filio in primogenitum filium, &c. for according to the statute of West. 2. the will of the donor ought to be observed, and here it appeareth that the intent of the donor was to create an estate-tail, although the words of the limitation do not amount to so much. And the estates mentioned in the statute aforesaid, are not rules for entails, but only examples, as it is said by Trew, 33 E. 3 F. Tail 5. & see Robeiges Case, 2 E. 2. 1 Fitz. Tail: and 5 H. 5. 6. land given to A. and B. uxori ejus, & hæredibus eorum & aliis hæredibus dicti A. si dict. hæredes de dictis A. & B. exeuntes obierint sine hæredibus de se, &c. and that was holden a good entail; so a gift to one and his heirs, si hæredes de carne sua habuerit, & si nullos de carne sua habuerit revertatur terra, and adjudged a good tail: so 39 E. 3. 20. land given to husband and wife, & uni hæredi de corpore suo ligitime procreat. & uni hæredi ipsius hæredis tantum, and that was hol-[213]-den a good tail; and so he conceived in this case, that although the words of the limitation are not apt to create an estate-tail according to the phrase and stile of the said statute of West 2. yet here the intent of the donor appears to continue the land in his name and blood, for William the son could not take with his father by his limitation, for he was not in rerum natura, and therefore all shall vest in William the father, which see 18 E. 3 Fitz.

Feoffments & Fait. 60 Now it is to see, if upon the limitation to Sir Thomas Cotton and William his son, by which the remainder is limited to Sir Thomas Cotton and William, and the heirs males of their bodies issuing, the said Sir Thomas Cotton and Wil. have a joynt estate-tail; in respect that the issue of the body of the son, may be heir of the body of the father: and so because they might have one heir which shall be inheritable to his land, it shall be one entire estate-tail in them: but he conceived that they are several estates-tail, and that they are tenants in common of an estate tail, 3 & 4 Phil. & Mar. Dyer 145. Land given to the father and son, and to the heirs of their two bodies begotten, the remainder over in fee, the father dieth without other issue than the son only, and afterwards the son dieth without issue, a stranger abates: or if the son hath made a discontinuance, if he in the remainder shall have but one or two several formedons was the question. And by Saunders, Brook, and Brown, but one formedon, and quære left of it; yet admitting that, yet notwithstanding that, it might be that they had several estates-tail, 17 E. 3. 51. 78. Land given to a man and his sister, and to the heirs of their two bodies issuing, they have several estates tail, and yet one formedon. And see 7 H. 4. 85. land given to a man and his mother, or to to her daughter in tail, here are several entails and here in the principal case, Sir Thomas Cotton hath one moyety in tail expectant upon his estate for life: and therefore as to the moyety of Sir Thomas Cotton he is bound by the fine. And the other moyety is left in the son, who may enter for a forfeiture upon the alienation made by his father, as well in the life of the father, as afterwards. Now after this fine levied, the entry of William the son by virtue of his remainder is lawful after the death of Sir Thomas, although that William the father was beyond the sea at the time of the fine levied, and there afterwards died, William the son being within age. The words of the statute of 4 H. 7. are, Other than women covert, or out of this realm, &c. so that they or their heirs make their entry, &c. within five years after they return into this land, &c. So that by the bare letter of the act, Will. the son hath not remedy, nor relief by this act against the fine, because that William, the father died beyond the sea, without any return into England; yet by the equity of the statute he shall have five years to make his claim, although his father never return, for if such literal construction should be allowed, it should be a great mischief, and it should be a hard exposition, for this statute ought to be taken by equity, as it appeareth by diverse cases, 19 H. 8. 6. My uncle doth disseise my father, and afterwards levies a fine with proclamations; my father dieth, and after within five years my uncle dies, that fine is no bar to me, yet the exception doth not help me, for I am heir to him that levied the fine, and so privy to it, but my title to the land, is not as heir to my uncle, but to my father: so if an infant after such a fine levied, dieth before his full age, his heir may enter within five years after, and yet that case is out of the letter of the statute. And by Brown and Sanders, if the disseisee dieth, his wife enseint with a son, the disseisor levieth a fine, the son is born, although this son is not excepted expressly by the words, because not in rerum natura at the time of the fine levied, &c. yet such an infant is within the equity and meaning of the said statute. See the case betwixt Stowel and Zouch, Plow. Com. 366. And by him, **[214]** it was holden, 6. Eliz. that an infant brought a formdon within age, and adjudged maintainable, although the words of the statute be, that they shall take their actions or lawful entries within five years after they come of full age: and he also argued, that here, when Sir Thomas being tenant for life, levyed a fine, which is a forfeiture, he in the remainder is to have five years after the fine levied, in respect of the present forfeiture, and also five years after the death of the tenant for life: and that was the case of one some adjudged accordingly in the Common Pleas: it hath been objected on the other side, that the defendant entring by color of the lease at will made to him by William who was an infant, that he was a disseisor as well to the infant as to the lessor of the plaintiff, who had the moyety as tenant in common with the infant, and then when the lessor of the plaintiff entred upon the defendant, and leased to the plaintiff, and the defendant entred and ejected the plaintiff, he is a disseisor; to which he answered, that the defendant when he entred by the lease at will, he was no disseisor, for such a lease of an infant is not void, but only voidable, &c. and then a sufficient lease against the plaintiff, although not against the infant. Beaumont Serjeant, to the contrary; by this manner of gift,

William the son took nothing, but the estate setled only in William the father, but not an estate tail, by the words, hæredi masculo, &c. And voluntas donatoris, without sufficient words cannot create an estate tail; but where the intent of the donor is not according to the law, the law shall not be construed according to his intent: but this intent shall be taken according to the law. And he held that Sir Thomas and William had several estates in tail, and several moyeties, and not one entire estate, and here, upon all the matter, Sir Thomas is tenant for life of the whole, the remainder of one moyety to him in tail, the remainder of the other moyety unto William in tail, and, rebus sic stantibus, Sir Thomas levying a fine of the whole, now as to one moyety which the conusor had in tail, the fine is clearly good, and so as to that, Robert the lessor of the plaintiff had a good title, as to the said moyety; and as to the other moyety he conceived also, that William is bound, for this statute shall not be construed by equity, but shall bind all who are expresly excepted, and that is not William the son, for his father never returned, and then his heir is not releived by the statute: also William had a right of entry at the time of the fine levied, scil. for the forfeiture, and because he hath surceased the time, for the said right of entry, he shall not have now five years after the death of tenant for life, for he is the same person, and the second saving which provides for future rights, extends to other persons than those who are intended in the first saving, and he who may take advantage of the first saving, cannot be relieved by the second saving, for no new title doth accrue to him in the reversion or remainder, by the death of tenant for life, for that title accrued to him by the forfeiture, so as the title which he hath by the death of the tenant for life, is not the title which first accrued unto him: also by this forfeiture, the estate for life is determined, as if tenant for life had been dead; for if tenant for life maketh a feoffment in fee, the lessor may have a writ of entry ad terminum qui prætерijt. Fitz. 201. which proves, that by the forfeiture the estate is determined, and then no new title doth accrue to him in the remainder, by the death of the tenant for life, but that only which he had before the alienation, so that his non-claim after the five years shall bind him. Then, when William the infant having a right to a moyety, and Robert the lessor of the plaintiff a right to the other moyety, and the infant leaseth unto the defendant at will, who entreth, now is he a disseisor as well to Robert as to the infant: then if the defendant be disseisor and hath no title by the infant, Robert who hath right in a moyety may well enter into the whole, for he hath the possession per my & per **[215]** tout by his entry, and then when the defendant doth eject him, he hath good cause of action. And after at another day the case was moved, and it was agreed, that for one moyety the infant is bound, for Sir Thomas had an estate tail in a moyety, for he was issue of the body of the conusor: but for the other moyety, the fine levied by tenant for life, William the father being then tenant beyond the sea, it was holden by Anderson, Windham, and Walmesly, that the infant was not barred, notwithstanding the objection abovesaid, that William the father never returned into England, and notwithstanding the words of the statute of 4 H. 7. And by Walmesley, If an infant make his claim within age it is sufficient to avoid the fine, and yet the said statute seems to appoint to him time within five years after his full age, so that according to the very words, a claim made before or after should be vain, yet in equity, although he be not compellable to make his claim until the time allowed by the statute, yet if he make it before, it is good enough. And by Anderson, Although that William the father did not return, yet if he makes not his claim within five years after the death of his father being of full age, and without any impediment, &c. he shall be barred. If in such case a man hath many impediments, he is not compellable to make his claim when one of the impediments is removed, but when they are all removed. So if the ancestor hath one of the said impediments, and dieth before it be removed, and his heir is within age, or hath other impediment, he is not bound to make his claim till five years after his impediment is removed. And Somes case cited before was holden and agreed to be good law, for the forfeiture may not be known unto him. And as to the objection against the lease at will, because it was made by an infant, and no rent reserved upon it, nor the lease made upon the land, and therefore the lessee should be a disseisor, to that it was answered, be the defendant a disseisor, or not, it is not material here, for if the plaintiff had not title according to his declaration, he cannot recover,

whether the defendant hath title or not, for it is not like unto trespass where the very possession without other title is good, contrary in actions against all who gave not title; but in ejectione firmæ, if the title of the plaintiff be not good and sufficient, be the title of the defendant good or not, he shall not recover: and afterwards judgment was given for the defendant, Hill. 33. Eliz.

Co. 2 Inst. 519. 1 Cro. 219. 1 Cro. 220. 1 Cro. 438.

MICH. 32 & 33 ELIZ. IN COMMUNI BANCO.

CCXCVIII. CHENY AND SMITHS CASE.

In an ejectione firmæ by Cheny and his wife against Smith: the plaintiffs declared upon a lease made by the master of the house or Colledge of S. Thomas of Acons in London to I. S. who assigned it over to Knevit, who by his will devised the same to his wife, whom he made also his executrix, and dyed, and afterwards she took to husband one Waters, and died; Waters took letters of administration of the goods and chattells of his wife, and afterwards leased to the plaintiffs: and upon not guilty they were at issue. And it was given in evidence that the lease given in evidence, was not the lease whereof the plaintiffs have declared, for the original lease shewed in Court, is, master of the house, or hospital, where the lease specified in the declaration is, master of the house or colledge, 38 E. 3. 28. And some of the justices conceived that there is not any material variance (but if the parties would, it might be found by special verdict) for by them colledge and hospital are all one. And afterwards the Court moved the plaintiffs to prove if the wife were in as executrix, or as lega-**[216]**-tee, for by Anderson, and Periam, until election be made he shall not be said to have it as legatee, especially if it be not alledged in fact, that all the debts of the testator are paid; and Anderson doubted, although that it be alledged, that the debts be paid, if the executor shall be said to have the said lease as a legacy, before she hath made election, vid. Weldens case, and Paramours case in Plowd. And afterwards it was given in evidence, that the wife after the death of the husband had repaired the banks of the land, and produced witnesses to prove it, as if the same should amount to claim it as a legacy; and the Court said, that that matter should be referred to the jury: and it was further shewed in evidence, that the said wife executrix, and her said husband Waters formerly made a lease by deed, reciting thereby, that where the husband was possessed in the right of his said wife as executrix of her first husband, &c. And by the opinion of the whole Court, the same was an express claim as executrix; and then when the wife died, if the husband would have advantage of it, he ought to take letters of administration of the goods of her first husband, and not of the wife; but if she had claimed the land and the term in it as legatee, and had not been in possession, administration taken of the rights and debts of the wife, had been good as to that intent, that his wife was not actually possessed of it, but only had a right unto it, and of such things in action, the husband might be executor or administrator to his wife, but here they have failed of their title; the administration being taken of the goods of the wife, where it should be of the goods of the testator the first husband; and for this cause the plaintiffs were non-suit, and the jury discharged. And it was agreed by all the justices, that if the wife before election had taken husband, that the husband might have made the election in the case aforesaid.

1 Roll. 620.

MICH. 32 & 33 ELIZ. IN THE COMMON BENCH.

CCXCIX. THE LORD COBHAM AND BROWNS CASE.

The case between the Lord Cobham and Brown, was, that the Abbot of Grace was seised of the mannor of Gravesend in the county of Kent, which mannor doth extend to the parishes of Gravesend, and Milton, and that the said abbot and all his predecessors, &c. time out of mind, &c. have had a water-court within the said mannor,

which court had been holden at Gravesend Bridge in the end of it, and that all the inhabitants within the said parishes, which have boats either entirely or joyntly with others, and have used to transport or carry passengers from Gravesend to London, & e contra, and have used to fasten their boats at the said bridge of Gravesend, have used to do suit at the said court, and there have used to enquire of all mis-orders, and mis-demeanors of watermen there, and that the said abbots, &c. have used to have the fines and amercements of the same court, and conveyed the said mannor to the plaintiff, and that at a court there holden, the defendant being sworn with the residue of the enquest to enquire of such dis-orders, refused to give his verdict, for which for the said contempt, the defendant, by the then steward was amerced twenty shillings, for the which amercement the plaintiff brought an action of debt: it was moved by Beaumount Serjeant; that the action did not lye, for the prescription upon which the action is grounded is not good; first, he claims to have this court within his mannor, and as a thing appertaining to it, and yet he claims suit at his court of all the inhabitants of the said two parishes, and to have them suitors at it, being meer strangers to the mannor, & which do not hold of it, for although it be alledged, that the said mannor doth extend **[217]** in the said parishes, yet the same doth not prove that every part of the said parishes is within the said manor, and if it be not so, the prescription may extend as well to all the county of Kent, as well as to the said two parishes, for such a prescription cannot bind but those which are tenants of the said manor, and cannot extend to strangers, which see 21 H. 7, 40, the case of pound-breach. Secondly, it is not alleadged here, that the steward ought and had used to assess amercements, for by the common law no steward hath authority to assess amercements or fines in a court baron, for there the suitors are judges and not the steward; and that this water-court is a court baron, it appeareth by the declaration, for there it is said that it is a court belonging to such a manor, and that prima facie shall be meant a court baron, if the contrary be not shewed, vi. Fitz. 75 g. Thirdly it is not shewed that the amercement was affered, which see ib. 75. Harris Serjeant, to the contrary: This court upon the whole matter is in nature of a leet for the reformation of mis-orders between the watermen, and the prescription here will warrant such a court well enough, and there are many courts in England which are not court barons, but grounded upon prescription, 40 E. 3, 17. The court before the Chancellor of Oxford, prescription to have Swan-mote, and it is reason that this prescription should hold place, for here is quid pro quo, for watermen receive their carriage and loading at this bridge, and also discharge their loading there, and they use to fasten their boats there, and therefore in lieu of that benefit, it is reason that they be attendant at the court which is upon the said bridge, and upon that reason is the prescription of toll traverse, 5 H. 7, 9. And to have a land bird, 2 R. 3, 15. and toll of every vessel which passeth the river, 21 H. 7, 16. And this court may be a court within the manor, and yet no court baron, but in the nature of a leet, and the prescription shall be good in law by reason of the recompence to the suitors, and then, if it be not a court baron, but rather in the nature of a leet, then it follows, that the suitors are not judges but the steward; and it behoves not to prescribe for the amercement, for that is incident to a court leet, for otherwise how can the suitors be compelled to do their suit at it, or their defaults, or contempts at the same be punished? and as to the affering of the amercement, it needs not here, for it is a fine for the open contempt, and despite done unto the court, and not an amercement, and it may well be assessed by the steward alone, vi. 23 H. 8. Br. Leet, 37. Drill Serjeant, to the contrary: For this prescription is not reasonable, to drive strangers to do suit at a court baron, for there is sufficient consideration in the case of tenants of the manor; for it may be at the beginning, the tenancies were given upon such consideration to do such suit: but in the principal case, the prescription is their ground, and therefore unreasonable, because without consideration, 22 E. 4, 43, see the case there, and 21 H. 7, 20. A custom alleadged, that if any tenant distrain the beasts of another damage feasant, that he ought to bring such beasts to the pound of the lord of the manor, and if not, that at the next court he should be amerced twelve pence, and the same was holden no good custom, because against common right and common law. Puckering Serjeant: If this court shall be reputed in law a court baron, then the prescription, for the maner of it is not good, for in such case, the amercement cannot be assessed by the

steward; but he held, that this court is in the nature of a court leet, and not a court baron, and all inhabitants within the precinct of it, are bounden to do their suit at it by reason of their reliancy, & their trade there, if they have boats, or shares in boats, and such court is for the better government of such watermen, and the exercise and practise of their trade, and for the redressing of misdemeanors betwixt them, and so this court hath a reasonable commencement, being **[218]** instituted for the publick good, and if customs which concern the private benefit of any be allowable; as the mayor and burgesses of a town prescribe to have of every tun which cometh in any ship into their port, and put upon the land 6d. for toll. See 21 H. 16. A fortiori, a custom or prescription which concerns the publick good, is good: & it is not strange that such court hath been maintained by prescription, for the Court of Stanneris is so without any commencement or erection, but by custom. And although that toll cannot be paid at any market for things brought to market, but for things sold, yet by custom toll shall be paid for every thing brought to market, and for the standing of the seller there; for the sale of victuals is for the good of the common wealth, which thing is the ground of the prescription in the principal case, & therefore the prescription in the manner of it is good; and if the prescription be good for the court, then to have a steward to keep the court, to assess fines for contempts and disorders is good without any special prescription, for it is incident to it. Periam Justice, If it be a court baron then cannot the steward impose or assess any fine: which Windham granted; but he said it is not a court baron, but a court by prescription. Periam, If the plaintiff claim it as belonging to his manor, it shall be intended a court baron, but yet a man may have a court within his manor by prescription, which is not a court baron. Anderson was of opinion that it is not a court baron, for although it be appertaining to the manor, yet that is not any proof that it is a court baron: for a leet may be appertaining to a manor. It was adjourned.

MICH. 32 & 33 ELIZ. IN COMMUNI BANCO.

CCC. GREEN AND EDWARDS CASE.

Between Green and Edwards the case was this, land is demised to A. for nine years, if he shall so long live, and if he die within the term, that B. his wife shall have it durante toto residuo termini prædict. The husband dieth during the term: if the wife shall have the residue of the term was the question. And by Periam & Walmesly Justices, by the death of the husband the term is determined, and thereupon nothing can remain, especially by way of grant, but by way of devise it might be. See 9 Eliz. 253. A lease for forty years to A. if he shall live so long, and if he die within the term that E. his wife shall have the residue of the years: where it was holden, that by the death of A. the term is determined, and then there is no residue, and so the limitation is void, vide 3 & 4 Phil. & Mar. 150. Anderson, If the husband and wife had been parties to the deed of demise, then the residue of the term should go to the wife after the death of the husband: and this word (terminum) shall not be taken for the interest which is given to the husband, but for the time, so it is as much as to say, that if the husband die before forty years expired, that then his wife shall have the residue for forty years; and it is reason to make such construction rather than to construe the said part of the deed to be void: for if in the construction of this grant, the term shall be taken for the interest, then the limitation shall be void. And in all grants, the deeds shall be taken most beneficially for the grantee, and most strongly against the grantor, especially ut res magis valeat quam pereat: and here are several grants and several terms: but if such matter be limited to the wife not named in the deed, all is void, for it is incertain when the term shall begin, & it cannot vest during the particular estate, and it is not certain, whether the husband shall survive the term, or not. And by Walmesly & Windham the said limitation is meerly void: as if a termer grants all his term for so many years as shall be behind after his death, the same is a void grant, for the lessee may over-live all the term, and then **[219]** it is incertain when it shall begin: and in this case this word, term

shall be taken for the interest, and not for time, vide 35 H. 8. Br. Conditions 203, vide Co. 1 part, in the rector of Chedingtons case, this case vouched.

1 Cro. 216, 217.

MICH. 32 & 33 ELIZ. IN THE COMMON BENCH.

CCCI. GAWTON AND THE LORD DACRES CASE.

[See *Lyell* v. *Kennedy*, 1889, 14 App. Cas. 460.]

In debt upon surplusage of an accompt by Gawton, against George Lord Dacres; it was said by Periam Justice, and not denied by any, that if I make J. S. my auditor, generally to take accompts of all my bayliffs and receivors, that he is not a sufficient auditor without a patent; for when a man is made an auditor generally, he is an officer, and an officer cannot be without a deed. But if a bayliff, or receiver be accomptable to me, it is as cleer on the other side, that I may appoint one to be my auditor to take the accompt of him, pro hac vice by word; which Anderson granted: but if he afterwards takes an accompt of any by force or colour of the said warrant without my commandment, he is not a sufficient auditor to such intent, either to take the accompt, or to assess the arrerages if the accomptant be found in arrear, or to make allowance if he be found in surplusage: and by him, if one become my bayliff of his own wrong, without my appointment, he is accomptable to me, but I am not compellable to make him any allowance for his expences about my business. And if I assign to such bayliff of his own wrong an auditor, he cannot make allowance of such expences. Anderson, If my auditor make allowance to my bayliff for any collateral expences, which he hath expended in my affairs, which do not concern my manor, whereof he is bayliff, such allowance shall not bind me. And note, that in this action the plaintiff declared that he was bayliff to the defendant of certain manors, receiver of certain monies, and so retained, ad diversa negotia procurandum: and upon accompt the allowance was made unto him for his board-wages, and other expences in riding circa negotia. And by Anderson, These allowances shall not bind the defendant; for as bayliff of a manor, no expences shall be allowed unto him, but those which the bayliff hath expended within the manor: and if I retain one to go about my business he is not accomptable. Windham, If I retain one to follow my business, and deliver to him mony to disburse in such business, he is accomptable. Anderson, It is so truly, but it is not in respect of the said retainer, but as he was receiver, and if he expend more than he hath received, he doth it without warrant and no allowance shall be made unto him. If the bayliff be found in surplusage in the conclusion of the accompt, the auditor ought to enter. Allocatur super determinationem compt. in surplusagiis, so much for such and such expences, allocatis allocandis upon the next accompt: but in this case it appeared upon the evidence, that the entry upon the foot of the accompt was, and so he is in surplusage upon the determination of this accompt twenty six pounds: but the auditor being examined, said, that it was not his meaning to allow unto him so much, but only to find and express the certainty of the whole accompt, and so refer the allowance of it to the defendant to whom he was auditor: and upon that the Court said to the jury, if they believed the auditor, that they should find against the plaintiff, for upon the matter here is not any accompt, and so no allowance; for the allowance if it had been according to law ought to be entred, before allocatur, &c. and such allowance is as a judgment, but here is not any allowance, for the auditor did refer the same to the defendant: but if the jury doth not give credit to the auditor, then the Court moved the jury to find **[220]** it specially that the party was auditor without deed, and the finding of the accompt as it is set down in the declaration, and the manner of the conclusion of it. viz. that the plaintiff was in surplusage upon the determination of the accompt for his expences in riding circa negotia defendentis, and for his board-wages twenty six pounds.

3 Len. 149.

MICH. 32 & 33 ELIZ. IN THE COMMON BENCH.

CCCII. CHAMBERLAYNS CASE.

Cattel taken in Withernam, worked.

In this case it was moved, whether beasts taken in withernam, might be used and worked by the party as his proper beasts: and it was said by the Court, that beasts distrained, as cows, could not be milked, nor horses wrought, but they ought to be put in the pound open, and there the owner might milk them and fodder them. But if cows be taken in withernam, because they are delivered to the party in lieu of his own cattel, he may milk them, or if they be oxen, or horses, reasonably work them, otherwise he should be at great charges of keeping and pasturing of them, and no profit, or consideration for it. Anderson, It should be a great inconvenience to the common-wealth: for if the cows are not milked, the milk is lost, and also the cows impaired thereby.

Owen. Rep. 124. 2 Cro. 148. 3 Len. 235. 236.

MICH. 32 & 33 ELIZ. IN THE COMMON BENCH.

CCCIII. BYNE AND PLAYNES CASE.

Assumpsit. Request.

In an action upon the case by Byne against Playne, the plaintiff declared, that whereas he himself had recovered against Thomas Ward in the Court of the Queen in Southwark, holden before Omesley Steward there for the Mayor of London, the sum of twenty pounds, and had obtained out of the said Court a levari facias directed to the bayliff to do execution upon the goods of the said Thomas Ward, which then were in the possession of the said plaintiff; and where the said bayliff by vertue of the said writ was ready to have done execution of the said goods, the defendant came to the now plaintiff, and assumed to him, that in consideration that the said plaintiff would deliver to the defendant the said goods, that he would in fourteen days after Michaelmas next pay to the plaintiff twenty pounds, or otherwise deliver to him the said goods again, if in the mean time no other makes title unto them, and prove them to be his own goods. And further, that the plaintiff shall have free ingress and regress to a chamber in the house of the defendant in the meantime. And upon non-assumpsit pleaded, it was found by the jury, that such a recovery was in the said Court, and that the defendant did assume, &c. But they further say, that before the said recovery, the said Thomas Ward was possessed of the said goods as of his own proper goods: and, by deed indented, sold them to his brother R. W. in consideration of a certain sum of mony, with a proviso, that the said Tho. Ward, notwithstanding the said sale should have the possession of them for four years, which are not yet expired, paying to the said R. Ward twenty shillings by the year, and if, at the end of the said four years, the said Thomas did repay the said sum of mony to the said R. Ward, that then the said sale should be void. And they further say, that the said Robert Ward made title to the said goods by vertue of the said sale. Exception was taken to the declaration, because it was not shewed by what authority or title the Court was holden; also it sheweth, that the bailiff was ready to do execution upon the said goods, but doth **[221]** not shew where the said goods then were, but the exceptions were not allowed, for these matters are but inducement and conveyance to the action, and not the matter, or substance of it. Another exception was taken, because the request is not sufficiently alleadged, licet sæpius requisitus, but that exception was not allowed, for here the assumpsit is to pay at a certain day, and then the request is not material; but where a request is parcel of the assumpsit, there an express request ought to be taxed, as if the payment should be upon request. As to the matter in law, here is not any consideration, for the goods were not subject

to execution, for Thomas Ward had but a special property in them, but the general property was in R. Ward, and so no cause to deliver them back to the plaintiff; and here by the verdict the forain title is proved; for proof ought to be by verdict, which see Perk. 154. a. & 7. R. 2. Tit. Bar. 241. For it appeareth, before the said recovery, Thomas sold the goods with promise, ut supra. Owen, Although it be found that R. Ward had the general property, yet Thomas had the special and present property, and that against R. Ward himself, so that during the said four years R. Ward could not entermeddle with the goods; and though that no execution can be had against him who hath such a special property, yet that is not the case here, for here one who hath the possession of certain goods, delivers them to another, and in consideration thereof, he to whom the delivery is made, promiseth to re-deliver them unto the bailee, or to pay so much mony, this is a good consideration, when a lawful property or title he hath who makes the delivery. And of that opinion were all the justices, for it appeareth, that the plaintiff had a possession of the said goods, and that the said Thomas Ward had a special property, and because of such possession was chargeable to an action of the said Thomas Ward, be it that the plaintiff comes to the said goods by baylment or trover, for by Periam, if goods come to another by trover, and he delivereth them over, he is answerable to him who hath right unto them: the delivery of these goods to the defendant, is a good consideration, and the defendant hath benefit by the use of them, and the property of the goods is not to be argued in this case, but the delivery to the defendant is the only matter: and because the delivery of the goods to the defendant, and the assumpsit upon it, it was holden, although the goods were not liable to execution, yet the assumpsit was good, and afterwards judgment was given for the plaintiff.

1 Cro. 218.

MICH. 32 & 33 ELIZ. IN COMMUNI BANCO.

CCCIV. VANDRINK AND ARCHERS CASE.

Trover and Conversion.

Vandrink brought an action upon the case against Archer, and declared, that whereas he himself was possessed of twenty ells of linnen cloath, as of his own goods, the same came to the hands of the defendant by trover, and he knowing the said goods to be the goods of the plaintiff, sold them unto persons unknown, and the mony thereof proceeding did convert to his own use: the defendant pleaded, that as to twenty four ells of the said linnen cloath, long time before the losing, one Copland was possessed thereof, ut de bonis suis proprijs, and sold them to the defendant, who before any notice that they were the goods of the plaintiff, & before any request, sold them to persons unknown: and as to the other three ells, he was always ready to deliver them to the plaintiff, and yet is, and upon these pleas, the plaintiff did demur in law. Owen Serjeant, for the plaintiff, that both pleas are insufficient, the first plea is not an answer but by argument, for the plaintiff declares of a commission of his own goods, and the defendant answers to a commission of his own goods, 33 H. 8. Br. Action **[222]** sur le case, 109. In an action upon the case the plaintiff declares, that the defendant found the goods of the plaintiffs, and delivered them to persons unknown, non deliberavit modo & forma, is no plea, but he ought to plead not guilty; and in an action upon the case, the plaintiff declared, that he was possessed of certain goods, ut de bonis suis proprijs, and the defendant found them, and converted them to his own use; it is no plea for the defendant to say, that the plaintiff was not possessed of the said goods as of his proper goods, but he ought to plead not guilty to the mis-demeanor, and give in evidence, that they were not the goods of the plaintiff, and 4 E. 6. Br. Action upon the case 113. The plaintiff declared that he was possessed of certain goods as of his proper goods and lost them, and the defendant found them and converted them to his own use; the defendant pleaded, that the plaintiff pawned the said goods to the defendant for ten pounds, for which he detained them according to the said pawn, and traversed the

conversion; and by some it was holden, that he ought to plead not guilty, and give the especial matter aforesaid in evidence; and 2 & 3 Phil. and Ma. Dyer 121. The case of the Lord Mountegle, in an action upon the case, the plaintiff declared upon a trover of a chain of gold, and that the defendant had sold it to persons unknown, the defendant pleaded, that ipse non vendidit modo & forma, & upon that the plaintiff did demur in law, and see 27 H. 8. 13. Where goods come to one by trover, he shall not be charged in an action, but for the time he hath the possession; but that is to be intended in an action of detinue, and not in an action upon the case, for such action upon the case is not grounded upon the trover, but upon the mis-demeanor, that is, the conversion, and as to the other plea it is utterly insufficient, for the plaintiff declares of a conversion, and he pleads a possession, that he is always ready, and so doth not answer to the point of the action. Yelverton Serjeant, to the contrary, and he conceived for the first plea, that it is a direct answer, for he hath justified his sale to persons unknown, for that he hath bought the goods of one Copland whose goods they were, and because the plaintiff hath demurred upon the plea, he hath confessed the truth of the matter contained in it, scil. that the property of the goods was to Copland, and so in defendant by the said sale, and then he hath good cause to convert them to his own use by sale or otherwise; and he conceived, that there is a difference, 27 H. 8. 13, betwixt baylment, and trover, for in case of trover, the party is not chargeable but in respect of the possession, which being removed, the action is gone against the finder, for he who findeth goods is not bound to keep them, nor to give an account for them. And he put the case reported by Dyer, 13 & 14 Eliz. 306, 307. R. Fines brought an action upon the case, and declared, he was possessed of a hawk, as of his proper goods at W. and casually lost it at B. and that it afterwards casually came to the hands of the defendant by trover, and that he knowing it to be the plaintiffs hawk, sold the same for mony to persons unknown; the defendant pleaded that the hawk first after the losing of it came to the hands of one Jeoffryes, who sold it to one Rowly, who gave it to the defendant at A. who sold it to Poulton, and the same was found a sufficient bar; and it is hard where goods, as oxen or horses come to another by trover, that he should be charged to keep them and pasture them until the owner claimeth them, and therefore it is not reason but that he discharge himself by the quitting of the possession of them. And as to the other plea, the matter of the plea is good enough, and the defect is but in the form, which because the plaintiff upon his demurrer hath not shewed to the Court according to the statute, he shall not take advantage of it, but the matter of the plea is sufficient, scil. the finding, and the offer to deliver it to the plaintiff. Anderson Justice, for the examination of the insufficiency of this plea, the nature of the action, and **[223]** the cause of it is to be considered; The nature of the action, it is an action upon the case, the cause, the trover and conversion; then for the latter plea his readiness, to deliver it, it cannot be any answer to the declaration of the plaintiff: for this action is not debt or detinue, where the thing itself is to be delivered, for in such case, the plea had been good, but the conversion is the special cause of this action, which by this is not answered, and for the other plea, the declaration is not answered by it. But here is some matter of justification, for when a man comes to goods by trover, there is not any doubt but by the law he hath liberty to take the possession of them, but he cannot abuse them, kill them, or convert them to his own use, or make any profit of them, and if he do, it is great reason that he be answerable for the same, but if he lose such goods afterwards, or they be taken from him, then he shall not be charged, for he is not bound to keep them, and so he conceived judgment ought to be for the plaintiff. Windham Justice, Neither plea is good; as to the first plea, he confesseth the conversion, but hath not conveyed unto himself a sufficient title to the goods by which he might justifie the conversion, for the plaintiff declares of a conversion of his own goods, and the defendant justifies, because the property of the goods was in a stranger who sold them to him, which cannot be any good title for him without a traverse, unless he had shewed, that he bought them in an open market, and then upon such matter he might well have justified the conversion. And as to the other plea, the same is naught also, for the goods are not in demand, and then the said plea is not proper to say, that he is ready to deliver them, for damages only for the conversion are in demand, and not the goods themselves, and therefore the

same is a plea but by argument, scil. he is ready to deliver, ergo, he hath not converted, and yet the same is not a good argument, for if a man find my horse, and rides upon him, or hereby he becomes lame, or otherwise by excessive travel misuseth him, so as my horse is the worse thereby; he may be ready to deliver me my horse, and yet this action will ly, for such an abusing of the horse is a conversion to his own use. Periam Justice, The latter plea clearly is insufficient, for it amounteth but to not guilty, but for the first plea, he doubted of it, for first the property is not traversable, nor the knowing; but upon the general issue pleaded, such matter may be given in evidence. And he conceived, that where a man buyes goods of one who comes to them by trover, that he may sell them, and shall not be answerable for them. And although it may be said, that the said matter may be given in evidence, yet it is not good to put the same to the people, but to refer the matter to the judgment of the Court. Walm. Justice, The latter plea is clearly insufficient, but for the first he doubted of it, for he conceived that the sale of the goods is not a conversion. Anderson, The first plea is, ut supra, and nothing in that is material or traversable, for all the plea may be true, and yet the defendant is guilty, for it may be that the defendant himself sold them to the plaintiff, or to another who sold them to the plaintiff, and that afterwards the defendant found them, and here the conversion is confessed, and not so voided by sufficient justification, and by him, the sale to persons unknown is no good plea, for his sale is his own act, and it cannot be but he must have notice of the buyers, and therefore he ought in his plea to shew their names. Periam, contrary to that matter as to the naming of the buyers, for it should be an infinite thing for a draper to take notice of every one who buyeth an ell of cloath of him. And afterwards the same term judgment was given for the plaintiff upon the insufficiency of the plea.

Ante, 189. Post. 224.

[224] MICH. 32 & 33 ELIZ. IN COMMUNI BANCO.

CCCV. WALGRAVE *against* OGDEN.

Trover and Conversion.

An action upon the case was brought upon a trover and conversion of twenty barrels of butter, and declared, that by negligent keeping of them, they were become of little value, upon which there was a demurrer in law: and by the opinion of the whole Court upon this matter, no action lieth; for a man who comes to goods by trover, is not bound to keep them so safely, as he who comes to them by baylment. Walmesley, If a man find my garments, and suffereth them to be eaten with moths by the negligent keeping of them; no action lieth: but if he weareth my garments it is otherwise, for the wearing is a conversion.

1 Cro. 219. Ante, 223.

MICH. 32 & 33 ELIZ. IN COMMUNI BANCO.

CCCVI. ALEXANDER AND THE LADY GRESHAMS CASE.

Debt for Arrerages of Annuity. Devises. Assets.

Alice Alexander, administratrix to her last husband, brought an action of debt for the arrerages of an annuity, against the Lady Gresham, executrix of Sir Thomas Gresham her late husband, incurred in the lifetime of her late husband Sir Thomas Gresham: the defendant pleaded that she had fully administred; the plaintiff replyed, assets, scil. that the defendant had divers goods in her hands not administred, which were the goods of the said Sir Thomas at the time of his death, upon which they were at issue. And it was found by special verdict, that Sir Thomas Gresham being seised of divers manors and other lands in fee, devised them by his

last will to his wife the defendant, to use at her own pleasure: and by his said will requested his wife to pay his debts and legacies: and further it was found, that at the Parliament holden 22 Eliz. a private act was made, by which it was enacted, that the said lady should take upon her the charge of all her husbands debts, and for the discharge thereof, she shall sell so much land as will yield so much mony as will serve for the payment of the said debts, and if she shall fail therein, that then certain commissioners shall be appointed for the sale of so much land, &c. and for all such debts as the said lady should not acknowledge to be good and true debts, that then the creditors to whom they were due, should repair to the said commissioners, and they should determine both of the certainty of the sum of the due debts, and of the damages for the forbearing thereof; and that afterwards the said creditors should have their remedy against the said lady for such sums of mony so agreed upon by the said commissioners: and found the statute at large, and that the said Lady Gresham had sold certain lands parcel of the possessions of the said Sir Thomas, by which sale she had received the sum of twenty thousand pounds, which yet is unadministered for the greatest part of it. And if upon the whole matter the said sum of twenty thousand pounds be assets, then they find for the plaintiff, but if not, then for the defendant.

And it was moved by Hammon Serjeant, that here is assets upon this matter, and that by the common law, for it appeareth upon the will, that the lands were devised to the lady, to the intent that she should pay his debts. And although the words of the charge are, that the testator requests the lady to pay his debts, the same in a will doth amount to a condition, and so the meaning of the devisor appeareth to be, that the **[225]** money which is levied by such sale shall be assets, &c. 2 H. 4. 21. 22. A man makes a feoffment in fee to divers persons, upon condition that they sell the land, and the money thereof coming distribute for his soul; the feoffor dieth, the feoffees (who were also executors of the feoffor) sell the lands, the money thereof coming is adjudged assets. And see 3 H. 6. 3. And although it be not assets by the common law, yet it is assets by the special statute, which ordains, that he shall be charged with the debts, and that the lands shall be sold. And it was found by the verdict, that such lands were sold, and such money levied upon the sale, which are administered. And although the said twenty thousand pounds were never the goods of the testator, yet as the case is, 3 H. 6. 3. if executors recover damages in trespass of goods taken away in the life of the testator, such damages so recovered are assets. So if executors redeem a pledge with their own proper goods, the same is assets in their hands, by Kingsmill, Vavasour, and Fisher, 20 H. 7. 42. And where the executors took of one who was indebted to their testator in a simple contract, the same is assets, 31 E. 3. And see many cases of such special assets, 7 Eliz. in Plowdens Comment. in Chapman and Daltons case, 292. It hath been objected, that the special assets enacted by Parliament, do not maintain the general assets intended in the issue; but he conceived the same is well enough. As 27 H. 8. 21. in an action upon the statute of 21 H. 8. for that the defendant hath occupied land to farm against the statute, the defendant pleaded, non tenuit ad firmam contra formam statuti: and gave in evidence, that he had taken to farm for the maintenance of his house, the same is a good evidence, and shall maintain the issue, for he did not occupy against the form of the statute: for there is a clause in the statute to that purpose. Puckering Serjeant to the contrary, that it cannot be said assets by the statute, and that the plaintiff upon this general issue shall not take advantage of the special assets enacted by Parliament: and here the plaintiff hath not pursued the statute, for in case the defendant will not confess the debt, by the statute the commissioners ought to determine of it, and assess damages for the forbearing and then the party is to have her remedy for all as shall be so determined by the commissioners by action of debt: and because the plaintiff hath not followed the said statute, those twenty thousand pounds shall not be assets as to her, for they are not agreed of the debt, nor of the damages for it; but the commissioners are to appoint sale of the lands, so as the money arising of the sale of any lands, shall not be assets but of such lands which have been appointed to be sold by the order of the commissioners. And as to the common law, the same is not assets; but where lands devised to be sold by the executors for the payment of debts and legacies, in such case the money arising of

such sale is assets. And see 9 Eliz. 264. Dyer. A man devised his lands to be sold by his executors, and that the money thereof coming shall be disposed in payment of legacies expressed in his will, the land is sold; by Catlin, Dyer and Sanders, The money thereof coming is assets: but 4 & 5 Ph. & Mar. Dyer 152. the law was otherwise taken. Where a man devised that his executors should sell his land, and that his daughters should have such portions out of the monies thereof coming, the land is sold accordingly, the daughters sued the executors in the Spiritual Court. In that case a prohibition lieth, for it is not a legacy testamentary, but out of the land, &c. And also in the principal case, the lands are not devised to be sold; but there is only a request to his wife, that she would pay his debts, without any condition, or express direction, or limitation, 30 H. 8. Land devised to executors to sell, and the money thereof coming to be divided between his children: the money shall not be assets, and if it be not assets by the common law, but special assets by a special law, the **[226]** plaintiff ought to have shewed the same in his declaration, and then to have maintained against the defendant the said special assets upon the statute: as if in debt upon an obligation, the defendant will plead, non est factum, and give in evidence the statute of 23 H. 6. the same shall not maintain his plea of non est factum; but he ought to have pleaded the special matter in bar. And see 4 H. 7. 8. So the plaintiff here ought to have in her replication shewed the especial matter upon the statute. Anderson and Walmesly conceived, that the same is assets within the stat. and that the defendant is chargable as executrix, otherwise there is no remedy, and the act confirms her to be executrix, and ordains, that she shall take upon her the charge of payment of debts, and that the goods and all the monies which come by sale of the lands and woods shall be assets. And because that by the said act the money coming by sale of woods and lands are joyned together with the goods of the testator in the same plight, all are in the same degree, and both equally assets. Periam did not speak to that; but Windham held, that these assets found by the verdict, are not assets intended in the will, and that the plaintiff hath not pursued the statute, which makes such matter assets. It was adjorned.

2 Cro. 139. Ante, 87. Roll. part 1. 920.

PASCH. 33 ELIZ. IN THE COMMON PLEAS.

CCCVII. THE QUEEN AND THE BISHOP OF YORKS CASE.

Quare Impedit. Collation gains not the Patronage of the King. Plenarty no Plea against the King.

The Queen brought a quare impedit against the Bishop of York, and one Monck; and counted upon a presentment made by him, Hen. 8. in the right of his dutchy of Lancaster, and so conveyed the same to the Queen by descent: the bishop pleaded, that he and his predecessors have collated to the said church, &c. and Monck pleaded the same plea, upon which there was a demurrer. And it was moved by Beaumont Serjeant, that the plea is not good, for a collation cannot gain any patronage, and cannot be an usurpation against a common person, much less against the Queen, to whom no lapses shall be ascribed; and although the Queen is seised of this advowson in the right of her dutchy; yet when the church becomes void, the right to present vests in the royal person of the Queen: and yet see the old Register 31. Quando rex præsentat non in jure coronæ tunc incurrit ei tempus. Hammon Serjeant, By these collations the Queen shall be put out of possession, and put to her writ of right of advowson; but the same ought to be intended not where the bishop collates as ordinary, but where he collates as patron, claiming the patronage to himself, for such a collation doth amount to a presentation; and here are two or three collations pleaded, which should put the Queen out of possession, although she shall not be bound by the first during the life of the first incumbent. Vide Br. Quare Impedit 31. upon the abridging of the case of 47 E. 3. 4. that two presentments the one after the other shall put the king out of possession, and put him to his writ of right of advowson, which Anderson denied. And it was holden by the whole Court, here is not any

presentation, and then no possession gained by the collations: and although the bishop doth collate as patron, and not as ordinary, yet it is but a collation. And there is a great difference betwixt collation and presentation, for collation is a giving of the church to the parson, and presentation is a giving and offering of the parson to the church, and that makes a plenarty, but not a collation. And although that the Queen hath the advowson by the right of her dutchy, yet that makes not any matter, for the person of the Queen priviledgeth all her capacities: and therefore plenarty is no plea against the Queen, be she seised of the advowson in the right of her Crown, or of her dutchy; but when she claims by lapse; it is otherwise. [227] And afterwards exception was taken to the writ, because it is not set forth in the writ how the Queen claimed the advowson; as where the King had right to present by reason of the temporalties of the bishop in his hands, the writ shall say, ratione archiepiscopatus cant. nunc vacant. or ratione custodiæ: and so because this advowson is parcel of her dutchy, the writ ought to say so. And Anderson Chief Justice was of opinion, that the writ was good enough, notwithstanding the want of that clause, ratione ducatus, for both ways it is good and sufficient, generally or specially; as where a man hath an advowson in the right of his wife, and the husband brings a quare impedit, the writ shall be general, ad suam special donationem, without the mentioning of his wife. See the Book of Entries 483. the writ is general, but the count is special. And there is the very case of the dutchy of Lancaster, and then the writ is general, but the count is ratione ducatus sui Lancastr. And such an avoidance of a church, parcel of the dutchy, may be granted under the Great Seal: and see the case of the dutchy of Lancaster in Plowden to that purpose; and afterwards a president was shewed, in An. 32. H. 6. where the writ was general, and the count was ratione ducatus.

1 Cro. 240. 6 Co. 50. a.

CCCVIII. Pasch. 33 Eliz. In the Common Pleas.

Leases.

A man made a lease for years to begin at the feast of our Lady Mary, for one and twenty years, without shewing the certainty at which feasts the Annunciation, Purification, &c. yet the lease is good enough, and the lessee may determine the certainty of the beginning of the term by his entry, at which of the said feasts the said term shall begin, by Anderson Chief Justice; but Periam doubted of it.

Pasch. 33 Eliz. In the Common Pleas.

CCCIX. Blagrave and Woods Case.

Surrender to the Steward out of Court.

In an action of trespass brought by Blagrave against Wood of lands in Totting in the county of Surrey, concerning a surrender made to the use of Sir Thomas Holcroft, by Alice Pagnam, 7 E. 6. before one Forcet then steward there: the issue was, if at the time of the said surrender, the said Forcet was steward of the said manor. And the jury found a special verdict, scil. that the said Forcet circa 9 Aprilis, 7. E. 6. was retained by one Elizabeth Pagnam, then, before and afterwards lady of the said manor, to be her steward there for the keeping of the courts of the said manor; and this retainer was only by word in the countrey, and no fee or annuity given for the exercise of the said office: and that the said Forcet, according to the said retainer, had kept courts there divers times. And further, that such a day and year at St. Dunstans in the east, the said Forcet took a surrender, which was entred in the rolls the next court: and that before that and after he took divers surrenders as well out of Court, as in Court, and had holden divers courts there. And upon this verdict, it was moved by Snagg Serjeant, that Forcet upon the matter found by

the verdict is not such a steward, that may take surrenders out of Court, being retained only by word, although to do other acts in Court he be a sufficient steward, for in the Court he is as a Judge, and no body is to dispute his authority there. And there is a great difference betwixt a steward of a manor, and a steward of Courts; and a steward of one manor hath not as great an authority as the steward of another manor, for a steward of a manor may take surrenders in any place, otherwise it is where a steward is retained to keep [228] Courts, for he hath no authority to keep Court, and all his power, is within the Court, and not without. See 8 Eliz. Dyer 248. Drew Serjeant to the contrary. Here Forcet upon this retainder was steward at the will of the lady of the manor, which will shall not be said to be determined, until the lady doth discharge him: and the difference which hath been taken betwixt steward of Courts, and a steward of a manor is nothing to the purpose, for there is not any reason in it: and it is true, an assise cannot be brought of such an office, without a patent of it, for it cannot pass for life without a deed; and although a steward in the courts of copyholders be a judge, yet he may be appointed without deed: as where two submit themselves to the arbitration of others, now the arbitrators are judges as to that intent, and yet they may be appointed arbitrators, and discharged without deed, 19. H. 6. 6. 5 E. 4. 3. 21 H. 6. 30. but they cannot by their award transfer free-hold from one to another, 21 E. 3. 26. 14 H. 4. 18. and 17. by Culpeper and Skreen; and see as to a steward retained by word, 8 Eliz. 248. and see 12 H. 7. 25, 26, 27. where a bayliff of a manor may be appointed without deed, and so of an under-sheriff, and yet he is a Judge. Owen Serjant contrary, Here Forcet at the time of this surrender was not steward, but the retainer void. 1. No fee is allowed unto him for the exercise of the said office, 3 H. 6. A labourer may be retained without promise of any sallary in certain, for it is appointed by the law. 2. He is not retained by deed, and although he may be retained without deed to hold court, pro hac vice, yet if the retainer be for life, or for years, it ought to be by deed. 3. He was retained to keep the court, but not to be steward, which shall be intended to hold court, and then when that is past his authority shall cease, and then all which he doth afterwards is void. But if he had been retained to be steward of the manor, then the surrender taken out of Court had been well enough. 4. There is not any custom found by the verdict, to warrant such a surrender taken out of Court, and then if the surrender be not warranted by their custom it is void. Yelverton to the contrary, In all cases in real actions which concern lands, the suitors are the judges; but in personal actions under the sum of forty shillings the steward is judge: and although he be a judge, yet he may be appointed without deed. And whereas it hath been objected, that no fee is appointed for the exercising of the office, the same is not material as to the grant, but the party is not compellable without a fee to do the service: and a man may be constituted bayliff of such a manor without deed, and yet more doth appertain to the office of the bayliff, than to the steward: as if the lord of a manor be beyond the sea, (More 1 Rep.) the writ of right shall be directed to the bayliff of the manor: and see 21 H. 7. 36, 37. Where the sheriff, or steward of a manor may be without deed: and here in the principal case, the retainer is not to keep one court, but to keep the courts of the lady of the manor, scil. all her courts, until he be discharged. It was adjourned.

Co. 4 Rep. 30. Vide Co. 4 part. 30. Dame Holcrofts Case.

Pasch. 33 Eliz. In the Common Pleas.

CCCX. Ascew and Fuliambs Case.

Audita Querela.

Ascew was bounden by statute to Fuliamb, and there was not two seals put to the statute, and execution was sued upon the said statute, the conusor brought an audita querela, and they were at issue, if two seals were to the said statute, and tried for the plaintiff in an audita querela by the sheriff of the City of Lincoln; and it

was moved by Glanvil Serjant, that the issue ought to have been tryed **[229]** by the certificate of the mayor of Lincoln, before whom the acknowledgment was, and not by jury, which was denyed, for the issue is not whether any such statute was acknowledged or not, but whether the statute in question hath two seals or not, and that is not recorded by the Mayor, as the statute it self is: another exception was taken, It appeareth by the margent of the record, that the issue was tryed by the county of Lincoln, where it ought to be tryed by the county of the City of Linc. for Linc. only is in the margent. But to that it was said, that such is the usual form, to which the preignothories agreed, and the book of 18 E. 3. 25. was urged, where execution of lands of the conusor was awarded upon a statute merchant, and the statute was to pay, &c. 16 E. 3. But the original writ which issued to take the body of the conusor was 14 E. 3. And upon that error brought: and the Court agreed that case, but these two cases do differ, for there the process was misawarded, not so here: and although a writ of error may lye, yet the same doth not prove, but that an audita querela may lye also: and afterwards judgment was given for the plaintiff.

1 Cro. 233.

Pasch. 31 Eliz. In the Common Pleas.

CCCXI. Jennings and Gowers Case.

In the case betwixt Jennings and Gower, the words were; That if the wife of the devisor would permit one Wats to enjoy such a term for the term of three years next following, that then she should have all the residue of his goods and chattels as his sole executrix, &c. Anderson Chief Justice conceived, that she should not be executrix; for she is to be executrix, upon a condition precedent to be performed before that she be executrix: and the condition is impossible to be performed, and then she shall never be executrix, for where an estate is be created upon a condition impossible to be performed, there the estate shall never come in esse, and here the condition is impossible, for how can she suffer Wats to enjoy the term for 3 years, next following, & the 3 years ought to be past before she hath any power, either to permit, or resist, for until the three years be encurred, she cannot be executrix, nor before the three years expired can she bring any action as executrix, for her authority doth not begin before the three years be expired. Walm. Peri. & Wind. contrary; Although a grant upon a condition precedent doth not take effect until the condition be performed, yet such a construction ought not to be used in this case, so the intent of the devisor in this case shall stand: if the condition had been, that if the wife will find meat and drink to such a person until his death, that then she shall be executrix, shall not the wife be executrix till after the death of such party: truly yes, for otherwise she should never be executrix, which is utterly against the meaning of the testator; for it was not his intent that the ordinary should commit administration of his goods in the mean time: and afterwards Anderson changed his opinion, and agreed with the other justices: Periam, The subsequent words prove directly, that the meaning of the testator was, to make his wife executrix immediately, until she were disturbed by the said Wats, for the words are, that if she refuse to suffer the said Wats to enjoy, &c. Then his son shall be his executor, which words imply, that by a disturbance made by the wife her executor-ship should cease, and that the son should have it, which cannot properly be if she was not executrix from the beginning. And it is the usual course in the construction of wills, to consider all the clauses of the will, and to judge upon all the words of the will, and not upon one part only, and such construction the Judges used in the cases of Param. and Yardley, and Welden, and Elhing, and afterwards at **[230]** another day judgment was given for the wife; that she was executrix presently, and her authority should not expect until the three years were expired, if not that any actual disturbance can be proved to be or have been made by the wife against the will of the devisor, and the words of the will, will receive such construction, that she shall be executrix until an actual disturbance of Wats.

1 Cro. 219.

PASCH. 33 ELIZ. IN THE COMMON PLEAS.

CCCXII. PALMES AND THE BISHOP OF PETERBOROUGHS CASE.

Quare Impedit. Refusal of the Bishop.

In a quare impedit by Margaret Palmes against the Bishop of Peterborough, who pleaded, that the plaintiff did present unto him one I. S. of whom the bishop asked if he were within orders; and if he had his letters of orders, and because the presentee could not shew the bishop his orders, he refused him: and commanded him to come another time and shew to him his orders, and that the presentee did never do it, nor offered to the said bishop his said orders, without that he did disturb him in other manner. And by Periam and Anderson it is no plea, for upon his own shewing the defendant is a disturber: for although that the statute of 13 Eliz. requires that no man shall be admitted to a benefice with cure of souls, if he be not a deacon, yet the statute doth not extend, to compel the clark to shew his orders, and therefore when he for such a frivilous cause doth refuse to admit him, the same is a disturbance; and afterwards exception was taken to the count, because that the plaintiff being tenant for life of the advowson of the gift of her husband, had not alleadged any presentment in her husband, or any of his ancestors, but only in her self: but that was not allowed, for that point hath been lately over-ruled in this Court, in the case betwixt Specot and the Bishop of Exeter, & 8 H. 5. 4. adjudged accordingly, vi. 9 H. 7. 23. And the clear opinion of the Court was, that the count was good notwithstanding that exception: as to the matter of the plea the Court doubted of it, for the plea was, that the bishop demanded, of the clerk presented, his letters of orders, and letters testimonial, of his good behaviour, and his letters missive, and he did not shew them but requested of the bishop the space of a week, to satisfie the bishop in those points, which was allowed unto him, but he never returned, for which cause the bishop afterwards refused, &c. And it was said upon that plea, that the clark who is presented, ought to make proof to the bishop that he is a deacon, and that he hath orders; otherwise by the statute of 13 Eliz. the bishop is not bound to admit such clark, but the statute doth not compel the clark to shew his orders, for perhaps he hath lost them, but how his orders should be proved, it was much doubted: Anderson, The bishop may examine him upon oath, if he hath orders or not; but as to the letters testimonial of his good behaviour and sufficiency, the bishop ought to examine the same himself, and if he give day and defer the admission because he is not resolved therein, he is a disturber if the clark come to him in a convenient time: and the bishop cannot refuse a clark for the want of letters testimonial.

1 Cor. 241. Degg. 75. Co. 5 Rep. 57. Degg. 75.

PASCH. 33 ELIZ. IN THE COMMON PLEAS.

CCCXIII. LINACERS CASE.

In an audita querela brought by Linacer, it was said by Anderson Chief Justice, that if a man be in execution by his body and lands **[231]** upon a statute; if the sheriff permit the conusor to go at liberty, yet the execution of the land is not discharged; but if he go at large by the consent of the conusee, then the whole execution is discharged: and the conusor shall have his land again presently.

2 Leon. 96. Co. 5. Rep. 86.

PASCH. 33 ELIZ. IN THE COMMON PLEAS.

CCCXIV. BROWNSALL AND TYLERS CASE.

The case was, that tenant in tail brought a writ of entry, sur disseisin and the writ was general, and it was moved, if the writ was good, and 21 H. 6. 26. was

vouched, where it is holden, that the writ ought to be special, scil. to make mention of the tail: but it was holden by the Court, that the general writ is good enough. And then the count ought to be special. Vi. Fitz. 191.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCCXV. WARD AND KNIGHTS CASE.

Toll. Prescription.

In an action upon the case, the plaintiff declared, that whereas Lostock parcel of the mannor of E. in the county of Suffolk is an ancient town, and ancient demesn of the Crown of England, and that, time out of mind, &c. all the men, and tenants of ancient demesn ought to be quitted of toll in all places within the realm, for them, their goods and chattels, &c. And whereas the Queen by her letters patents the tenth of September, the nineteenth of her reign, commanded all mayors, bayliffs, constables, &c. to permit and suffer the men and tenants of ancient demesn, to be quit of toll, murage, and other exactions throughout the whole realm; and whereas the plaintiff was an inhabitant, and tenant in Lostock aforesaid, and such a day and year carried his goods to Yarmouth in the said county, the defendant not ignorant thereof, had taken and carried away a cable of the plaintiffs goods, of the value of eight pounds for toll, to his damage, etc. The defendant pleaded by protestation, that Lostock was not ancient demesn, and by protestation that the tenants of ancient demesn ought not to be quit of toll, he said, that the town of Yarmouth is an ancient borough, and that they had been incorporated by the name of bayliff and burgesses, &c. And that they have had, time out of mind, &c. an officer called a water-baly, and that, time out of mind, &c. they and their predecessors have had and taken toll of the tenants and inhabitants of Lostock, for any of their goods brought thither to merchandize with, and if it be not paid, they have used time out of mind, to distrain for it by their water-bayly: and said, that the plaintiff such a day brought to the said town of Yarmouth, two thousand weight of cable ropes to sell, for which there was due for toll six pence, for murage six pence, for thronage four pence, and the defendant being water-bayly demanded of the plaintiff the said sum which he refused to pay, for which he took the said cable, nomine districtionis, for the said thronage, &c. Golding for the plaintiff, The defendant hath not set forth in himself any authority to demand the duty: for he shews, that they have used to distrain by their water-bayly, but not that they have used to demand it by him, and it may be, that they have several officers, one to demand it, and another to distrain for it. And always when a man demands a thing against common right, he is **[232]** to shew authority express in the whole: and as to the matter in law, scil. the prescription to have toll of the tenants in ancient demesn, it cannot have a lawful beginning: as 21 H. 7. 40. The lord of a mannor says, that he hath had a pound within his mannor, time out of mind, &c. and that he hath used to have of every one who breaks his pound, three pounds, the same is a void custom to bind a stranger, for it cannot have a lawful beginning, and see 5 H. 7. 9. b. One prescribed, that if any cattel be taken in such a place, damage feasant, that he might distrain them and put them in pound until the owner had made amends, at the will of him who distrained them, the same is a void prescription, for it cannot have a lawful beginning, and time cannot make such a thing to be good. The King may grant tollage, pontage, &c. but not to the prejudice of another, as 22 E. 3. 58. The King cannot grant to one thorough-toll to pass by highways, for it is an oppression to the people, for every highway shall be common to every one, see 16 E. 3. Grants 53. and here the tenants of ancient demesn are quit of toll by the common law, and not by prescription, which see Fitz. 14. and such tenants have an inheritance in such liberties, which the King by his grant cannot take away, and then if it cannot have a lawful beginning, it cannot be good by prescription: also this prescription is against the common-wealth, therefore it is a void prescription, and the common-wealth is much respected in law, and things which in themselves are justifiable by reason, are not justifiable if they be injurious to others, as 21 E. 4. & 8 E. 4. 18.

Fishers may prescribe to dry their nets upon the lands of others, and none can prescribe against such a prescription, so here, all lands which are ancient demesn, are holden in socage, so as they were all husbandmen, who manured their lands for the sustentation of the Kings subjects, to which they had such priviledges to be the better able to follow their husbandry, and therefore to disable such profitable subjects, and to prescribe against these liberties and priviledges, is to take away the name of ancient demesn, and to make their lands at the common law. Hobart contrary: To shew the authority to demand is not necessary, for our prescription is not upon demand to distrain: for the common officer hath authority to demand, for they ought to demand it, who ought to take the thing demanded, and those are the bailiffs and burgesses, and then when their water-bayly doth it, it is as much as if it had been done by the corporation, which see 48 E. 3. 17. The Mayor and Comminalty of Lincoln, brought an action of covenant against the Mayor and Comminalty of Derby, and declared, that the Mayor and Comminalty of Derby had covenanted with the Mayor and Comminalty of Lin. that they should be quit of murage, pontage, custom and toll within the town of Derby, of all merchandises of those of the town of Lin. and further declared, that I. W. and H. M. two burgesses of the town of Derby, had taken certain toll of certain burgesses of the town of Lin. &c. Exception was taken to this declaration, because they had alleadged the taking of such toll, not by the corporation of Derby, but by I. and H. two of the burgesses of it, in which case the plaintiffs might have an action of trespass against the burgesses, for the act of any of the corporation is not the breaking of the covenant, made by the comminalty, but it was not allowed; for if the common officer of the town doth any thing for their common use, as it is intended such thing was done by the officer, it is reason all the town be answerable for it, and the whole comminalty by intendment cannot come at one time to take, &c. and so in our case, for as much as the corporation ought to make the demand, and their common officer doth it to their use, the same is the act of the whole corporation. As to the matter in law, we have pleaded specially; that we took toll only of those things which are brought by sea by merchants, and not otherwise, and I conceive that tenants in ancient demesn, are not discharged of toll, for **[233]** all things, but only for such which arise out of their tenements, or are bought for their tenements or families there, and their sustentations, according to the quantity of their tenements, 9 H. 6. 25. 19 H. 6. 66. They shall be quit of toll, of all things sold and bought coming of their lands, or for the manurance of their lands; and 7. H. 4. 111. Tenants of ancient demesn, ought to be quit of toll for oxen or beasts bought and sold for tillage, and manurance of their lands, and for their sustenance and maintenance of their families, and for putting them to pasture to make them fat and more vendable, and so to sell them, &c. And see accordingly, F. N. B. 224. D. See Crook 138. 139. 28 Eliz. A judgment was given for the said parties, for the plaintiffs: but there the plaintiff declared generally, and the defendant did demur in law generally, wherefore by common intendment, the cattel were bought for the tillage and manurance of their lands: for there it was not shewed (as it is here) that it was to merchandize: also we have justified, not only for toll, but also for trouage, and that they have not shewed, and therefore as to the trouage our justification is good enough, for their priviledge shall not be construed to extend beyond the words of it: as the priviledge of the law is, that if I leave my horse at a smiths forge to be shod, there my horse cannot be distrained, but if I or my servant take the saddle from the horses back, and lay it in the smiths forge, the saddle may be distrained. Then here are two customs meeting together, and to begin together, and the one was not before the other, then the particular custom shall stand: and I conceive that by the writ, de exoneratione sect. Fitz. N. B. 161. b. the tenants in ancient demesn, have not always such priviledges, for the writ saith, quod si ita sit, then, &c. and nisi ipsi, & eorum antecessores tenentes de eodem manerio venire consueverunt temporibus retroactis, and see the same matter in the Register, 181. And afterwards judgment was given, quod querens nihil capiat par billam, for the justices were of opinion, that the tenants in ancient demesn should pay toll for their merchandizes.

1 Cro. 227.

MICH. 32 & 33 ELIZ. IN THE KINGS BENCH.

CCCXVI. LANCASTER AND LUCAS CASE.

Leases. Attornment.

Trespass was brought for entering into the parsonage-house of Ringhall, and divers lands appertaining to it: the defendant being farmor of the parsonage, pleaded, not guilty; and the jury found, that one Tybbin was parson of the said church, and that one Ash and Dorothy his wife, Wivell and Drausfield were patrons of the said church, scil. Ash and his wife in the right of his wife, Wivell as tenant by the curtesie, the reversion to his son, and Drausfield also as tenant by the curtesie, but without issue by his wife, &c. so as the inheritance of the said parsonage was in Wivell and Ash: and afterwards the Bishop of Chester being ordinary, the parson and patron, 4 E. 6. joyned in a lease of the rectory (which lease was void as to the wife of Ash) to S. who assigned it to the defendant. All the lessors dyed: and further found, that Ash and Wivell were heirs of the patronage, and that the church being void, the presentment came to the bishop by reason of lapse, and that the successor of the bishop had collated his clark. Cook argued, and he conceived that the same now incumbent should avoid the lease in toto; and the case is but **[234]** this: three coparceners patrons of an advowson, or tenants in common, the parson, three patrons, and the ordinary joyn in a lease (where the one of them is a feme-covert, and so her act void) if the successor of the incumbent being presented by lapse shall avoid it in all: and he conceived that he should, for all three have interest in the parsonage, and all three ought to agree, but the agreement of the one is worth nothing: but it hath been said, that that is but matter of assent; and that the assent of the one is as strong as the assent of them all; as if many joint-tenants hold by certain services, and the lord granteth the services to a stranger, and one of the joint-tenants attorneth to the grant, the same is as sufficient as if they had all attorned, Lit. 128. 566. Otherwise it is of a rent-charge, for there all the joint-tenants of the lands charged upon the grant of the said rent ought to attorn to the grant; for the ter-tenant ought to attorn, and one of them is not ter-tenant: and in case of a rent-charge, the avowry is upon the lands: but attornment differs from our case, for attornment is but a bare assent, without any interest in him who attorns, for an abator may do it; but here is matter of interest, and in attornment, attornment for one acre is effectual for all, 18 E. 3. Fitz. variance 63. but otherwise it is in case of confirmation for one acre, the same doth not extend to the rest, for in such case an interest passeth. So here, the one of them is not patron, therefore all of them ought to concur, 31 E. 3. Grants 61. that such act of the patron shall not bind but according to the estate of the patron, which see Lit. 112. 528. as if tenant in tail confirm, the same shall not bind the presentee of the issue, see Fitz. Grants 104. In R. 2. the case was that the Bishop of Covent. and Lichfeild had two chapters, one of Coventry, the other of Lichfeild, and he made a conveyance, but one chapter only did confirm it, the same doth not bind the successor, for both are but one chapter in respect of the bishop, and see the case abridged by Statham Title Assize, for if the bishop is chosen by both chapters, there a confirmation must be of them both: the case in Dyer 11 Eliz. 282. Thark, Archbishop of Dublin, hath two deans and chapters, the one surrendreth without the assent of the bishop, and afterwards the other dean and chapter confirmeth a lease made by the bishop, the same is good: I confess that; for the surrender was by Act of Parliament, and so one sole chapter remained: and in our case, the lease cannot be good in part, and void for the residue, for all are but one patron, as 22 H. 6. 47. two coparceners are, they make composition to present by turns, a writ of annuity is brought against the incumbent, he shall have aid of both. And see the case betwixt Gore and Dawbney in the Exchequer Chamber upon a writ of error, where two are accountable, an account made by the one is not good, for both the accountants shall make but one account, and therefore the account of the one cannot be good: and the Lord Anderson put this case, two joynt-tenants of a manor, the one of them doth grant a copy, the same is void, for he is not dominus pro tempore: and see as to the assent of them all, &c. 3 Eliz. 190. Dyer. But it hath been objected,

that now the incumbent comes in by the ordinary, and not by the presentment of the patron, and the ordinary is bound by the confirmation of his predecessor, so that the collation of the bishop by lapse, is in the right and sted of the patron, and as the presentee of the heir of the patron shall avoid, &c. so also of the ordinary: and 20 E. 3. Br. Presentment 12. the patron shall have a writ of darrein-presentment upon the present. of the bishop for lapse, and 22 H. 6. if a man can recover an advowson, and after the bishop collate for lapse, the same is an execution of the judgment, and will make a possessio fratris, as Moyle saith: and in our case this confirmation is void in all, because non sunt concurrentes ii qui in hac parte concurrere debuerant: and it is an entire act, and cannot be avoided in part, and stand for the residue, and the pre-[235]-sentee comes in in the right of the heir, for which he may avoid it, &c. Popham contrary, It is to be here considered, if the ordinary hath interest in the church by this lapse, or only an authority; for if he hath an interest, then it will follow, that every one of his successors shall be bound by his confirmation, and also their presentees: it hath been objected, that there ought to be a full and entire patron who makes such a lease, otherwise it is void: but that is not so, as if the patron be tenant for life, his lease or confirmation shall not be void in all, but shall be good during his life, which see 31 E. 3. Grants 61. and 19 Eliz. 356. A parson makes a lease for forty years, the bishop being patron and ordinary confirms it, the patron dyeth, the bishop presents, and afterwards is translated, this lease shall stand during the life of the bishop, and of the new incumbent who found the church charged, and then such lease may be good for part, and void for part. See for the same, 2 E. 3. 8. If the advowson of a church be appropriated unto a prior and his successors, if afterwards the wife of the grantor be endowed of it, and present her clerk, the church is become dis-appropriated during the life of the wife, but afterwards shall stand. See the case cited to the contrary, 29 Eliz. in the case of the Earl of Bedford 7 Co. 8. At the beginning the patron was not restrained to any time to present his clerk, but the six months was appointed at the instance and suit of the ordinaries by a canon, confirmed in the councel of Lateran, before which time, the ordinaries had not any lapses, but after the said canon, they had an interest in the church, and this appeareth in the register: and see F. N. B. 37. f. that after the ordinary is entituled to lapses, the plaintiff in a quare impedit cannot have a ne admittas, for now the ordinary hath an interest: and if the bishop hath title to present by lapse, and before presentment he dyeth, so as his temporalties come to the King, the King shall present, which proves that it is an interest, and the civilians call it, interesse caducum & conditionale: and in our case the confirmation of the coparcener shall bind the other coparceners; in a nativo habendo, shall bind them all, and the villain shall be free for ever. And it was moved also, if an usurper, or the clerk who is in by him shall avoid this clause, and by the words of the statute of West. 2. si tempus semestre transierit per impedimentum alicujus, ita quod Episcopus ecclesiam conferat, & verus patronus ea vice præsentationem suam amittat, adjudicentur damna ad valorem ecclesiæ pro duobus annis; wherefore what the patron loseth, the ordinary hath the same, therefore it is an interest, and in lieu of that loss the statute gives damages to the patron, &c. And the case was adjorned to be further argued at another day, &c.

Bac. on Leases.

PASCH. 33. ELIZ. ROT. 392. IN THE KINGS BENCH.

CCCXVIII. PET AND BALDENS CASE.

Prohibition.

In a prohibition the plaintiff declared, that whereas Michael Pett was seised of divers lands, and made his will, by which he made the plaintiff his son his executor, and thereby devised unto A. his wife one hundred pounds, in consideration and recompence of her dower of all his lands, and dyed, and the said A. took to husband the defendant: and that after betwixt the plaintiff and defendant, colloquium quoddam habebatur, &c. upon which conference and communica-[236]-tion, the defendant in consideration that the plaintiff promised to pay to him the said one hundred pounds,

promised to make to him a discharge of the said one hundred pounds, and also of the dower of his wife, and shewed further, that notwithstanding that the said Pett was ready, and offered the said one hundred pounds, and dower also, yet, &c. Upon which there was a demurrer in law; it was moved by Tan. that here is not any cause to have a prohibition, for the agreement upon the communication is not any cause, for it doth not appear that it was performed. Coke, A prohibition lieth, for the wife cannot have both, money, and dower, for that was not the meaning of the devisor, and therefore it hath been holden, that if a man deviseth a term for years to his wife, in satisfaction and recompence of her dower, if she recovereth dower, she hath lost her term; also here is modus and conventio which alters the law, scil. mutual agreement: so if the parson and one of the parishioners agree betwixt them that for forty shillings per annum he shall retain his tithes for three years, &c. as it was in the case betwixt Green and Pendleton, &c. it is good.

1 Cro. 274.

MICH. 32 & 33. ELIZ. IN BANCO REGIS.

CCCXIX. MARTINGDALL AND ANDREWS CASE.

Action upon the Case for Wast.

In an action upon the case, the plaintiff declared, that one Mildmay was seised of a house in A. and that he and all those whose estate, &c. time out of mind, &c. have had a way over certain lands of the defendants called C. pro quibusdam averiis suis, and shewed, that the said Mildmay enfeoffed him of the said house, and that the defendant stopt the said way, to his damage, &c. and it was found for the plaintiff, and it was moved in arrest of judgment, that the title to the way is not certainly set forth, i.e. pro quibusdam averiis suis, quod omnes justiciarii concesserunt: but Gawdy Justice conceived, that the same was no cause to stay judgment: for it appeareth to us, that the plaintiff hath cause of action, although that the matter be incertainly alleadged, and of this incertainty the defendant hath lost the advantage, having surceased his time by pleading to it, as 20 E. 3. Trespass for taking and carrying away of charters, the defendant pleaded not guilty, and it was found for the plaintiff to the damage, &c. and error was brought, because the plaintiff had not set down in his declaration, the certainty of the lands comprized in the charters: but non allocatur, for the defendant ought to have challenged that before, and also 47 E. 3. 3. in a writ of covenant the plaintiff declared of a covenant, by which the defendant covenanted with the plaintiff to assure to him all his lands and tenements which he had in the counties of Gloucester and Lincoln, and declared, that at a certain day he required the defendant to make him assurance of all the lands, &c. And the writ of covenant was general, quod teneat conventionem de omnibus terris quas habeat in, &c. And it was objected (as here) that the writ wanted certainty, as how many acres, or such a mannor, but non allocatur, for here the plaintiff is not to recover land, but only damages, and the writ was awarded good. Fenner Justice, The cases are not like to the case at bar, for in the said cases, the certainty is not needful, but for the taxing of the damages; but here, the certainty of the number of the cattel is part of the title.

[237] MICH. 32 & 33 ELIZ. IN THE KINGS BENCH.

CCCXX. BEALE AND TAYLOR CASE.

Leases. Retainer of Rent.

Upon evidence to a jury, it was holden by Gawdy and Clench Justices, that if a lease for years be made, and the lessor covenants to repair during the term; if now the lessor will not do it, the lessee himself may do it, and pay himself by way of retainer of so much out of the rent, which see 12 H. 8. 1. 14 H. 4. 316. A lease for

years by indenture, and the lessor covenants to repair the houses, and afterwards the lessor commands the lessee to mend the houses with the rent, who doth it accordingly, and expends the rent in the charges, &c. So 11 R. 2. Bar. 242. The lessor covenants, that the lessee shall repair the tenements when they are ruinous, at the charge of the lessor: in debt for the rent, the lessee pleaded that matter, and that according to the covenant he had repaired the tenements being then ruinous with the rent, and demanded judgment; if action, &c. and good. Fenner Justice contrary, for each shall have action against the other, if there be not an express covenant to do it. Quære, if the lessor covenant to discharge the land leased, and the lessee, of all rent-charges issuing out of it. If a rent charge be due, if the lessee may pay it out of his own rent to the lessor, ad quod non fuit responsum.

1 Cro. 222. Jones 242. Yelv. 43.

MICH. 32 & 33 ELIZ. IN THE KINGS BENCH.

CCCXXI. OFFLEY AND SALTINGSTON, AND PAYNES CASE.

Escape.

Offley and Saltingston, late sheriffs of London, brought an action upon the case against Payne, because that he being in execution under their custody for fifty three pounds, in which he was condemned at the suit of one Spicer, made an escape, the debt not satisfied, by reason whereof they were compelled to pay the money; the defendant confessed all the matter, but further pleaded, that after the escape Spicer had acknowledged satisfaction (being after the escape) upon record of the sum recovered, upon which there was a demurrer: Owen Serjeant argued, that the acknowledging of satisfaction, being after the escape, was not any plea, for when the plaintiffs sheriffs have paid the money recovered, there was no reason that Spicers acknowleding satisfaction should stop to the sheriffs of their remedy against Payne. It was holden by the justices, that the plaintiffs in this action ought to shew, that they had been impleaded by him who recovered, for they cannot have this action before they are sued. For perhaps the plaintiffs who recovered must be contented to hold themselves to the defendant, and to be satisfied by him. It was said by Glanvil Serjeant, that by the escape the debt was cast upon the sheriffs, and the defendant discharged: and that it was the case of Sir Gervas Clyston, who being sheriff suffered him who was in execution, and in his custody, to go and see a play, and the same was adjudged an escape, and the party could not be in execution again: and then he said, that this acknowledgment of satisfaction could not be any bar to the plaintiffs. At another day the case was moved again. And then it was the clear opinion of the whole Court, that the action was maintainable, although that the plaintiff in the first action had acknowledged satisfaction: and it hath been adjudged here in this Court, in the case betwixt Hill and Hill, that notwithstanding such satisfaction, that the action lieth. See F. N. B. 130. b. for the payment after doth not take away the action, but mitigate the damages only, for the act of third person shall not take away an action once vested.

1 Cro. 237.

[238] MICH. 32 & 33 ELIZ. IN THE KINGS BENCH.

CCCXVII. GREENLIFF AND BAKERS CASE.

Assumpsit.

The plaintiff declared, that whereas he was bound to the defendant in an obligation of forty pounds for the payment of twenty pounds, the defendant the second of No. after, in consideration that the plaintiff at the request of the defendant had paid the said twenty pounds without suit at law, promised to deliver to the plaintiff before such a day an obligation, by which one A. was bounden to the defendant in forty pounds, with a letter of attorney to demand the same of the said A. and to sue for

it in the name of the defendant, which he had not done, and in that matter the plaintiff had judgment, and thereupon the defendant brought a writ of error: first, here is not any consideration; for the payment of the mony is no more than he ought to do, and which he was compellable to do, &c. Secondly, the same is no benefit to the plaintiff, but only a matter of charge to sue the said bond against A. Thirdly, upon the venire facias, the sheriff returned but twenty three jurors. As to the first error it was the opinion of Gawdy and Fenner Justices, that here is not any consideration, for the defendant hath not any benefit by it, and the plaintiff doth no more than he ought to do, and the payment was in respect of the debt, and not of the defendants request. And by Gawdy, Upon this promise an action doth not lye, for the plaintiff is not to have any benefit by it, but travel. Fenner contrary, And that the action lieth for that; as to the third error, the same is helped by the statute of 32. H. 8. and the statute of 18 Eliz. of imperfect and insufficient return of any sheriff: Fenner, Not only the return is naught, but also the pannel, is insufficient. And it was moved by Tanfield, that it was adjudged in this Court, Pasch. 25 Eliz. betwixt Cook and Huet, that where A. was bounden to B. in forty pounds, B. promised to A. that if A. would pay the mony without suit he would deliver him the said bond, by which he is bound to the said B. and it was holden a good consideration, quod fuit concessum per totam curiam; but that is not like to the case at bar, and it was holden in the same plea, that if the obligor pay the duty at the day and place, that if the obligee will not deliver the bond, yet the obligor shall not have the detinue for it.

1 Cro. 193.

MICH. 32 & 33 ELIZ. IN THE KINGS BENCH.

CCCXII. GUILDFORDS CASE.

Indictment upon the Statute of 23 Eliz.

Guilford was indicted upon the statute of 23 Eliz. cap. 1. for withdrawing divers persons, Her Majesties subjects, from the religion established in England to the Roman religion, and to promise obedience to the Church of Rome, and for that he himself was with-drawn from the obedience of the Queen. Coke took exception to the indictment, because that the indictment was not found within the year after the offence committed. In the said Act there is a proviso, that all offences against the Act, shall and may be enquired of within the year and day after the offence committed. Popham Attorney General, This case is not within that proviso, but both depend upon other statutes before, viz. 1, 5, & 13 Eliz. touching the acknowledging of Her Majesties supream government in causes ecclesiastical, or other matters touching the service of God, or coming to church, or establishing of true religion within this realm, shall and may be enquired as well before the justices of the peace, as other justices named in the said sta-[239]-tute, within one year and a day after such offence committed: and he said, these words in the proviso refer only to such offences contained in the said Act, which toucheth the supremacy and causes ecclesiastical, &c. and such offences ought to be enquired within the year and day: but this indictment here doth consist upon other matter, for withdrawing himself from the obedience of the Queen, which is an offence out of the compass of the said proviso, and therefore the enquiry of it not restrained unto any time; and the statute of 13 Eliz. extends to bills, writings, instruments, &c. and not to the words (with-drawing by words) which is supplied by 13 Eliz. (with-drawing by other means) and the restraint of the enquiry at the time, goes to the hearing of mass, and saying of mass, and not (repairing to the church;) but as to with-drawing, the same is at large, not restrained by that statute: and he said, that this indictment doth consist upon many offences, some to offences within the proviso, and as to those the judgment is void: some to other offences, as treason, the offence of with-drawing, the enquiry of which is not restrained, and therefore this indictment shall stand: also it was the intent of this statute, not to restrain this Court, but only the justices of peace, for they are specially named. Coke conceived, that this word touching, &c. did not extend to anything contained in the statute of 23 Eliz. but only to offences within the Acts of 1, 5, & 13 Eliz. which were incertain before;

also this proviso is in the disjunctive, against this or against the Acts of 1, 5, or 13 Eliz. so as that which follows is to be applied to the last disjunctive, and not to the whole sentence; and always when a thing is named certain, and after general things, the words subsequent shall be referred to the general words, and not to that which is certain. Also if (touching, &c.) doth refer to this statute, the sentence would have begun with it; but here it begins with the supremacy, of which nothing is spoken in this statute, and therefore it ought to be referred to the statute which begins it, and that is 1 Eliz. and then it shall be preposterous to come after 23 Eliz. and these words (shall and may) ought to be so construed, (shall) is restrictive of itself, and (may) shall be referred to that which was restrained before, as the proceedings upon the statute of 1 Eliz. cap. 2. were restrained to the next sheriffs: and he conceived, that this Court is as well restrained to time as any other Court, for the words are as well before justices of the peace, as before other justices named in the said statutes, and in the statute of 5 Eliz. this Court is especially named: Wray, This proviso begins with justices of the peace, therefore it doth not extend to offences which are treason; and the meaning of this statute of 23 Eliz. was to enlarge the statutes of 1, & 5 Eliz. for where the offence against the statutes before was to be enquired at the next session, and the other within six months; now by this statute it may be enquired at any time within the year and day, but it doth not extend to restrain the proceedings against offences of treason, for the words of the statute are, that such offences shall be inquired before justices of peace within a year, &c. But in the next clause, the justices of peace may punish all offences against this Act, but treason, by which it appeareth that no offences are restrained to time, but those which the justices of the peace have authority to hear and determine, and that is not treason: Gawdy to the same purpose: For all the proviso is but one sentence, and there the whole shall be referred to spiritual offences, as the not coming to church &c.

[240] MICH. 32 & 33 ELIZ. IN THE EXCHEQUER, ERROR.

CCCXXIII. FILCOCKS AND HOLTS CASE.

Assumpsit.

In an action by Filcocks against Holt, administrator of A. the plaintiff declared, how that the husband of the defendant, who died intestate, was indebted to the plaintiff in ten pounds by bill, and that the defendant in consideration, that the plaintiff would permit the defendant to take letters of administration, and give to her further day for the payment of the said ten pounds, promised to pay the said ten pounds to the plaintiff, at the day; and upon a writ of error brought in the Exchequer, upon a judgment in the Kings Bench, in that case, it was assigned for error, that here is not any consideration, for by the law she is to have administration, being wife of the intestate; and as to the giving of further day for the payment of the ten pounds, the same will not make it good, for it doth not appear that she was administratrix at the time of the promise made, and then she is not chargeable, and then, &c. And such was the opinion of the Court. And it was said by Periam Justice, and Manwood Chief Baron: That the bishop might grant letters of administration to whom he pleased, if he would forfeit the penalty limited by the statute: also it was said, where an executor or administrator is charged upon his own promise, judgment shall be given de bonis propriis, for his promise is his own act.

Larch. 67, 68.

MICH. 33 ELIZ. IN THE KINGS BENCH.

CCCXXIV. ADAMS AND BAFEALDS CASE.

Action upon the Case.

An action upon the case was brought, and the plaintiff declared, that where such an one, his servant, departed his service without cause or license, the defendant knowing

him to be his servant, did retain him in his service, and so kept him. Tanfeild, The action doth not lye, for if my servant depart out of my service, and another doth retain him, an action doth not lye at the common law, if he do not procure him to leave my service, and afterwards retain him, or immediately taketh him out of my service. And this action is not grounded upon any statute. See 11 H. 4. 176. 47 E. 3. 14. 9 E. 4. 32. Gawdy, The action lieth, for here is damage and wrong done to the plaintiff. Fenner contrary, For the wrong is in the departure, and not in the retainer; and upon the statutes it is a good plea to say for the defendant, that the party was vagrant at the time of the retainer, and the (sciens) doth not alter the matter.

MICH. 32 & 33 ELIZ. IN THE KINGS BENCH.

CCCXXV. NASH AND MOLLINS CASE.

Prohibition. Tithes.

Nash and Usher sued a prohibition against Mollins, for that the defendant had libelled against them in the Spiritual Court, for tithes of wood, growing in Barking Park in Essex; the other did surmise, that the lands were parcel of the possessions of the prior and covent of Cree Church, and that the said prior, and his successors, time out of mind, &c. had held the said lands discharged of tithes, and held them so at the time of the dissolution, &c. and the other part traversed it, whereupon they were at issue, if the prior, &c. **[241]** held the land discharged, tempore dissolutionis, &c. And now on the part of the plaintiff in the prohibition certain old persons were produced, who remembred the time of the monasteries, and that they did not pay any tithes then, or from thence; exception was taken to the suggestion by Coke, that here is nothing else than a prescription, de non decimando, for here is not set forth any discharge, as composition, unity of possession, priviledge of order, as templarii, hospitiarii, &c. Fenner Justice: Spiritual persons may prescribe in non decimando, for it is not any prejudice to the church: Wray, although it is not set down the special manner of discharge, yet it is well enough, for we ought to take it that it was by a lawful means, as composition, &c. or otherwise: for the statute is, that the King shall hold discharged as the abbot, &c. and we ought to take it, that it was a lawful discharge of tithes tempore dissolutionis: and afterwards the jury found for the plaintiffs in the prohibition: but no evidence was given to prove, that the defendant did prosecute in the Spiritual Court, contrary to the prohibition.

1 Cro. 206.

MICH. 32 & 33 ELIZ. IN THE KINGS BENCH.

CCCXXVI. SHELDON'S CASE.

Indictment upon the Statute of 23 *Eliz. Exposition of Words.*

Sheldon, Talbot, and two other, four persons in all, were indicted upon the statute of 23 Eliz. of Recusancy; the words of the indictment were, quod illi nec eorum uterque venerunt to any parish church, &c. It was moved by Atkinson, that the indictment is not good, for uterque doth refer unto one of them, and not where they are many, as here, and so is an insensible word, and so upon the matter there is no offence laid to their charge. And the Justices doubting of it, demanded the opinions of grammarians, who delivered their opinions, that this word (uterque) doth aptly signifie one of them, and in such signification it is used by all writers: Gawdy, I conceive, that the opinions of the grammarians is not to be asked in this case; but I agree, that when an unusual word in our law comes in question, for the true construction of it, then the opinion of grammarians is necessary: but (uterque) is no unusual word in our law, but hath had a reasonable exposition heretofore, which we ought to adhere unto, which see 28 H. 8. 19. Three bound in an obligation:

obligamus nos & utrunque nostrum, and by the whole Court (uterque) doth amount to quilibet: and see 16 Eliz. Dyer 337, 338. Three joyntenants in fee, and by indenture tripartite each of them covenanteth and granteth to the others, & eorum utrique, to make assurance, and there it was holden that the word (uterque) doth amount to quilibet. Wray, Admit it shall be so taken in a bond, yet it shall not be so taken in an indictment: as if a man make a lease for years, rendring rent payable at the day of St. Martin, although there be two days of St. Martin in the year, yet the reservation is good, and the rent shall be taken payable at the most usual day of St. Martin there in the country: but in an indictment, if an offence be laid to be done on St. Martins Day, without shewing which in certain, it is not good. Fenner, The word uterque is matter of surplusage, and therefore shall not hurt the indictment.

[242] MICH. 32 & 33 ELIZ. IN THE KINGS BENCH.

CCCXXVII. BLUNT AND WHITEACRE'S CASE.

Error. Amercement.

A writ of error was brought upon a judgment given in the Common Pleas in a replevin, where the defendant did avow as fermor of the manor of F. in the county of Berks, to St. Johns Colledge in Oxford, and laid a prescription there in him and his fermors to distrain for all amercements in the court of the said manor, and shewed that the plaintiff in the replevin was presented by the homage for not repairing of a house, being a customary tenant of the said manor, according to a pain imposed upon him at a former court, for which he was amerced by the steward to ten shillings, and was also presented for not ringing of his swine, for which he was amerced three shillings four pence, and for these amercements he distrained: and upon nihil dicit judgment was given for the avowant to have return, upon which a writ of error was brought: and error assigned, in that there is not any prescription laid in the avowry for the lord to amerce the tenants, and of common right he cannot do it. See 48 E. 3. And such amercement is extortion, for the lord cannot be his own judge, and therefore he ought to enable himself to distrain by prescription; another error, because the fine is laid to be assessed by the steward, whereas by the law it ought to be by the suitors, for they are judges, and not the steward: another, because that in the avowry it is set down, quod præsentatum fuit, that he had not repaired a certain house; but he doth not say, in facto & categorice, &c. that he had not repaired, for that is matter traversable. 4. Here is no offence, for a copy-holder is not bound to repair by the common law, if it be not by prescription, for he cannot have house-boot upon the land as a termor may, if it be not alledged a custom. Fenner, The steward may assess fines for a contempt; but not amercements if not by prescription. Gawdy, The lord of a mannor cannot assess amercements for a trespass done to himself upon his own lands; but otherwise it is of a common trespass, or a trespass done in the land of another; but for the distress he ought to prescribe, and the judgment was reversed.

1 Cro. 748. 886.

PASCH. 29 ELIZ. ROT. 121. IN THE KINGS BENCH.

CCCXXVIII. PAGE AND FAWCETS CASE.

Error.

Error was brought upon a judgment given in Lyn, where by the record it appeareth, that they prescribe to hold plea every Wednesday, and it appeared upon the said record that the Court was holden, 16 Feb. 26 Eliz. which was dies Dominicus, and that was not assigned for error in the record; but after in nullo est erratum pleaded, it was assigned at the bar: and almanacks were shewed to the Court in

proof of it, and it was holden clearly to be error; but the doubt was, if it should be tried by jury, or by the almanacks, and it was said, that the justices might judicially take notice of almanacks, and be informed by them, and that was the case of one Robert in the time of the Lord Catline, and by Coke; so was the case betwixt Galery and Bunbury, and afterwards the judgment was reversed.

3 Cro. 227.

[243] TRIN. 33 ELIZ. IN THE KINGS BENCH.

CCCXXIX. GEOFRIES AND COITES CASE.

It was found by special verdict, that one Avice Trivilian was tenant for life, the remainder to her son in tail, the remainder over; tenant for life, and he in the remainder in tail make a lease for life, the remainder for life rendring rent; tenant for life dieth, he in the remainder dieth, and his son accepteth of the rent of the tenant for life in possession, who dieth. The issue in tail entreth, he in the remainder for life entreth, &c. And it was conceived, that this acceptance of the rent of the lessee for life doth affirm also the remainder. See Litt. Sect. 521. and such was the opinion of Gawdy and Fenner Justices.

1 Cro. 252.

PASCH. 33 ELIZ. IN THE KINGS BENCH.

CCCXXX. THE LORD MORDANT AND VAUX CASE.

The Lord Mordant brought an action of trespass against George Vaux, and declared of a trespass done in quodam loco, called N. parcel of the manor of Hawarden. The case was, William Lord Vaux was seised thereof, and thereof levied a fine to the use of the Lord Vaux, which now is, for life, and after his decease to the use of Ann and Muriel daughters of the Lord Vaux and their assigns, until Ambrose Vaux should return from the parts beyond the seas, and should come to the age of 21 years, or dye, if they should so long live: and after the return of Ambrose from beyond the seas, and the age of 21 years, or death, whichsoever of the said days or times should first happen, to the use of the said Ambrose and the heirs of his body begotten, with divers remainders over. Ambrose returned, and 31 Eliz. before he came of full age (for it is not pleaded that he was of full age) levied a fine to the use of George Vaux, the defendant in tail, with divers remainders over. Afterwards the Lord Vaux being tenant for life, enfeoffed the Lord Mordant in fee, upon whom the said George Vaux entred for a forfeiture, upon which entry the Lord Mordant brought the action. Buck argued for the plaintiff. Amb. Vaux had nothing in the lands in question until his return from beyond the seas, and his full age, and the estate doth not begin until both be past; and he said, that no use did arise to Ambrose until the time incurred, for the time of the beginning is uncertain and upon a contingent, as 13 Eliz. Dyer 301. A. makes a feoffment in fee to the use of himself for life, and after to the use of B. who he intendeth to marry, until the issue which he shall beget on her shall be of the age of 21 years, and after the issue shall come of such age, then unto the use of the said B. during her widowhood; the husband dieth without issue, the wife entreth, and her entry holden lawful. But error was brought upon it; and also Calthrops case was cited to the same purpose, 16 Eliz. Dyer 336. This estate limited to Ambrose doth refer to the estate limited to Muriel and Ann, and not to the time, for ever the first estate is to be respected, as 23 Eliz. Dyer 371. He in the remainder in fee upon an estate for life deviseth it to his wife, yielding and paying during her natural life yearly 20 shillings, and dieth, living tenant for life, the rent shall not begin until the remainder falleth: so as the general words refer to the beginning of the estate, although the words imply that the rent shall be paid presently: and see also such construction, 9 Eliz. 261. A lease was made for thirty years, and four years after the lessor makes another lease by these words, nos dictis

30 annis finitis, dedisse & concessisse, &c. habend & te-**[244]**-nend. a die confectionis præsentium, termino prædict. finito, usque terminum, &c. And although, prima facie, the beginning of this term seems incertain, yet the justices did respect the former estate, and so the lessee hath the interest of the term from the making of the deed, but no estate until the first term expire: then Ambrose before his age of 21 years levying a fine, the fine shall not bind the feoffee, for it enures only by way of conclusion, and so binds parties and privies, but not a stranger: and the party needs not to plead against this fine, quod partes to the fine nihil habuerunt, for that appeareth upon their own shewing. Wiat contrary; The state of Ambr. accrues and rises when any of the said times come, first full age, return, death, for the words are, And after the return of Ambrose from beyond the seas, and the age of 21 years, or death, &c. This word (or) before (death) disjoyns all, and makes the sentence in the disjunctive, and he cited a case lately judged in the Common Pleas: a lease was made to Trewpeny and his wife for one hundred years, if he and his wife, or any child or children betwixt them begotten should so long live; the wife died without issue, the husband held the land, &c. for the disjunctive before (child) made the sentence disjunctive. Gawdy Justice, That had been law if no such word had been in the case. And Wiat said, that although the return be incertain, yet it is certain enough that he shall come to the age of 21 years, or dye. And also this is by way of use, which needs not to depend upon any estate, and if the remainder shall vest presently upon his return, then it would be doubtful what remainder it is, if it be a remainder depending upon the estate for the life of Ann and Muriel, or for years, i.e. until Ambrose shall come of the age of 21 years: but be it incertain, yet the fine is good, for here is a remainder in Ambrose, and both are but particular estates, and there is not any doubt, but that one may convey by fine, or bar by fine such contingent uses, for which see the statute of 32 H. 8. All fines to be levied of any lands intailed in any wise to him that levieth the fine, or to any his ancestors in possession, reversion, &c. which word (use) goes to contingent uses, for at the time of the making of that statute, there was no other use. Fenner Justice remembred the case adjudged M. 30 & 31 Eliz. betwixt Johnson and Bellamy, which ruled this case. Gawdy Justice, Here is a certainty upon which the remainder doth depend, i.e. the death of Ambrose; but the case had been the more doubtful if no certainty at all had been in the case. Atkinson contrary; Here the Lord Vaux is tenant for life, the remainder to George in tail; now when the Lord Vaux levies a fine, this is a forfeiture, and then the entry of George is lawful. It hath been objected on the other side, that this remainder was future and contingent, and not vested, therefore nothing passed to George by Ambrose. The words are (quousque Ambrose shall return). This word (quousque) is a word of limitation, and not of condition, and then the remainder may well rise when the limitation hapneth. It hath been said, that this remainder is contingent, and then the remainder which is to vest upon a contingency, cannot be granted or forfeited before that the contingent hapneth: and he cited the case of 14 Eliz. 314. Dyer. A fine is levied to A. to the use of B. for life, the remainder to E. in tail, the remainder to B. in fee. Proviso, that if B. shall have issue of his body, that then after such issue, and 500l. paid to, &c. within six months after the death of such issue, the use of the said lands, after the death of the said B. and the said six months expired, shall be to the said B. and the heirs of his body: and it was holden, that before the said contingent hapneth, B. had not any estate tail, for there it was incertain if the said contingent would happen: but in our case, the contingents or some of them will happen, or run out by effluxion of time, and that makes the remainder certain in Ambrose. And he also argued, that the limitations are several, by reason of the dis-**[245]**-junctive, and the last part of the sentence, and that the said sentence is in the disjunctive appeareth by the subsequent words (which of the said days or times shall first happen) and then the return of Ambrose (for that first hapned) vests the remainder in him, and therefore the plaintiff ought to be barred. Buckley contrary: The estate of the daughters doth depend upon a copulative, i.e. the return of Ambrose and his full age, and both is but one limitation; it is clear, that the first limitation is upon a contingent, and the remainder cannot vest until both are performed. And as to that which hath been said, that there is a certain limitation, i.e. the return of Ambrose, 18 Eliz. the case was, lands were given to husband and wife, the remainder to such of them as should

survive the other, for years, the husband makes a lease for years and dieth, it was holden, that although the limitation was upon a certain estate, yet because it is not known in which of the parties the estate secondly limited shall begin, the lease is void; so here it is not certainly appointed when the estate limited to Ambrose shall begin, upon the return, full age, or death of Ambrose, and he said, that here are but two times of limitation, first return and full age, second death; return and full age determines the estate of the daughters, and also the death, if it shall first happen, and if these three times shall be construed in the disjunctive, the same would overthrow the estate of the daughters, which is an estate for years determinable, upon the death of themselves or Ambrose. The last words of the limitation do not distinguish or disjoyn it, but respect the estate precedent. And by Clench Justice, if the use limited to Ambrose, shall depend only upon the limitation of his death, the same should be void, for then he should not be in esse to take. But the other justices were of a contrary opinion, and that the use is good, 7 H. 4. Gawdy, Although that here be three things, yet but two times; for the words are not (or) at such of the said days or times, as shall first happen, for that would alter the case: but here these words ought to be intended as if they were spoken before in the limitation of the estate to the daughters, and cannot divide the former limitation: and he said, that if by reason, that the limitation upon the death, which is certain, it shall vest in Ambrose presently, then if after the other limitation shall fall, then his remainder which vested in him upon the said certain limitation should be devested, and should now accrue to him upon the other limitation, which should be absurd and inconvenient, &c. It was adjorned.

1 Inst. 225. 1 Cro. 269. Plow. Com. 376 a. Ante, 18, 76. 2 Len. 36. 2 Len. 27.

Trin. 32 Eliz. In the Kings Bench.

CCCXXXI. Thomas and Wards Case.

Ejectione firme.

In ejectione firmæ, by Thomas against Ward, upon a lease made to him of the Manor of Middleton Cheney by one Chambers, the defendant pleaded, that long time before the lessor of the plaintiff had anything, the Bishop of Rochester was seised, and leased the same to the defendant: the plaintiff by replication said, that the said lease was upon condition, viz. the lessee by the indenture of the said lease, did covenant that he would not put out, or disturb any of the tenants inhabiting within the said manor out of their tenancies, doing their duties according to the custom of the said manor; and shewed, that the defendant had put out one Ann Green a tenant dwelling there upon a tenement parcel of the said manor, late in the possession and occupation of the said Ann, and that the bishop had re-entred for the condition so broken, and made a lease to the lessor of the plaintiff, upon which replication, the defendant hath demurred in law: **[246]** Tanfeild argued for the defendant, that the bishop had no cause to re-enter, for there is not any condition in the case, but only a covenant, for it comes in only on the part of the lessee, and they are words of covenant only, whereas every condition ought to be the words of the lessor, and the bishop hath sufficient remedy by action of covenant: but if the words had been indifferent and absolute without depending on the lessor or lessee, then it had been otherwise, as 3 E. 6. Dyer, 65. Non licebit, to the lessee, dare, concedere, vel vendere statum vel terminum, without the licence of the lessor, under pain of forfeiture, the same is a good condition, but here it is merely a covenant, and it cannot be both. Haughton, Although the words sound in covenant, and be the words of the lessee, yet the lease being made by indenture, the same is the deed of both, and every word in it is spoken by both parties, and although that he may have an action of covenant, yet he cannot thereby overthrow the lease, as by entry, by condition broken, and yet by the words it seems the meaning of the indenture was, that by the breach of this covenant, the estate should be defeated, for so are the words, sub pœna forisfactur. And here by way of action he cannot have the benefit of the whole covenant, and

therefore he shall have it by way of condition: and see the case betwixt Browning and Beston, Plow. 132. If it happen the rent to be behind, that then the lessee covenants, that although the rent be not demanded, that the said lease should be utterly extinct, void, and of no effect; and 24 Eliz. there was a case betwixt Hill and Lockham, where by the indenture of lease, the lessee covenanted to grind all his corn at the mill of the lessor, and afterwards in the end of the said indenture, the lessee covenanted to perform all the covenants, sub pœna sorisfactor. and by the opinion of the whole Court, the same was a condition: and see 21 H. 6. 51. where in an obligation where A. was bound to B. the condition is written in this manner, prædict. B. vult & concedit, that if the said A. doth stand to the arbitrament of such a one that then, &c. the same is a good condition, although they are the words of the obligee, and the deed of the obligor, and so here is a good condition. And such was the opinion of Wray and Gawdy, and Fenner did not contradict it: wherefore Tanfeild said, Admit here it is a condition, yet here is not any breach of it sufficiently set forth, for the breach is assigned because he had put out a woman, unam tenentem, & inhabitantem, out of certain lands parcel of the said manor, late in the possession and occupation of the said woman, and that might be, that she was but tenant at will, and the covenant doth refer only to copy-holders: and it may be also, that she had disseised one of the tenants of the manor, in which case, the putting out of such a tenant being in by wrong, is no breach of condition. Also it is not averred in facto, that Ann was tenant of any part of the mannor: also the replication is, that the said defendant had ousted the said Ann, where she had done her duty, fecit debitum suum, before the ouster, and that might be, that she had done her duty once, but not after, and therefore he ought to have said, that she had done her duty always, before her putting out, and this word (duly) being single, is too general, for it may be understood of curtesie, where the words in the indenture are (Doing their duty according to the custom of the manor.) And also it might be, that Ann Green was tenant and inhabitant, but was not put out of the land which was parcel of the manor. And Wray said, that these exceptions were incurable: and therefore judgment was given against the plaintiff.

1 Cro. 102.

[247] MICH. 31 & 32 ELIZ. ROT. 414. IN THE KINGS BENCH.

CCCXXXII. HARVY AND THOMAS CASE.

Leases.

The case was, husband and wife seised of lands in the right of the wife, the husband alone makes a lease by word for years: afterwards the husband and wife levy a fine, and after the wife and husband both dye, it was holden clearly by the whole Court, that the conusee should avoid the lease.

1 Cro. 216.

TRIN. 32 ELIZ. ROT. 314. IN THE KINGS BENCH.

CCCXXXIII. SLY AND MORDANTS CASE.

In an action upon the case the plaintiff declared, that whereas he was seised of certain lands, the defendant had stopped a water-course, by which his land was drowned, and found for the plaintiff, it was moved in arrest of judgment, that it appeareth upon the plaintiffs own shewing, that the plaintiff hath the free-hold, and therefore he ought to have an assize, but the same was not allowed, and therefore the plaintiff had judgment.

1 Cro. 191. 2 Len. 103. 3 Len. 174. Dy. 250. 1 Cro. 198, 199.

TRIN. 33 ELIZ. IN THE KINGS BENCH.

CCCXXXIV. KENSAM AND REDINGS CASE.

Grants of the King.

The case was, that the Queen by her letters patents granted the site of the manor of Brokeley lying in W. and all the lands, pastures, woods, under-woods, and hereditaments, parcel or appertaining to the said site, exceptis omnibus grossis arboribus, boscis & maremio; and further in the said letters patents there was a proviso, that the lessee should have sufficient house-boot, and hedge-boot, &c. And if, notwithstanding the said exception, the lessee should have the under-woods, was the question: and it was argued, that the lessee should have subbois, i.e. underwoods, for that is granted by express words, and the exception extends only grossis arboribus, for this word (grossis) in the exception extends to all that which follows: Gawdy Justice, If it were in the case of a common person, it is clear, that upon such matter the underwoods are not excepted, 7 E. 6. Dyer, 79. A lease is made of a mannor except timber and great woods, the underwoods shall pass. Fenner Justice, The proviso, that the lessee should have house-boot, shews the Queens intent, that the under-woods should not pass. Wray, If this word (bois) in the exception should not extend to under-woods, it should be vain and signifie nothing, which should be hard in the case of the Queen.

1 Cro. 244. Hob. 170.

CCCXXXV. TRIN. 33 ELIZ. IN THE KINGS BENCH.

Trover and Conversion.

In an action upon the case the plaintiff declared of trover of a bag of mony, and the conversion of it, the defendant pleaded, that the bag of mony was delivered to him as a pawn to keep until A. and B. were agreed, which of them should have it, and pleaded further, that A. and B. were not yet agreed, who of them should have it, for which cause he kept it, absque hoc, that **[248]** he converted it to his own use, upon which the plaintiff did demur in law; it was moved that the conversion is never traversable. Wray, Generally conversion is not traversable, but upon such special matter as is here: or if A. lend money to B. and B. delivereth a thing of the value to A. in pawn, now the conversion is traversable; see the same case, 4 E. 6. Br. Action upon the Case, 113. so here. Fenner agreed with Wray.

1 Cro. 97. 201. 555, 693.

MICH. 33 ELIZ. IN THE KINGS BENCH.

CCCXXXVI. THE BISHOP OF LINCOLN AND COWPERS CASE.

Prohibition. Tithes.

The Bishop of Lincoln sued a prohibition against Cowper, who had libelled against him in the Spiritual Court for tithes out of the manor of D. And the bishop did suggest, that he and all his predecessors had been seised of the said manor, and that as long as it was in their possessions, had been discharged of tithes, and shewed, that in the time of E. 6. the said manor was conveyed to the Duke of Somerset in fee, and afterwards was re-granted to the bishop and his successors; it was moved, that the prescription was not good, because de non decimando: and admit that the prescription be good, the same is interrupted by the seisin of the Duke of Somerset; and although that the manor be re-assured to the Bishop of Lincoln, yet the prescription is not revived: as homage ancestrel if it be once in a forrain seisin, although it

be re-assured, yet it is not revived. But by Wray, Gawdy, and Fenner, The prescription is good in the case of a spiritual person, but not in the case of a common person. And they all were clear of opinion, that the prescription is not gon by this interruption, for tithes are not issuing out of the lands, neither can unity of possession extinguish them, neither are they extinguished, by a release of all right of land, &c. See for this case, Co. 11. part of his reports in the case of Pridle and Napper.

1 Cro. 216. Post. 331, 332.

33 ELIZ. IN THE KINGS BENCH.

CCCXXXVII. DETHICK, KING OF ARMS CASE.

Indictment. Misnosmer in an Indictment.

William Dethick, alias Garter king of arms, was indicted upon the statute of 5 E. 6. for striking in the church-yard: for that the said Dethick in Pauls Church-yard in London, struck I. S. It was moved; if cathedral churches be within the meaning of the statute: the Court was clear of opinion, that they were. And afterwards the defendant pleaded, that before the indictment found, he was created and crowned by the letters patents of the Queen which he shewed, chief and principal king of arms, and it was granted by the said letters patents, that he should be called Garter, and that that name is not in the indictment, and demanded judgment: the Kings Attorney by replication said, that by the law of arms and heraldry, every one who is made king of arms before he receives his dignity ought to be led betwixt two officers of arms, by the arms, before the Earl Marshal of England, or his deputy, and before him are to go four officers of arms, whereof the one is to bear his patent, another a collar of esses, the third a coronet of brass double guilt, fourthly a cup of wine, and his patent shall be read before the Earl Marshal; and afterwards his coronet shall be set upon his head, and the collar of esses about his neck, and afterwards the wine poured upon his head: and that the defendant had not received these ceremonies, for which cause he is not king of arms, nor to be **[249]** called upon, to which the defendant did demur in law. Broughton argued for the defendant, and he took exception to the replication, because it is pleaded there, that secundum legem heraldorum, Garter upon his creation ought to receive, &c. of which law this Court cannot have conusance, and therefore the replication ought to be, scil. secundum legem Angliæ: if in appeal the defendant wage battel, although that belongs unto arms and heraldry, yet it shall be pleaded according to the law of the land, and shall not speak of the law of arms. So if an infant be made a knight, and he be to plead in discharge of his wardship, he shall plead according to the law of the land, and yet the degree of a knight belongs to the law of arms, 11 E. 3. Dower against the Earl of Richmond, who was also Duke of Britain, who pleaded to the writ, that he was Duke of Britain, and not so named in the writ; but the Court did not regard it, for they cannot have knowledge of it, so not here of the law of heraldry: also this Court cannot write to the heralds to certifie it, as they may to the Marshal of the King, or to the bishop: but we have sufficiently shewed our matter, scil. that we have letters patents of the Queen, and that we were sworn in the said office, and so we are king of heralds by matter of record, against which is pleaded only matter in defect of ceremony and circumstance, which is not material. An earl is created with the ceremonies of putting a sword broad-wise about his body, and a cap with a coronet upon his head. Yet the King may create an earl without such ceremonies: and may also create an earl by word, if the same be after recorded; when a knight is made, spurs ought to be upon his heels, yet without such ceremony such degree may be conferred to and upon another, for such ceremonies are or may be used, or not used at the Kings pleasure. Afterwards it was objected, that the same is but a name of office, but not a name of dignity. To which it was answered, that this word coronamus always imports dignity, and this is a dignity and office, as earl, marquess, &c. Fenner Justice, The patent is, Nomen tibi imponimus, and therefore (Garter) is parcel of his name: and therefore he ought to be indicted by such name. And it should be

hard, to tye estate and degrees to ceremonies. Gawdy was of opinion, that this is but a name of office, and therefore the indictment good, as 1 Mar. writ of summons of Parliament issueth without these words (supream head) and the writ was holden good, for it is not parcel of the name, but addition only: so here, Fenner and Wray, contrary, for the words are creamus, coronamus, nomen imponimus, ergo, part of his name, which Clench also granted, and afterwards Dethick was discharged.

1 Cro. 224. Yelv. 34. Noy 250.

PASCH. 32 ELIZ. ROT. 318. IN THE KINGS BENCH.

CCCXXXVIII. STRAIT AND BRAGGS CASE.

In an action of trespass, for breaking his close in H. the defendant pleaded, that long before the trespass, the Dean and Chapter of Pauls were seised of the manor of C. in the said county of H. in fee, in the right of their church, and so seised King Edward the Fourth by his letters-patents, dat. An. 1. of his reign, granted to them all fines pro licentia concordandi, of all their homages and tenants, resiants, and non-resiants within their fee, and shewed, that 29 Eliz. a fine was levied in the Common Pleas, betwixt the plaintiff and one A. of eleven acres of lands, whereof the place where is parcel, and the post-fine was assessed to 15s. and afterwards Scambler the forain opposer did allow to them the said 15s. because the said land was within their fee: and afterwards, in behalf of the said dean and chapter, he demanded of the plaintiff the said fifteen shillings, **[250]** who refused to pay it, wherefore he in the right of the said dean, &c. And by their commandment took the distress as baily, &c. for the said 15s. and afterwards sold it, upon which the plaintiff did demur in law. It was moved, that it is not averred that the land whereof the fine was levied was within their fee; but they say that Scambler allowed it to be within their fee, and the same is not a sufficient averment; which the Court granted. And it was the opinion of the Court, that the dean and chapter cannot distrain for this matter, but they ought to sue for it in the Exchequer, as it appeareth 9 H. 6. 27. in the Dutchess of Somersets case. Gawdy, This grant doth not extend to the post fine, for fine pro licentia concordandi, is the Queens silver, and not the post fine. Wray, All shall pass by it, for it is about one and the same matter, and they were of opinion to give judgment for the plaintiff.

2 Len. 179.

TRIN. 32 ELIZ. ROT. 451. IN THE KINGS BENCH.

CCCXXXIX. SHEREWOOD AND NONNES CASE.

Covenant.

In an action of covenant, the plaintiff declared, that Charles Grice and Hester his wife were seised of certain tenements called Withons, with divers lands to the same appertaining, and of another parcel of land called Dole, containing eight acres, to them and the heirs of the body of the said Charles on the body of the said Hester his wife lawfully begotten, and so seised, 15 Eliz. leased the same to the defendant by indenture for years, by which indenture the lessor covenanted, that the lessee should have sufficient house-boot, fencing-wood, and hoop-wood upon the lands during the term; and that further the lessee covenanted for him, his executors and assigns, with the lessor, &c. That it should be lawful for them to enter upon the lands during the said term, and to have egress and regress there, and to cut down and dispose of all the wood and timber there growing, leaving sufficient house-boot, fencing-wood and hoop-wood to the lessee, upon the lands called the Dole, for his expences at Withons; and further, that he would not take any wood or timber upon the premisses, without the assent or assignment of the lessor or his assigns, otherwise than according to the indenture and true meaning thereof. And further declared, that the said Charles

and his wife so seised, levied a fine of part of the land to R. S. and his heirs, to whom the defendant attorned, and that the said R. S. afterwards devised the same to I. his wife, the now plaintiff for years, the remainder over to another, and died, and that the defendant had felled and carried out of the lands called Withons, twenty loads of wood without the assent and assignment of the lessor or his assigns, for which the plaintiff as assignee brought the action. The defendant pleaded, that after the lease John Grice and others by assignment of Hester had cut down and carried away fifty loads of wood in the said lands called the Dole, and so they had not left sufficient woods for his expences at Withons according to the indenture, for which cause he took the said twenty loads of wood upon Withons for his expences, upon which the plaintiff did demur in law. Godfrey, The plea is not good; this plea is no more, but that sufficient wood was not left upon the Dole for his expences, and although there be not, yet the defendant cannot cut wood elsewhere, for he hath restrained himself by the covenant. Also the covenant of the lessor is, that the lessee shall have sufficient wood upon the Dole for his expences at Withons, but in his satisfaction he doth not alledge, that he had need of wood for to spend at Withons, nor doth aver that he hath spent it there, for otherwise he hath not cause to take, &c. And the meaning was, that the lessee should have sufficient wood when he had need of it. Hobart for the defendant, He would not speak to the plea in **[251]** bar; but he conceived that the declaration was not good, for here no breach of covenant is assigned, for the covenant is in the disjunctive, scil. that the defendant should not take wood without the assent or assignment of the lessor or his assigns: and the plaintiff chargeth the defendant with cutting of wood without the assent and assignment of the lessor, so he would compel us to prove more than we ought, for if he did it with their assent only, or by their assignment only, it is sufficient; but if the covenant had been in the copulative, both was necessary: and for the nature of copulatives he cited the case, where two churchwardens bring an action of trespass, the defendant pleads, that the plaintiffs are not churchwardens, upon which they are at issue. The jury find, that the one was churchwarden, and the other not, and for that the plaintiffs could not have judgment, for if the one of them be not churchwarden, then the plaintiffs are not churchwardens, for the copulatives ought not to be disjoyned: and he cited the case lately ruled in the Common Pleas betwixt Ognel and Underwood concerning Crucifeild Grange, A. leased unto B. certain lands for forty years, B. leased part of the same to C. for ten years. A. grants a rent-charge out of the lands in tenura & occupatione B. It was resolved, that the lands leased to C. should not be charged with that rent, for although it was in tenura B. yet it was not in his occupation, and both are exquisite because in the copulative: so here, the lessee may cut wood with the assent of the lessor without any assignment. Also here, the substance of the covenant cannot charge the defendant, for although it be in the negative, yet it is not absolute in the negative, but doth refer unto the covenant precedent; for the words are, that the lessee shall not cut woods, aliter quam, according to the intent of the indenture, where the covenant precedent is not, that the lessee shall not cut woods but in the Dole, but that the lessor might cut down any trees in the Dole leaving sufficient for the lessee, which covenant in it self doth not restrain the lessee to cut down any trees in any part of the lands demised, nor abridgeth the power which the law giveth to him by reason of the demise. Then when this last covenant comes, i. e. that the lessee will not cut, aliter, then according to the meaning of the indenture without the assent, &c. the same doth not restrain him from the power which the meaning of the indenture gives, and so no breach of covenant can be assigned in this. For by virtue of the lease, the lessee of common right may take necessary fuel upon any part of the land leased: also this first covenant being in the affirmative doth not abridge any interest, as 28 H. 8. 19. The lessor covenants, that the lessee shall have sufficient hedge-boot by assignment of the baily. It is holden by Baldwin and Shelley, that the lessee may take it without assignment, because there are no negative words, & non aliter. So 8 E. 3. 10. A rent of ten pounds was granted to husband and wife, and if the husband overlive his wife that he shall have three pounds rent, and if the wife do overlive the husband, she shall have forty shillings, there it was holden that the rent of ten pounds continued, not restrained by the severance of any of them. And although peradventure

it appeareth here, that the meaning of the parties was, that the lessee should not cut down any wood but in the Dole, yet forasmuch as such meaning doth not stand with the law, it shall be rejected, as it was holden to be in the case betwixt Benet and French, where a man seised of divers lands, devised parcel of it called Gages, to the erecting of a school, and another parcel unto B. in fee, and all his other lands unto one French in fee, the devise of Gages was holden void, because too general, for no person is named; and it was further holden, that it passed by the general devise to French, and yet that was not the meaning of the devisor: also the plaintiff is not assignee but of parcel of the reversion, for if **[252]** the reversion is granted to him for years, and such assignee cannot have an action of covenant, for a covenant is a thing in action, and annexed to the reversion, so that if the reversion doth not continue in its first course as it was at the time of the creation of the covenant, but be altered or divided, the covenant is destroyed, and therefore it was holden, 32 H. 8. betwixt Wiseman and Warringer, where a lease for years was made of one hundred acres of lands, rendring ten pound rent, and afterwards the lessor granted fifty acres of it, that the grantee should not have any part of the rent, but all the rent was destroyed. So in our case here, the grantee hath but parcel of the estate, a term for years, and so is not an assignee intended, as the case betwixt Randal and Brown in the Court of Wards: Randal being seised of certain lands, covenanted with B. that if he pay unto him, his heirs and assigns, five hundred pounds, that then he and his heirs would stand seised to the use of the said B. and his heirs. Randal devised the land to his wife during the minority of his son, the remainder to his son in fee, and died, having made his wife his executrix. Brown at the day and place tendred the money generally, the wife having but an estate for years in the land took the money. It was holden, that the same was not a sufficient tender, for the wife is not assignee, for she hath an interest but for years, and here the son is to bear the loss, for by a lawful tender the inheritance shall be devested out of him, and therefore the tender ought to be made to him and not to his wife. Also as the case is here, he is no assignee, for although Charles Grice and his wife hath the reversion, to them and the heirs of the body of Charles, and levy a fine without proclamations, nothing passeth but his own estate, and then the conusee hath not any estate, but during the life of Charles, and then when a man is seised to him and his heirs during the life of another, he hath not such an estate as he can devise by the statute, and then when he deviseth it to his wife for years, it is void, &c. It was adjorned.

Owen Rep. 152. 1 Co. 215. 5 Co. 96. b. 97. a. Poph. Rep. 91. 1 Cro. 804, 805.

TRIN. 33 ELIZ. IN THE KINGS BENCH.

CCCXL. SMITH AND HITCHCOCKS CASE.

Assumpsit. Traverse.

In an action upon the case the plaintiff declared, that whereas the defendant was indebted to him, 19 Maii 30 Eliz. the defendant in consideration that the plaintiff would forbear to sue him until such a day after, promised at the said day to pay the debt. The defendant pleaded, how that 29 Maii 29 Eliz. he was indebted unto the plaintiff in the said sum, for assurance of which afterwards he acknowledged a statute to the plaintiff, upon which he had execution, and had levied the money, absque hoc, that he was indebted to the plaintiff, antea, vel post, the said day, aliquo modo, upon which the plaintiff did demur. It was argued that the traverse was not good, for the consideration in assumpsit is not traversable, because it is but conveyance, and amounts to the general issue, as in debt upon the sale of a horse, it is no plea for the defendant to say, that no such horse was sold to him. Partridge, If the conveyance be the ground of the suit it is traversable; an action upon the case against an hostler, it is a good plea that he is not an hostler, 2 H. 4. 7. See 26 H. 8. Br. Traverse 341. In an action upon the case, the plaintiff declared, that whereas the defendant, habuit ex deliberatione of the plaintiff certain goods, the said defendant in consideration of ten shillings, assumpsit and eidem querenti promisit salvo custodire, &c. Non

habuit ex deliberatione, is a good plea. Godfrey, The defendant doth not answer the point of our action, which is the assumpsit, but only by way of argument, 11 E. 4. 4. In trespass upon the statute of 5 R. 2. by the master of a colledge and his con-[253]-freers, the defendant doth justifie by reason of a lease made by a predecessor of the plaintiff, and his confreers, by their deed under their common seal, the plaintiff, replicando saith, that at the time of the making of the lease there was no such colledge, and it was holden no plea, for it is no answer but by argument. Gawdy Justice, In all cases where the defendant may wage his law, there the conveyance is traversable. Wray, The cause of the action is the assumpsit, therefore the consideration is not traversable, for it is not the point with which the plaintiff is charged: and it is common here, that the declaration in such action upon the case, in consideration of divers sums of money, without any more certainty is good, which should not be good if the consideration were traversable, but the consideration is to be given in evidence; and it is also common, that in an action upon the case in trover and conversion, the trover is not traversable, for the conversion is the point of the action. Fenner Justice, The debt here is no cause of the action, but only the assumpsit. In debt upon arbitrament, the arbitrament is traversable: so in debt for rent upon a demise, the demise is traversable, for the arbitrament and demise is the cause and ground of the action. At another day it was moved again, and Gawdy, mutata opinione said, that consideration executory is traversable; as where one in consideration that he may marry my daughter, or of service promiseth to pay, the same consideration is traversable, contrary of a consideration executed. And afterwards judgment was given for the plaintiff.

1 Cro. 201. Antea 189.

TRIN. 33 ELIZ. IN THE COURT OF WARDS.

CCCXLI. ESTONS CASE.

Eston was seised of lands in fee holden of the King in chief, and took a wife seised of other lands holden in socage, they have issue, and the husband dieth; and afterwards the wife dieth. Owen Serjeant conceived, that the Queen should not have the wardship of the land of the wife, or the primer seisin of it: and if the husband had survived his wife being tenant by the curtesie, the Queen should not have primer seisin of it after his decease. Wray, If the father be seised of lands holden in socage, and the mother of lands holded in knights service, and the husband over-lives his wife being tenant by the curtesie the king shall have all. Anderson denied that, and he conceived, that the opinion of Stamford is not law; and yet see 13 H. 4. 278. Where the father is seised of lands in chief, and the mother of other; and the father dieth, and afterwards the mother dieth, both shall be in ward. And it was said, that if there be grandfather, father, and son, and the father dieth seised of lands holden in socage; and afterwards the grandfather dieth seised of lands in knights service, the lands in socage shall not be in ward. Anderson held strongly, that the Queen should have primer seisin of the lands of the mother. Wray contrary. Quære.

1 Cro. 243.

TRIN. 33 ELIZ. IN THE COURT OF WARDS.

CCCXLII. ELLIS HARTOPS CASE.

Ellis Hartop was seised of divers lands, whereof part was holden of the King in knights service, and devised two parts thereof to W. Denham and his heirs, to the use of T. his brother, and his wife, and afterwards to the use of the said T. and his heirs males. T. died in the life [254] of the devisor, and afterwards a son is born; first it was agreed that a devise might be to the use of another; then, when cesty que use dyeth in the life of the devisor, the devisee shall take it, and when a son is born, it shall go to him: but if the use be void, then the devisee shall have it to his own use,

for every devise doth imply a consideration: Coke was of opinion, that the son takes by descent, when cestuy que use, to whom land is devised, doth refuse the use, the devisee cannot take it, for he shall not have it to his own use, for if the use be void, the devise is also void: and the use is void, for cestuy que use died in the life of the devisor, which see Bret and Rygdens case. A man seised of three acres, bargains and sells one of them, without shewing which, and that before the statute of 27 H. 8. the bargainee dyeth before election, no election descends to the heir, for then he should be a purchaser: and by Wray, and Anderson, the devise is void, and it is all one with Brett and Rigdens case. And by Anderson, A man deviseth lands to the use of one, which use by possibility is good, and by possibility not good; if afterwards cestuy que use cannot take, the devise shall be to the use of the devisor and his heirs.

TRIN. 33. ELIZ. IN THE KINGS BENCH.

CCCLXIII. WESTON AND GARMONS CASE.

Assize.

Assize was brought of a rent of fifty pounds per annum, and the plaintiff made his plaint to be disseised of his free-hold in H. E. and H. W.; and shewed, that John Vaughan and Amy his wife, who before was the wife of one Weston, and mother of Sir Henry Weston, the plaintiff in the assize was seised of the said manors of H. W. and H. E. lying in Barton and Kinton in fee. And 18 Eliz. a fine was levied betwixt Robert Vaughan, and Miles Whitney complainants, and the said John Vaughan and Amy his wife, and Francis their son deforceants of the said two manors, inter alia per nomen of the manors of H. E. and H. W. and of fifty messuages, three hundred acres of lands, two hundred acres of meadow, cum pertinentiis, in the said towns, by which fine the said deforceants, did acknowledge the right of the said manors and tenements, to be the right of the complainants, come ceo, &c. with warranty, of the said husband and wife, for which the complainants did render a rent of fifty pounds, per annum, with clause of distress, in dictis manerijs, to the said, John & Amy, & the heirs of Amy, and also rendred the tenements aforesaid, with the appurtenances to the said John and Amy for their lives, the remainder to the said Francis their son in tail, the remainder to the said Amy and her heirs; and that John and Amy dyed, by force whereof the said rent descendeth to the said plaintiff, as son and heir of the said Amy, and that the said Francis entred into the said mannors as in his remainder, and was seised in tail, and was seised of the said rent by the hands of the said Francis, and afterwards thereof did enfeoff the said Garmons the defendant &c. The tenant pleaded, that the plaintiff was never seised so as he could be disseised, and if, &c. nul tor. nul disseisin, which was found for the plaintiff who had judgment and execution, upon which the tenant brought a writ of error: Stephens assigned error, first, the fine is levyed of two manors, inter alia, so as no other lands passed by the fine besides the manors, and so the rent is granted out of the said lands and manors, and no other lands which passed by the fine, and then upon the plaintiffs own shewing it appears, that all the tenants of the lands charged with the rent in demand, are not named in the assize: second error: this rent is granted only out of the estate tail, for Amy hath fee in both, as well the rent as the land, and then when the **[255]** estate tail is determined, the rent is also determined, and he hath not averred the life of the tenant in tail, or any of his issue, wherefore it shall be intended that he is dead without issue, and then the rent is gone, and then he hath not any cause to have assise: Bourchier, As to the first conceived and argued that it is not error, for although these words (inter alia, &c.) yet it shall not be intended that the conusor had any other lands, or that the rent is issuing out of other lands than those two manors which are expressed, & not inter alia: as to the second, the continuance of the tail needs not to be averred, for the tenant in tail hath enfeoffed the tenant of the land, by which the estate tail is discontinued; and although the tenant in tail be dead without issue, yet the rent doth remain until recovery of the land by formedon in the remainder. Fenner Justice was of opinion, that the per nomen should go unto the mannors only,

and should not extend to the inter alia: for if a man in pleading saith, that J. S. was seised of twenty acres of land, and thereof (inter alia) did enfeoff him per nomen of Green-wead, the same shall not have reference to the inter alia, but only to the twenty acres: and the averment of the continuance of the tail needs not, for the estate-tail is discontinued. Gawdy Justice was of opinion, that the per nomen should go as well to the inter alia, as to the two manors, and then all the ter-tenants are not named in the assise, and the same not to be pleaded, for it appears of the plaintiffs own shewing, and there needs no averment of the continuance of the tail for the cause aforesaid. Clench Justice, The per nomen doth refer to all, which see by the fine, which shews that other lands passed by the fine, than the said two manors. And as to the second point he said, there needed no averment. Gawdy, As to the first error, the same cannot be saved by any way, but to say, that the conusor was not seised of any other lands than the said two manors, and then the fine doth not extend unto it, and then no rent is granted out of it. Fenner, In the Common Pleas, in the great case of fines, it was holden, that in pleading of a fine, it needs not to say, that the conusor was seised, for if the conusor or conusee were seised, it is sufficient: for such pleading is contrary in it self; for a fine, sur conusance de droit come ceo, &c. doth suppose a precedent gift: it was also objected, that here is a confusion in this fine, for the rent is rendred to the husband and wife, and to the heirs of the wife, and the land is rendred to the husband and wife for their lives, the remainder to Francis in tail, the remainder to the wife and her heirs: and these matters cannot stand together in a fine, but the one will confound the other: but as to that, it was said, that the law shall marshall these two renders, so as they both shall stand; and it is not like unto a rent-service, for a rent-service issueth out of the whole estate: and therefore if a remainder upon an estate for life escheats, the seigniory is gone even during the life of the tenant for life; which see, 3 H. 6. 1. contrary of a rent-charge: for if the grantee of a rent in fee purchaseth the remainder of the land out of which it is depending out of an estate for life, he shall have the rent during the life of the tenant for life. And of that opinion were all the three justices, for the conusors took by several acts, and the estate is charged, for it cometh under the grant. Fenner Justice, There is a difference betwixt a rent service and a rent-charge, or common, for that shall charge only the possession, but a rent-charge shall charge the whole estate: and therefore if he who hath a rent-service releaseth to him in the remainder upon an estate-tail, or for life, the rent is extinct; which Gawdy denied: and this case was put, the disseisee doth release to the lessee for years of his disseisor, nihil operatur; but if the disseisor and disseisee joyn in a release to such lessee, the same is good, for first it shall enure as the release of the disseisor, and then of the disseisee, &c.

1 Cro. 226. Vaugh. Rep. 175.

[256] MICH. 32 & 33 ELIZ. IN THE KINGS BENCH.

CCCXLIV. TEDCASTLE AND HALLYWELS CASE.

Debt.

In debt upon a bond, the defendant pleaded, that the condition was, that whereas John Hallywel had put himself to be an apprentice to the plaintiff, if the defendant John Hallywel during his apprenticeship, or any other for him, by his consent or agreement take, or riotously spend any of the goods of his said master the plaintiff: if then the defendant within one month after notice thereof given to him, do pay and satisfie the plaintiff for all such sums of monies, wares, &c. so taken or riotously spent by the defendant, or by any other by his procurement or consent, the same being sufficiently proved; that then, &c. the defendant by protestation; quod nec ipse, nor any other by his procurement or consent had taken, or riotously spent the goods of the plaintiff: for plea saith, that the plaintiff before the writ brought had not sufficiently proved, that the said John Hallywel took, or riotously spent any of the plaintiffs goods: upon which the plaintiff did demur in law. It was argued by

whole Court, that Richard Hart being seised with seven others, unto the use of himself and his heirs, might well devise all the use, although his use was in part suspended, because he was joyntly seised with seven others to his own use, and so the use for the eighth part suspended, for when this devise is to take effect, i.e. at the time of his death, all the possession of the land by the survivor passeth from the use, and then the use being withdrawn from the possession shall well pass. And by Wray, A use suspended may be devised: as if feoffees to use before the statute of 27 H. 8. be disseised, by which disseisin the use is suspended, and afterwards during the disseisin, cestuy que use, by his will deviseth, that his feoffees shall re-enter, and then make an estate to I. S. in fee, the same is a good devise, for by that disseisin the trust and confidence reposed by cestuy que use in the feoffees, is not suspended: secondly, it was holden that here a use implied was limited to Joan the wife of William, although there be not any express devise of it, according to the book of 13 H. 7. 17. Thirdly, when a use is limited to the heir of the body of William and Joan lawfully begotten for life, and afterwards to the heir of the body of the same heir for life, &c. Geofry Justice was of opinion, that here is in effect an estate tail, for the estates limited are directed to go in course of an estate tail; for he wills, that every heir of the body of his son shall have the land, and the special words shall not make another estate to pass, but that which the law wills: as if lands be given to one for life, the remainder after his death to the heirs of his body lawfully begotten, notwithstanding that the words of the limitation imply two several estates, yet because the law so wills, it is but one estate. Gawdy Justice said, that every issue begotten betwixt William and Joan should have an estate for life successive, and a remainder in tail expectant as right heir of the body of William, and this estate tail shall not be executed in possession by reason of the mesne remainder for life limited to the heir of the body of William and Joan, and although that these mesne remainders are but upon a contingent, and not in esse, yet such regard shall be had to them, that **[258]** they shall hinder the execution of the estates for life, and in tail in possession: as if an estate be made to A. for life, the remainder to the right heirs of B. in tail, the remainder in fee to A. although the estate tail be in abeyance, and not in esse during the life of B. yet in respect thereof the free-hold and fee shall not be conjoyned. Southcote Justice, to the same purpose: and he put a case lately adjudged betwixt Vaughan and Alcock: land was devised to two men, and if any of them dieth, his heir shall inherit, these devisees are tenants in common, because in by devise, but contrary if it were by way of grant: lands are devised to A. and B. to be betwixt them divided, they are tenants in common. Wray, William and Thomas have but for life, for they are purchasors by the name (heir) in the singular number, but when he goes further, and says, for want of such issue to the heirs of the body of William, in the plural number, now Will. hath an inheritance: and if a devise be made to one for life, and then to his heir for life, and so from heir to heir in perpetuum for life, here are two estates for life, and the other devisees have fee, for estates for life cannot be limited by general words from heir to heir, but by special words they may: and here, Thomas being next heir of the body of William and Joan, hath an estate for life, and also being heir of the body of the said William, hath a remainder in tail to him limited, & the mesn remaineth limited to others, i.e. to the next heir of the body of Thomas being in abeyance, because limited by the name heir, his father being alive, shall not hinder the execution of these estates, but they shall remain in force according to the rules of the common law: then Thomas so being seised levyeth a fine against the provision of the will, by which Thomas hath forfeited his estate for life, and so his next heir shall have the land during his life: and a great reason wherefore the heirs, ut supra, after the two first limitations shall have tail, is, because that if every heir should have but for life, they should never have any interest in the lands by these limitations, for by the express words of the devise, none shall take but the heir of the first heir for ever, i.e. when Thomas aliens, by which the use vests in Francis, and when afterwards Francis levieth a fine, then the use vests in Percival Hart, being next heir of the said Francis at the time of the fine levyed (notwithstanding that afterwards Francis had a son which is his next heir) and therefore the use in Percival by the birth of the said son in Francis shall not be devested, because it was a thing vested in him before by purchase, 9 H. 7. 25. A. enfeoffs B. upon condition on the part of A. to be performed,

and dyeth, having issue a daughter, the daughter performs the condition, and afterwards a son is born, the daughter shall hold the lands against the son : so 5 E. 4. 6. A woman hath issue a daughter, and afterwards consents to a ravisher, the daughter enters, and afterwards a son is born, yet the daughter shall hold the lands for ever, i.e. And Geofries Justice said, Francis being in by force of the forfeiture, shall not be subject to the limitation of the will, i.e., to any forfeiture if he alien, for the estate which Francis hath for his life is but an estate gained by the offence of his father, and the use was limited to him upon the will of Richard, and then the said estate is not subject to the proviso of the will, and then hath not Francis committed any forfeiture : and admit Francis shall forfeit, yet Percival shall get nothing thereby, but the estate which Francis had at the time of the fine levied, scil. the free-hold only, for no estate of inheritance was in him living his father. As to the regress of the feoffees, Geofries was of opinion, that where an use is limited to a person certain, and thereupon vested in the person to whom it is limited, that the entry of the feoffees in such case is not requisite, notwithstanding that the first estates be discontinued, but where the use (as in our case) is not limited to a person certain in esse, but is in abeyance, not vested in any person upon the limitation of it, some estate ought to be left in the feoffees to maintain that use, and to render it according to the limi-[259]-tation, and in our case, these uses not in esse at the time of the making of the statute of 27 H. 8. could not be executed by the said statute, but now at the appointed time by the limitation shall be raised and revived by the entry of the feoffees, but here by the fine and non-claim, the feoffees are bound, and their entry taken away, and so no use can accrue to Percival Hart by such entry. Southcote Justice was of opinion, that the feoffees cannot enter at all, because that by the statute of 27 H. 8. nothing is left in them at the time of the making of the statute, which saves the right of every person, &c. other than the feoffees, so as no right is saved to them but all is drawn out of them by the operation of the statute, and the second saving of the statute, saves to the feoffees all their former right, so as the right which the feoffees had by the feoffment to the use is utterly gone. But Percival Hart may well enter, for he is not bound to the five years after the fine levied, for he had not right at the time of the fine levied, but his right came by the fine. Wray Chief Justice, The feoffees are not to enter, for the statute of 27 H. 8. hath two branches, 1. gives the possession to cestuy que use in such manner as he hath in the use, 2. takes away all the right out of the feoffees, and gives it to cestuy que use, so as nothing at all remains in the feoffees ; for if an Act of Parliament will give to me all the lands, whereof my brother Southcote is seised, and that I shall be in the seisin thereof, now is the actual possession in me without my entry : so where an use is often executed by the statute, cestuy que use without any entry hath an actual possession. i. As to the uses contingent, nothing remains in the feoffees for the setling of them when they happen, but the whole estate is setled in cestuy que use, yet subject to such use, and he shall render the same upon contingency : and if any estate should remain in the feoffees, it could be but an estate for life, for the fee simple is executed in cestuy que use, with an estate in possession, and then the feoffees should be seised to another use than was given them by the livery. Also if a feoffment be made unto the use of the feoffor, and his heirs, until J. S. hath paid unto the feoffor 100l. from thenceforth the feoffor and his heirs shall be seised to the use of the said J. S. and his heirs, if upon such feoffment any thing should remain in the feoffees before the payment by I. S. the same should be a fee-simple, and then there should be two fee-simples of one and the same lands, one in the feoffor, and the other in the feoffees, which should be absurd, and therefore the best way to avoid such inconveniences is to continue the statute, that it draws the whole estate of the land, and also the confidence out of the feoffees, and reposeth it upon the lands, the which by the operation of the statute, shall render the use to every person in his time according to the limitation of the parties : and also if any interest doth remain in the feoffees, then if they convey to any person upon consideration who hath not notice of the use, then the said use shall never rise, which is utterly against the meaning of the said statute, and the meaning of the parties, and therefore, to construe the statute, to leave nothing in the feoffees will prevent all such mischief : and if a feoffment in fee be made to the use of the feoffor for life, and afterwards to the use of his wife which shall be for life, and after-

wards to the use of the right heirs of the feoffor; the feoffor enfeoffeth a stranger, taketh a wife, now cannot the feoffees enter during the life of the feoffor, and after his death they cannot enter, because they could not enter when the use to the wife was to begin upon the intermarriage, and then if the entry of the feoffees in such case should be requisite, the use limited to the wife by the act of the feoffor should be destroyed against his own limitation, which is strong against the meaning of the act aforesaid, for by the said act, the land is credited with the said use, which shall never fail in the performance of it. And such contingent estates in remainder may be limit-[260]-ed in possession, a fortiori in use, which see 4 E. 6. Colthirsts case, 23. And Plesingtons case, 6 R. 2. And it is true, at the common law, the entry of the feoffees was requisite, because the wrong was done unto them by reason of the possession which they then had; but now by the statute, all is drawn out of them, and then there is no reason that they medle with the lands wherein they have now nothing to do, and the scope of the statute is, utterly to disable the feoffees to do any thing in prejudice of the uses limited, so as the feoffees are not to any purpose but as a pipe to convey the lands to others; so as they cannot by their release or confirmation, &c. bind the uses which are to grow and arise by the limitation knit unto the feoffment made unto them, which see Br. 30. 30 H. 8. Feoffments to uses 50. A. covenants with B. that when A. shall be enfeoffed by B. of three acres of land in D. that then the said A. and his heirs shall be seised of land of the said A. in S. to the use of B. and his heirs, and afterwards A. enfeoffeth a stranger of his lands in S. and afterwards B. enfeoffeth A. of his lands in D. now the feoffee of A. shall be seised to the use of B. notwithstanding that the said feoffee had not notice of the use, for land is bound with the use in whose hands soever it come: and see the like case, ibid. i. Ma. 59. Upon the reason of which cases many assurances have been made, for it is the common manner of mortgage, i.e. if the mortgagor pay such a sum, &c. that then the mortgagee and his heirs shall be seised after such payment, to the use of the mortgagor and his heirs; in that case although that the mortgagee alien, yet upon the payment, the use shall rise well enough out of the possession of the alienee, and the lands shall be in the mortgagor without any entry: for the mortgagee could not enter against his own alienation, to revive the use which is to rise upon the payment, and therefore without any assistance of such entry, it shall arise: as at the common law, land is given to A. in tail, the remainder to the right heirs of B. A. levies a fine, makes a feoffment, suffers a recovery, &c. although the same shall bind the issues, yet if B. dyeth, and afterwards A. dyeth without issue, now notwithstanding this fine, &c. the right heir of B. may enter: and always a use shall spring out of the land at his due opportunity, and it is a collateral charge which binds the lands by the first liberty, and cannot be discharged, vi. 49. Ass. 8 & 49 E. 3. 16. Isabell Goodcheapes case: A man deviseth, that his executors shall sell his lands, and afterwards dyeth without heir, so as the land escheats to the King, yet the authority given to the executors shall bind the lands in whose hands soever it comes, &c. And so a title of entry continues notwithstanding twenty alienations: but an use is a less thing than a title of entry, especially an use in contingency, and an use as long as it is in contingency cannot be forfeited: as if the mortgagor be attainted and pardoned mean betwixt the mortgage and the day of redemption, &c. Then when Thomas levies a fine, Francis may well enter; and Thomas before the fine had an estate tail executed to his free-hold, and therefore by the fine he gave an estate of inheritance to the conusee, and then no right of entail remained in Francis, but he took an estate for life only, and that as a purchasor by the limitation of the will, and then when Francis levied a fine, his estate was gone (which was but for life) and then the right of the entail, and all the other estates which are especially limited are also gone, and so Percival Hart, to whom no estate was specially limited hath not any cause to enter, &c. And it was further said by Wray: Husbands and wife tenants in special tail, the husband levies a fine with proclamations and dieth, the wife enters, the issue in tail is barred, but if the wife enter after the death of her husband, and before the proclamations pass, the issue is not bound by the fine: and if tenant in tail granteth totum statum, and after levieth a fine thereof with proclamations, come ceo, &c. The issue is barred; contrary where the fine is upon a release, &c.

4 Len. 2. More Rep. 368. Co. 11. Rep. 80. 1 Cro. 61.

[261] 18 ELIZ. IN THE KINGS BENCH.

CCCXLVI. HENNINGHAM AND WINDHAMS CASE.

Error. Error and Attaint, by him to whom the Land is to descend.

Arthur Henningham brought a writ of error against Francis Windham upon a common recovery had against Henry his brother, and the case was, that land was given in special tail to Thomas Henningham, father of the said Henry and the said Arthur, the remainder in general tail (the estate tail in possession was to him and the heirs males of his body) Thomas had issue the said Henry and three daughters by one woman, and the said Arthur and two other sons by another woman, and dyed seised. Henry entred, and made a feoffment, a common recovery is had against the feoffee, in which Henry is vouched, who vouched over the common vouchee according to the usual course of common recoveries. Henry dyed without issue, and Arthur brought a writ of error being but of the half blood to Henry : and it was resolved by the whole Court, that error and attaint always descends to such person to whom the land should descend : if such recovery, or false oath had not been ; as if lands be given to one and the heirs females of his body, &c. and suffers an erronious recovery and dyeth, the heir female shall have the writ of error : so upon recovery of lands in borough English, for such action descends according to the land, quod fuit concessum per totam curiam : but it was objected on the defendants part : that because that the feoffee being tenant to the præcipe is to recover in value a fee-simple, and so Henry is to yield a fee-simple which should descend to the heir at the common law if this recovery had not been, therefore he to whom the same should descend, should have the writ of error, for he hath the loss : but the said exception was not allowed : and it was said, that tenant in tail upon such a recovery, shall recover but an estate in tail, scil. such estate which he had at the time of the warranty made, &c. And afterwards judgment was given that the action was maintainable : so if a man hath lands of the part of his mother, and loseth it by erronious judgment and dyeth ; that the heir of the part of the mother shall have the writ of error.

Owen Rep. 68.

18 ELIZ. IN THE KINGS BENCH.

CCCXLVII. FOSTER AND PITFALLS CASE.

In ejectione firmæ the case was : Brook devised lands to his wife in general tail, the remainder over to a stranger in fee, and dyed, she took another husband, and had issue a daughter : the husband and wife levied a fine to a stranger : the daughter as next heir by 11 H. 7. entred : it was agreed by the whole Court, that an estate devised to the wife, is within the words, but not within the meaning of the statute : secondly, it was resolved, that no estate is within the meaning of the statute, unless it be for the joynture of the wife : thirdly resolved, that the meaning of the statute was, that the wife so preferred by the husband should not prejudice the issues or heirs of her husband ; and here nothing is left in the issues or heirs of the husband, so as the wife could not prejudice them, for the remainder is limited over.

1 Cro. 2.

[262] 18 ELIZ. IN THE KINGS BENCH.

CCCLXVIII. GREENES CASE.

Acceptance of Rent. Entry.

Greene made a lease for years rendring rent with clause of re-entry, and the rent due at the Feast of the Annunciation was behind being demanded at the day, which rent the lessor afterwards accepted, and afterwards entred for the condition broken,

and his entry holden lawful, for the rent was due before the condition broken; but if the lessor accepts the next quarters rent, then he hath lost the benefit of re-entry, for thereby he admits the lessee to be his tenant. And if the lessor distrain for rent due at the said Feast of the Annunciation after the forfeiture, he cannot afterwards re-enter for the said forfeiture, for by his distress he hath affirmed the possession of the lessee: so if he make an aquittance for the rent as a rent, contrary, if the acquittance be but for a sum of mony, and not expressly for the rent, all which tota curia concessit.

1 Cro. 3. 3 Co. 64. b. Plow. Com. in Browning and Bestons Case.

CCCXLIX. 20 Eliz. In the Common Pleas.

Entry for Forfeiture. Livery of Seisin.

The case was, lessee for life, the remainder for life, the remainder in tail, the remainder in fee: the two tenants for life make a feoffment in fee. Dyer, A woman tenant for life in joynture, the remainder for life, the remainder in fee; the tenants for life joyn in a feoffment, the entry of him in the remainder in fee is lawful by 11 H. 7. And if tenant for life be impleaded, and he in the remainder for life will not pray to be received, he in the last remainder may; and so in our case, inasmuch as he in the remainder for life was party to the wrong, he in the remainder in tail shall enter: which Harper and Munson granted, i.e. Manwood, Although that this feoffment be not a disseisin to him in the remainder in tail, yet it is a wrong in a high degree; as by Littleton, a disseisor leaseth for life to A. who aliens in fee, the disseisee releaseth to the alienee; it is a good release, and the disseisor shall not enter although the alienation was to his disinheritance, Lit 111. which Dyer granted: and if tenant for life alieneth in fee, and the alienee enfeoffeth his father, and dieth, the same descent shall not avail him no more than in case of disseisin. It hath been objected, that this is the livery of the first tenant for life, and the confirmation of him in the remainder for life. Dyer was of opinion, that by this livery the remainder for life passeth, and this livery shall be as well the livery of him in the remainder as of the tenant in possession; and although where an estate is made lawfully by many, it shall be said the livery of him only who lawfully may make livery: yet where an estate is wrongfully made it shall be accounted in law, the livery of all who joyn in it. And in this, the remainder for life is extinguished by the livery in the feoffee, and the livery of him in the remainder for life shall be holden a void livery, especially when he joyns with such a person who hath not authority to make livery; as if the lord and a stranger disseise the tenant, and make a feoffment over, the whole seigniory is extinct, as if he solely had been seised: so if he in the reversion, and a stranger disseise for life, and make a feoffment over, the seigniory is gone, and yet it is the livery of the lessee only. And although it be but the confirmation of him in the remainder for life, yet thereby the remainder is gone and extinct. And afterwards judgment was given, that the entry of him in the remainder in tail was lawful: and it was said by the L. Dyer, that if tenant for life be, the remainder for life, the remainder in fee, [263] tenant for life in possession alieneth in fee, that he in the remainder in fee cannot enter, for it was not to his disinherisin.

Dyer 339. a.

CCCL. 20 Eliz. In the Kings Bench.

The case was, that a capies ad satisfaciend. was delivered to the sheriff, and after the sheriff did arrest the party against whom the capias issued, by force of a capias utlagatum, and then the party in the capias came to the sheriff, and prayed that the party remain in execution for his debt also, and notwithstanding that the sheriff let the prisoner go at large, and upon both writs returned, non est inventus. It was the opinion of all the justices, that the sheriff was not bound in point of escape to detain the prisoner for the debt of the plaintiff; and it is not like where one is in

the Fleet in execution, there (if other condemnations in other Courts be notified to the warden of the Fleet) he shall be chargeable with them all. It was holden also, per curiam, that if the body had been returned by capias utlagatum, that the Court at the prayer of the party would grant that the prisoner might remain in execution for the debt as in case of a capias pro fine.

5 Co. 88. 89.

19 Eliz. In the Common Pleas.

CCCLI. The Lord Saint John and the Countess of Kents Case.

Grants of Executors of omnia bona sua.

In evidence given to the jury in an action of debt brought by the plaintiff against the defendant: it was said by Dyer and Manwood Justices, that if executors grant omnia bona sua, that the goods which they have as executors do not pass, which see 10 E. 4. 1. b. by Danby: but the contrary was holden by Wray Chief Justice of the Kings Bench, and by Plowden, in Bracebridges case, P. 18 Eliz. and they denied the opinion of 10 E. 4. to be law, for by such grant made by executors, the goods of the testator do pass.

1 Cro. 6.

CCCLII. 19 Eliz. In the Common Pleas.

Abatement of Writ. Account.

Note, it was said by Dyer and Manwood, Justices, that if one be condemned in an action upon the case, or trespass upon nihil dicit, or demurrer, &c. and a writ issueth forth to enquire of the damages, and before the return of it the defendant dieth, that the writ shall not abate, for the awarding of the said writ is a judgment. And it was said by Manwood, In a writ of account the defendant is awarded to account; if the defendant account, and be found in arrearages and dieth, the writ shall not abate, but judgment shall be given that the plaintiff shall recover, and the executor shall be charged with the arrearages, and yet account doth not lye against them.

3 Len. 68.

[264] CCCLIII. 19 Eliz. In the Kings Bench.

Attachment of Goods, after the Money is in the Sheriffs hand, is void.

A. did recover in debt against B. whereupon a fieri facias issued to the Sheriff of Devon; and the defendant, seeing the writ of execution in the sheriffs hands, said to him, that he would pay the debt recovered at Exeter such a day to satisfie the execution, at which day the defendant paid the mony accordingly, and presently came an officer of the City of Exeter, and attached the mony in the sheriffs hand, supposing the said A. to be indebted so much to one C. in whose name he made the attachment, and now on the behalf of the said A. a certiorare was prayed to remove the attachment hither; and it was therefore holden by the whole Court, that the attachment was void, and a certiorare granted: and Wray said, If it can be proved by oath, that if the defendant did procure, or was assenting to the said attachment, that process of contempt should issue against him; and the sheriff demanded of the Court what return he should make, because the monies were attached in his hands, and taken from him by force; to which Wray answered, That the sheriff ought to answer the monies to the plaintiff, which were once in his hands by force of the execution, and that it was his folly to suffer the mony to be taken from him by colour of the said attachment, and if the mony was taken by force, the sheriff had his remedy by an action of trespass; for the attachment was void, but the sheriff at the return of the writ ought to answer for the mony.

Antea 29. 1 Cro. 63.

CCCLIV. 19. Eliz. In the Common Pleas.

Forfeiture.

Tenant for life bargained and sold his lands to A. and his heirs, and afterwards levied a fine to the bargainee, sur conusans de droit come ceo, &c. It was holden by the Court, that it was a forfeiture committed by the bargainee, not by the bargainor, who at the time of the fine had nothing to forfeit; and it was said by Manwood Justice, that if tenant for life be disseised, and takes a fine, ut supra, of a stranger, it is a forfeiture, and yet he in the reversion hath but a right in reversion; so that if tenant for life be disseised, and the disseisor commits wast, he in the reversion shall have an action of wast against tenant for life; and if two tenants for life be disseised by two, A. and B. and one of the tenants for life doth release unto A. and the other tenant for life doth re-enter, he hath the moiety in common with the other to whom the release was made, and he hath revested the entire reversion in him, in whom the reversion was before, &c.

4 Len. 124. 2 Len. 60, 65.

CCCLV. 20. Eliz. In the Common Pleas.

Bracebridges Case.

The case was, Thomas Bracebridge seised of a manor in fee, leased a messuage, parcel of it to one Curtes for 21 years, and afterwards 35 H. 8. leased the same to one Moore for 26 years, to begin after the expiration of the former lease; and afterwards 5 E. 6. he enfeoffed Griffith and others to the use of the feoffees themselves, and their heirs, upon condition, that if the feoffees did not pay to the said Thomas Bracebridge 2000l. within 15 days after, that then immediately after the said 15 days, the feoffees should stand seised of the said manor **[265]** to the use of the said Thomas Bracebridge, and Joyce his wife, for their lives, without impeachment of wast, and afterwards to the use of T. B. their second son in tail, with divers remainders over, the feoffees do not pay the said mony within the said 15 days, afterwards Curties attorns to the feoffees. It was moved, if the reversion of the lands passed to Curties, passeth by the feoffment of the manor without attornment, which see Littleton 133, 134. 2. If by the attornment of Curties, after the 15 days the uses can rise to Bracebridge and his wife, &c. and it was said, that the case 20 H. 6. Avowry 11, 12. If a manor be granted for life, the remainder over in fee; tenant for life dieth, if the tenants attorn to him in the remainder, the same is good; and if a reversion be granted to two, and one of them dieth, attornment to the survivor is good; and if a reversion be granted to husband and wife in special tail, the wife dieth afterwards without issue, attornment to the husband is good; and if a reversion be given in frank-marriage, and afterwards the husband and wife are divorced, and afterwards the particular tenant attorns to the wife, the same is good; and by Manwood, If a man seised of a manor, the demesns of which extends into two counties, and hath issue a son and a daughter by one woman, and a son by another woman, and dieth, the eldest son enters into the demesns in one county only, and takes the profit in one county only, and dieth without issue, the daughter shall have and inherit the demesns or services whereof her brother was seised, and the son of the half-blood the rest: and by Manwood, The attornment of Curties, who was the first lessee, shall bind Moore the second lessee, for he ought to attorn, against whom lieth the quid juris clamat: and if a lease for years be made of a manor, and the reversion of it be granted to another in fee, if the lessee for years attorneth it shall bind the tenants of the manor, 18 E. 2. A man seised of a manor in the right of his wife, leased parcel of it for years without his wife, the reversion thereof is not parcel of the manor; contrary if the lease had been made by husband and wife. And by Dyer, If tenant in tail of

a manor leaseth parcel for years, and afterwards makes a feoffment of the whole manor, and makes livery in the demesns not leased, the reversion of the land leased doth not pass; for by the feoffment a wrong is done to the lessor, which the law shall not further enlarge than appeareth by the deed; contrary in case of tenant in fee of a manor, and that without deed with attornment. And it was the case of one Kellet, 25 H. 8. Kellet was cestuy que use before the statute of 27 H. 8. of divers lands by several conveyances, the use of some being raised upon recovery, of some upon fine, and of some upon feoffment, and he made a feoffment of all these lands by deed, with a letter of attorney to make livery; the attorney entred into part of the land, and made livery in the name of the whole, and it was agreed by all the justices, that the lands passed, notwithstanding in others possession, i.e. other feoffees: and by Dyer, If the tenants of a manor pay their rents to the disseisor, they may refuse again to pay them; and if a lease be made for years, the remainder for life, if the lessor will grant over his reversion, the lessee for years shall attorn, and his attornment shall bind him in the remainder for life; and if a lease be made to one for years, the remainder over for life, the remainder to the lessee for years in fee. Now if the lessee for years grant all his interest, &c. there needs no attornment: and if grantee of a rent in fee leaseth for life, and afterwards grants the reversion to another, the attornment of the ter-tenant is not requisite, but only of the grantee for life. It was also holden, that this attornment by Curties two years after the livery was sufficient, for it shall have relation to the livery to make it parcel of the manor, but not to punish the lessee for waste done mean between the livery and **[266]** the attornment, but betwixt the feoffor and the feoffee it shall pass ab initio. It was holden also, that although the uses for it limited are determined by the default of payment within the 15 days, yet the feoffees shall take the reversion by this attornment to the second uses; and if I enfeoff one upon condition to enfeoff J. S. who refuseth, now the feoffee shall be seised to my use; but if the condition were to give in tail, contrary: so here is a limitation beyond the first use, which shall not be defeated for want of attornment to the first uses; and here it was not the meaning of Bracebridge to have the lands again upon breach of the condition in his former estate, but according to the second use; and judgment was given in the principal case according to the resolutions of the Judges, as aforesaid. And it was said by Harper Justice, that if a feoffment in fee be made to J. S. upon condition that he shall grant to A. a rent-charge, who refuseth it, J. S. shall be seised to his own use.

2 Len. 222. Antea 199.

CCCLVI. 20 Eliz. In the Common Pleas.

Seisin.

The case was this, lord and tenant by service to pay every year such a quantity of salt; but since 10 H. 7. the tenant hath always paid the money for salt. The question was, if the lord might resort to the first service, and if the money be seisin of the salt. And Manwood took this difference, i.e. where the lord takes a certain sum of money for the salt, the same is not any seisin, for the service is altered, as at the first, socage tenure was a work done by labor, i.e. plowing; but now it is changed into certain rent, and the lord cannot resort to have his plowing; and in Kent divers tenants in ancient time have paid barley for their rent, but the same afterward was paid in a certain sum of money, so as now the Lord of Canterbury, who is lord of such tenements cannot now demand his barly, &c. but if the sum which hath been used to be paid be incertain one year so much, according to the price of salt, then such a payment of money is a sufficient seisin of the salt. Quod fuit concessum per curiam.

CCCLVII. 20 Eliz. In the Common Pleas.

Accompt by the Heir of a Copyholder. Custom.

In accompt, brought by an heir copyholder, for the profits of his copyhold lands taken during his nonage, the defendant pleaded, that by the custom of the said manor, the lord of the manor might assign one to take the profits of a copyhold descended to an infant, during his nonage to the use of the assignee, without rendring an accompt, and the same was holden to be a good custom, as a rent granted to one and his heirs, to cease during the nonage of every heir; but admitting that the custom were void, yet this action doth not lye, for the defendant hath not entred and taken the profits, as prochein amy, in which case although he was not prochein amy, &c. he is chargeable, as prochein amy according to his claim; but here he claimeth by the custom and grant of the lord, and not in the right of the heir; and therefore it was adjudged in this time of this quære, that if one entreth into lands claiming by devise, where in truth the land devised is entailed, he should not be charged in accompt, &c.

Owen Rep. 36, 83, 84.

[267] CCCLVIII. 20 Eliz. In the Common Pleas.

Exposition of the Statute of 32 and 34 of Wills.

Note, it was holden by the whole Court, that the Statute of 32 & 34 H. 8. of Wills, did not extend to lands in London, but that the devise of the whole is good: and if houses in London, parcel of the possessions of abbies came to the Crown by dissolution, and he grants them over to hold in chief by knights service, these lands are devisable: but it was holden, that the said statutes as acts executed, extended to lands in London, and shall be good but for two parts: and if a man hath lands in tail, and in fee-simple, which are of double the value of the lands in tail, and deviseth all his lands, all the land in fee-simple shall pass. Dyer, One seised of three manors, the one in capite in fee, and two in socage in tail, and deviseth all his land in capite, it is good against the King for all capite land, and he shall be tied to have the lands in socage, but it shall not bind the heir: and a devise of the third part (where all is devised) is void as well against the heir as against the King. And he said, that if a man be seised of twenty acres in socage, and ten acres in capite, and deviseth two parts of his lands, it is reasonable to say, that all the socage lands shall pass; but if the devise was of two parts of all his lands, it is otherwise, for this word (all) implies, that the two parts shall be per my & per tout, as well capite as socage, i.e. it was argued by Fenner, that the lands in London are now devisable as they were before the statute, for if the devisee of lands in London be disturbed, he shall have ex gravi querela, otherwise it is of lands at the common law: and if an assize of mortdancester be brought of lands in London, it is a good plea to say, that the lands are devisable: but in an assise of mortdancestor of lands at the common law, it is not any plea: and if a man gives lands at the common law, i.e. not devisable by the common law, he cannot devise the reversion, for the statute shall not do wrong to the person, i.e. to the donee, who there shall lose his acquittal: but of lands devisable by custom, it is otherwise; and if land in a burrough was devisable for life by the custom, and afterwards came the statute of 32 H. 8. which made all lands devisable, now that land is devisable for life by the custom, and the reversion by the statute.

CCCLIX. 20 Eliz. In the Common Pleas.

Wast. View.

In an action of wast, of wast assigned in a wood, the jury viewed the wood only without entring into it: and it was holden that the same was sufficient, for otherwise

it should be tedious for the jury to have had the view of every stub of a tree which had been felled. Yet Meade Justice said, that if wast be assigned in several corners of the wood, then the jury is to have the view of every corner; but contrary where wast is assigned in the whole wood; and if wast be assigned in every room of a house, the view of the house generally is sufficient. And Dyer Justice said, that if wast be assigned in several places, and of some of them the jury had not the view, of that they may find no wast done.

[268] 20 ELIZ. IN THE COMMON PLEAS.

CCCLX. SIR THOMAS LEES CASE.

[See *Savill Brothers, Limited*, v. *Bethell* [1902], 2 Ch. 538.]

Election.

It was holden per curiam, that whereas Sir Thomas Lee was seised of a manor, and alienated the manor, except one close parcel of the said manor called Newdick, and there were two closes parcel of the said manor called Newdick, the one containing nine acres, and the other containing three acres; that the alienee should not chuse which of the said closes he would have; but the alienor or feoffor should have the election which of the said closes should pass.

CCCLXI. 20 ELIZ. IN THE COMMON PLEAS.

Fines levied by Tenant in Tail in Remainder.

Tenant in tail, the remainder in tail, &c. Tenant in tail, in possession, makes a lease for three lives, according to the statute of 32 H. 8. and afterwards dieth without issue, he in the remainder before any entry levieth a fine, the same is good; for by the death of tenant in tail without issue, the free-hold is vested in him in the remainder in tail: and of that opinion was the whole Court.

3 Cro. 211.

20 ELIZ. IN THE COMMON PLEAS.

CCCLXII. FERRAND AND RAMSEYS CASE.

Rents. Reversion. Feoffments upon Condition. Regula.

In an ejectione firmæ brought of a house in London, the defendant pleaded, that long before the lessor of the plaintiff had anything, &c. one Ann Ramsey was seised in fee, and died seised, and that the same descended to William Ramsey as son and heir to the said Ann, who was disseised by Israel Owen, who leased to the plaintiff, upon whom the said William Ramsey did re-enter: the plaintiff replicando, that the said Ann did not die seised, said, that before the ejectment one Robert Owen was seised, and died seised, and from him descended the said house to Israel Owen as son and heir of the said Robert, absque hoc, that the said Israel did disseise the said Ann, upon which they were at issue, and at nisi prius in London, it was given in evidence of the defendants part: that Crofton and Langhton were seised in fee of the said messuage, and by deed indented conveyed it to one John Ramsey, Robert Dakins, and four others and their heirs, upon condition that the said feoffees, their heirs or assigns should pay to the said Ann and her heirs, six pounds thirteen shillings and four pence: and also should enfeoff the said Ann, if to the same they were required by the said Ann in her life, or within four days next following such request in fee unto the use of the said Ann and her heirs, cum & quando ad hoc per eandem Annam requisit, fuerint, and if the said Ann died before such request, that then the said

feoffees or their heirs should enfeoff such issues of the said Ann, or such other persons which the said Ann should name, cum & quando ad hoc per eandem Annam requisit. fuerint, or within four days after such request, the said feoffees or their heirs should be seised of the said house, to the use of the said Ann and her heirs. Afterwards the seventh of April, 16 Eliz. Ann demanded of William Ramsey, son and heir of John Ramsey, six pounds thirteen shillings and four pence, being due to the said Ann, ut supra, the which sum the said William Ramsey did refuse to pay, by force of which, and by the statute of 27 H. 8. the said Ann Ramsey was thereof seised, and died seised, and from her descended the said house **[269]** to William Ramsey. The plaintiff confessed the feoffment to Crofton and Langhton, to John Ramsey and others, and shewed further, that the said Ann required the surviving feoffees to enfeoff one Robert Owen of the said house, who three days after made the feoffment accordingly, Robert Owen enfeoffed John Owen, who died thereof seised, and from him the said house descended to Israel Owen. Crafton died, Langhton having issue two daughters died; all the feoffees but one died, Ann the time aforesaid demanded the said six pounds thirteen shillings and four pence of the said William Ramsey in another house in London, due at the Feast of St. Michael last before, who denied to pay it; the second daughter of Langhton entred, and thereof enfeoffed the said Israel Owen, who leased the same to the plaintiff, and upon that evidence the defendant did demur in law: and first it was resolved by the whole Court, that the said sum to be paid to the said Ann was not a rent, but a sum in gross, because reserved to a stranger, &c. which see Lit. 79. And by Munson Justice, If the words of the reservation had been twenty nobles rent, yet it had been but a sum in gross, but otherwise it had been by devise. Also there is not any condition for the payment of it, but only a limitation, for the word subsequent which limits the future use, takes away all the force of the words of the condition, as 27 H. 8. 24. Land given in tail upon condition that the donee and his heirs shall carry the standard of the donor when he goes to battel; and if he fail thereof, then the same to remain to a stranger, the limiting of the remainder hath taken away the condition, and hath controlled it, and now the condition is become a limitation; but where the words subsequent are against law, as if upon failer, that then it shall be lawful for a stranger to enter, &c. these words because they are against law (for a rent cannot be reserved to a stranger, &c.) do not destroy the condition, by Mead, contrary by Munson, for the condition is utterly gone. And by Mead, Feoffment in fee upon condition, that if the feoffor shall do such a thing that he shall re-enter and retain the land to the use of a stranger, the use is void, and the feoffor shall hold the land to his own use. A feoffment in fee upon condition, that the feoffee shall marry my daughter, and if he refuse to marry her, that then he shall be seised to the use of I. S. the same is not a condition, but a limitation; and in all cases afterwards of a condition, where an interest is limited to a stranger, there it is not a condition, but a limitation. And Mead said, that the said annual sum is not demandable, but the party ought to pay it at his peril, Lit. 80. But by Munson, It ought to be demanded, for so this word (refuse) doth imply: and when at the request of Ann the feoffment is made, by Munson, Mead, and Windham, the rent is gone; but Dyer contrary, unless the feoffment be made to Ann herself: and afterwards judgment was given for the plaintiff, Hil. 19 Eliz. Rot. 748. There was a case betwixt Shaw and Norton. One Green devised his lands to A. and devised also, the said A. should pay a rent to B. and that B. might distrain for it; and if A. fail of the payment of it, that the heirs of the devisor might enter, the same is a good distress, and a good condition. And by Munson, Demand ought to be made of the rent, for the words are (refuse) which cannot be without demand or request: and it was certified, that such a clerk refused to pay his tenths, and because it was expressly set down in the certificate, that he was requested, &c. for that cause he was discharged. And it was also holden, that if request be necessary, that in this case request is to be made, that it ought to be made to the surviving feoffee, or his heir, and not to the heirs of any of the feoffees who are dead.

3 Cro. 210, 211. 1 Cro. 401, 402.

[270] HILL. 25 ELIZ. IN THE KINGS BENCH.

CCCLXIII. LACYES CASE.

Indictments. Commission repealed.

Lacy was indicted of the death of a man upon Scarborough Sands, in the county of York, between the high water-mark, and the low water-mark, and the same indictment was removed into the Kings Bench, and being arraigned upon it, he shewed, that the said indictment was sued by vertue of a commission which issued the first day of May, directed to the Justices of Assize, and other justices of peace in the said county, to enquire of all murders, felonies, &c. and pleaded further, that the second day of May aforesaid, issued another commission directed to the Lord Admiral and others upon the statute of 28 H. 8. cap. 15. by force of which the said Lacy was indicted of the same murder, whereof he was now arraigned, and the said last commission was, ad inquirendum, tam super altum mare, quam super littus maris, & ubicunque locorum infra jurisdictionem nostram maritimam: and that the said indictment taken before the Admiral, was taken before this, upon which he was arraigned, and upon the whole matter prayed to be dismissed: and the opinion of all the justices was, that the first commission was repealed by the second, and so the indictment upon which he was arraigned, taken, coram non judice, 10 E. 4. 7. If a commission for the peace issueth into one county, and afterwards another commission issueth to a town within the same county and parcel of it, the first commission is repealed, which Gawdy granted, if notice be given, &c. but Wray denied it; but the whole Court, by this last commission to the Lord Admiral, the first commission, as to the jurisdiction in locis maritimis is determined and repealed; for these two commissions, are in respect of two several authorities; the first commission meerly by the common law, the other by the statute aforesaid, and thereupon the party was discharged against the Queen, as to that indictment. Note, that in the argument of this case, it was said by Coke, and agreed by Wray, that if a man be struck upon the high-sea, whereof he dieth in another county afterwards, that this murder is dispunishable, notwithstanding the statute of 2 Ed. 6.

Co. 13. Rep. 53. 2 Co. 93.

PASCH. 25 ELIZ. IN THE KINGS BENCH.

CCCLXIV. THE QUEEN AND BRAYBROOKS CASE.

The Queen brought a writ of error against Braybrook, the case was this, That King Ed. 4. was seised of the manor of Marston, and gave the same to Lionel Lord Norris, and A. M. and the heirs of the body of the lord, the remainder to H. Norris in tail, L. and A. entermarry, L. suffered a common recovery against himself only, without naming the said A. Hen. Norris is attainted of high treason by Act of Parliament, and by the same Act all his lands, tenements, hereditaments, rights, conditions, &c. the day of the treason committed, or ever after, &c. Hen. Norris is executed, Lionel dieth without issue, the Queen falsified the said recovery for one moiety by scire facias, because Anne who was joint-tenant with Lionel was not named party to the said recovery: and afterwards the Queen granted to the Lord Norris, son of the said Hen. Norris, manerium suum de Merston, & omnia jura in eodem, and now upon the said recovery, the Queen brought a writ of error, and it was argued by Egerton the Queens sollicitor, that this right to a writ of error is such a right as is transferred to the Queen by the Act of Parliament, for the words are, omnia jura sua quæcunque, and here is a right, although not a present **[271]** right, yet a right although in futuro, so it is a right of some quality, as A. tenant in tail, the remainder in tail to B. A. makes a feoffment in fee, B. is attainted of high treason, and by such Act all his lands, &c. given to the King. A. dieth without issue, the Queen shall have a formedon in the remainder; and although the Queen hath granted to the Lord

Norris, manerium suum de Merston, & omnia jura in eodem, yet by such general words, a writ of error doth not pass, which see 32 H. 8. Br. Patents 98. And also this action rests in privity of record, and cannot be displaced from thence, but by Act of Parliament, see Br. Chose in Action 14. 33 H. 8. for when the King will grant a thing in action, he ought in his patent to recite all the circumstances of the matter, as the right, and how it became a right, and because the Queen here doth not make mention of this right, as of the entail, the recovery, and the attainder, for that cause the right doth not pass. The case betwixt Cromer and Cranmer, 8 Eliz. the disseisee was attainted of treason, the Queen granted to the heir of the disseisee all the right which came unto her by the attainder of his ancestor, nothing passed, causa qua supra: and always where the King grants any thing, which he cannot grant, but as King, that such a grant without special words, is to no purpose. Coke contrary, & he agreed the case put by Egerton, for at the time of the attainder, B. had a right of remainder; but in our case Hen. Norris had not any right, but a possibility of a right of action, i.e. a writ of error; and he said that this writ of error is not forfeitable (for it is an action which rests in privity) no more than a condition in gross, as a feoffment in fee is made upon condition of the party of the feoffor who is attainted ut supra: This word (right) in the Act of Attainder shall not transfer this condition to the Queen, and of the Act of Attainder to Hen. Norris, it is to be conceived that the makers of the Act did not intend, that by the word (right) every right of any manner, or quality whatsoever should pass to carry a condition to the Queen, and therefore we ought to conceive, that the makers of the Act did not intend to touch rights which rested in privity: and as to the grant of the Queen, to the Lord Norris of the mannor of Merston, et omnia jura sua in eodem, he conceived, that thereby the right of the writ of error did pass; for it is not like Cranmers case, but if in the said case, the land it self had been set down in the grant, it had been good enough, as that Cranmer being seised in fee of the manor of D. was thereof disseised, and so being disseised was attainted of high treason: now the Queen grants to his heirs totam jus suum in his manor of D., &c. and so in our case, the Queen hath granted to the Lord Norris, manerium suum de Merston & omnia jura sua in eodem, &c. at another day it was moved by Plowden, that this right of writ of error was not transferred to the Queen by the Act, but such right might be saved to a stranger, &c. the words of the Act are, omnia jura sua, and this word (sua) is pronomen possessionis, by which it is to be conceived, that no right should pass, but that which was a present right, as a right in possession, but this right to a writ of error, was not in Hen. Norris at the time of his attainder, but it was wholly in him against whom the erroneous judgment was had: and therefore if in a præcipe quod reddat, the tenant vouch and loseth, and judgment is given, and before execution, the tenant is attainted by Act of Parliament, by words ut supra, and afterwards he is pardoned, the demandant sueth for execution against the tenant, now notwithstanding this attainder, the tenant may sue execution against the vouchee, and afterwards Wray Chief Justice openly declared in Court, the opinion of himself and all his companions justices, and also of all the other justices to be, that by this Act of Parliament, by which all lands, tenements, hereditaments, and all rights of any manner and quality whatsoever Henry Norris had, the day of his attainder, or ever after, Lionel then being alive, and overliving the said Hen. Nor-**[272]**-ris, that this writ of error was not transferred to the Queen: and that the said Act by the words aforesaid could not convey to the King this possibility of right, for at the time of the attainder, the right of the writ of error was in Lyonel, and Hen. during the estate tail limited to Lyonell had not to do with the land, nor any matter concerning it: and judgment was given accordingly; and it was holden, that he in the reversion, or remainder upon an estate tail might have a writ of error by the common law, upon a rectory had against tenant in tail in reversion.

3 Co. 1, 2, &c.

CCCLXV. MICH. 25 & 26 ELIZ. IN THE COMMON PLEAS.

Copyholder.

In trespass brought by a copyholder against the lord for cutting down and carrying away his trees, &c. It was found by special verdict, that the place where, &c. was customary lands of the plaintiffs, holden of the defendant, and that the trees whereof, &c. were chery trees, de magnitudine sufficienti effendi maremium, and that the place where they growed, was neither orchard, nor garden: it was said by the Court, that by the custom the copyholder could not cut down such trees, but the lord might, and that the cutting down of such trees which were not wast, the copyholder might justifie without punishment: but because by the verdict it did not appear that the trees for which the action was brought were timber in facto, but only de magnitudine effendi maremium, the plaintiff had judgment.

MICH. 25 & 26 ELIZ. IN THE COMMON PLEAS.

CCCLXVI. THE LORD STAFFORDS CASE.

Extent.

Upon recovery in debt against the Lord Stafford, certain lands of the lord were extended by elegit; the Queen because the Lord Stafford was endebted unto her, by prerogative ousted the tenant by elegit: Fleetwood Serjeant moved the Court in the behalf of him who recovered, and surmised to the Court that the Queen was satisfied, and therefore prayed a re-extent; but the Court would not grant it, because they were not certain of the matter, but advised the party to sue a scire facias against the said Lord Stafford, to know and shew cause, why a re-extent should not issue forth, the Queen being satisfied, &c.

MICH. 25 & 26 ELIZ. IN THE KINGS BENCH.

CCCLXVII. GIBBS AND ROWLIES CASE.

Tithes. Prohibition.

Symon Gibbs parson of Beddington, libelled in the Spiritual Court against Rowlie, for tithe milk, Rowlie upon surmise of a prescription, de modo decimandi, obtained a prohibition, which was against Symon Gibbs, rectorem ecclesiæ parochial. de Nether Beddington, and the parties were at issue upon the prescription, and it was found for Rowlie. Egerton solicitor moved against the prohibition, because the libel is against Gibbs, rectorem ecclesiæ paroch. de Beddington, and the prohibition was, de Nether Beddington, and it was not averred that Beddington in the libel, and Nether Beddington, is unum & idem, and non diversa; it was said by the Court, that upon the matter there is not any prohibition against rectorem ecclesiæ de **[273]** Beddington only, and therefore said to the plaintiffs counsel, let the parson proceed in the Spiritual Court at his peril.

MICH. 25 & 26 ELIZ. IN THE KINGS BENCH.

CCCLXVIII. RUSSELL AND HANDFORDS CASE.

Nusance. Words of Prescription. Seisin in Fact, and in Law.

Russell brought an action upon the case against Handford, and declared, quod cum quoddam molendinum ab entiquo fuit erectum, upon such a river, de quo, one Thomas

Russell whose heir the plaintiff is, was seised in his demesn as of fee, and died thereof seised, after whose death the same descended to the plaintiff, by force of which the plaintiff was seised in his demesn as of fee, and so seised, the defendant upon the same river had levyed a new mill, per quod cursus aquæ prædict. coarctatus est, and upon not guilty, it was found for the plaintiff: it was moved in arrest of judgment, that it is not layed in the declaration, that his mill had been a mill time out of mind, &c. And then if it be not an ancient mill time out of mind, &c. it was lawful for the defendant to erect a new mill; and it was said, that these words (ab antiquo) are not fit or significant words to set forth a prescription, but the words, a tempore cujus contrarii memoria hominum non existit, are the usual words for such a purpose: see the Book of Entries, 10, 11. See 11 H. 4, 200. If I have a mill and another levies another mill there, and the miller hinders the water to run to my mill, or doth any such nusance, an action lyeth without any prescription, as it seems by the book in 22 H. 6, 14. The plaintiff declared, that he was lord of such a town, and that he and all his predecessors, priors of N. lords of the same town, have had, within the same town, four mills time out of mind, &c. And that no other person had any mill in the said town, but the plaintiff and his predecessors, the said four mills, and that all the tenants of the plaintiff within the same town, and all other resiants there, &c. ought, and time out of mind, &c. had used to grind at the said mills of the plaintiff, and that the defendant, one of the tenants of the plaintiff, had erected and set up a horse mill within the said town, and there the resiants grinded, &c. And it was holden, that peradventure upon such matter an action lyeth, because the defendant being one of the tenants of the plaintiff is bound by the custom and prescription, so as he hath offended against the privity of the custom and prescription. And as to the case in question, it was the opinion of all the justices, that if the mill whereof the plaintiff hath declared, be not an ancient mill, that this action doth not lye upon the matter, eo quod cursus aquæ coarctatur; but yet at last, it was holden by the Court to be good enough, notwithstanding the exception. Another exception was taken to the declaration, because that here is set forth the seisin of the father of the plaintiff, and the descent to the plaintiff, by force of which he was seised in his demesn, &c. without shewing that after the death of the father that he entred into the said mill, &c. so as no seisin in fact is alleadged, but only a seisin in law, and if the plaintiff was not seised in fact, he cannot punish his personal wrong, but the exception was disallowed, for such a seisin in law is sufficient for the maintenance of this action. And afterwards the plaintiff had judgment to recover his damages. See for the action it self contained in the declaration. 8 Eliz. Dyer, 248.

Roll. 140. Hob. 189. Ante, 168. 1 Cro. 415.

[274] MICH. 26 ELIZ. IN THE EXCHEQUER.

CCCLXIX. CLEYPOOLS CASE.

Informations, upon the Statute of 5 Eliz. of Tillage.

Information in the Exchequer against Cleypool, upon the Statute of Tillage, 5 Eliz. setting forth, that the defendant hath converted three hundred acres of arable lands of tillage, to pasture, and the same conversion hath continued from 15 Eliz. unto the two and twentieth of Eliz.: the defendant as to the conversion pleaded not guilty, and as to the continuance, the general pardon by Parliament, 23 Eliz. upon which the Attorney-General did demur in law. It was argued, that that pardon did not extend to the continuance of the said conversion: and first the Barons were clear of opinion, that if A. be seised of arable lands, and converts the same to pasture, and so converted, leaseth it to B. who continues it in pasture as he found it, he shall be charged by that statute: and it is not any good construction, where the exception in the pardon is, excepting the converting of any land from tillage to pasture, made, done, committed, or permitted, that the conversion excepted out of the pardon shall be intended and construed the bare act of conversion, but the whole offence, i. the continuance and practice of it is understood: as if by general pardon all intrusions are excepted, now

by that, the instant act of intrusion, i. the bare entry is not only excepted, but also the continuance of the intrusion, and the perception of the profits: and note, the words of the statute are (conversion permitted) and conversion continued is conversion permitted: and the said statute doth not punish the conversion, but also the continuance of the conversion, for the penalty is appointed for each year in which the conversion continues: and Egerton solicitor put this case, 11 H. 8. It was enacted by 3 H. 7, cap. 11, that upon recovery in debt, if the defendant in delay of execution sues a writ of error, and the judgment be affirmed, he shall pay damages, now the case was, that one in execution brought such a writ of error, and the first judgment is affirmed, he shall pay damages, and yet here is not any delay of the execution, for the defendant was in execution before, but here is an interruption of the execution, and the statute did intend the execution it self, i. the continuance in execution, ibidem moraturus quousque: it was said on the other side, that the conversion and continuance thereof are two several things, each by it self, and so the conversion only being excepted in the pardon, the continuance thereof remains in the grace of the pardon: and it appeareth by the statute of 2 and 3 Ph. & Ma. that conversion, and continuance are not the same, but alia, atque diversa, and distinct things in the consideration of the law; for there it is enacted, that if any person shall have any lands to be holden in tillage according to the said statute, but converted to pasture by any other person, the commissioners, &c. have authority by the said statute to enjoyn such persons to convert such lands to tillage again, &c. And in all cases in the law, there is a great difference betwixt the beginning of a wrong, and the continuance of it: as if the father levyeth a nusance in his own lands to the offence of another and dyeth; an assize of nusance doth not lye against the heir for the continuance of that wrong, but a quod permittat, see F. N. B. 124. It was adjorned.

[275] MICH. 26 ELIZ. IN THE KINGS BENCH.

CCCLXX. POWLEY AND SIERS CASE.

Debt.

Powley brought debt against Sier executor of the will of A.: the defendant demanded judgment of the writ, for he said, that one B. was executor of the said A. and that the said B. did constitute the defendant his executor, so the writ ought to be brought against the defendant as executor of the executor, and not as immediate executor to the said A. The plaintiff by reply said, that the said B. before any probate of the will, or any administration dyed, and so maintained his writ. Wray Justice was against the writ, for although here be not any probate of the will of A. or any other administration, yet when B. made his will, and the defendant his executor, the same is a good acceptance in law of the administration and execution of the first will, for the defendant might have an action of debt due to the first testator: Gawdy and Ayliff Justices, the writ is good: see Dyer, 23 Eliz. 372, against Wray.

1 Cro. 211, 212.

CCCLXXI. PASCH. 26 ELIZ. IN THE KINGS BENCH.

1932. 2 Ch. 100.

Bargain and Sale of Trees.

The case was: A. seised of certain lands, bargained and sold by indenture all the trees there growing, habendum, succidendum, & exportandum, within twenty years after the date of the said indenture, the twenty years expire; the bargainee cuts down the trees, A. brought an action of trespass for cutting down the trees: and by Wray, Justice, the meer property of the trees vests in the bargainee, and the limitation of time which cometh after is not to any purpose but to hasten the cutting of the trees within a certain time, within which, if the vendee doth not cut them, he should be punished as a trespassor as to the land, and not as to the trees: Gawdy contrary; and

that upon this contract, a conditional property vests in the vendee, which ought to be pursued according to the direction of the condition, and because the condition is broken, the property of the trees is vested in A.

Post. 288.

PASCH. 26 ELIZ. IN THE KINGS BENCH.

CCCLXXII. CURRITON AND GADBARYS CASE.

Leases.

In an action upon the case, the plaintiff declared, that the defendant in consideration that the plaintiff should make a lease for life to the defendant of certain lands, habendum after the death of A. before the tenth of August next following, promised to pay the plaintiff ten pounds, the first day of May next after the promise which was before the tenth of August: and the truth was, that the said ten pounds was not paid at the day, ut supra, nor the said lease made: and now both sides being in default, the plaintiff brought an action; it was said by Wray Justice, If the plaintiff had made the lease according to the consideration, and in performance thereof the action would have lyen, but now his own default had barred him of the action: but for another cause, the declaration was holden insufficient, for here is not any consideration, for the promise is, in consideration that the plaintiff shall lease to the defendant for life, habendum after the death of A. which cannot be good by way of lease, but ought to enure by way of grant of the reversion, so as here is no lease, therefore no consideration, and notwithstanding **[276]** that if a lease be made for life, habendum after the death of A. the habendum is void, and the lease shall be in possession according to the premises, yet the law will not give such construction to the words of a promise, contract, or assumpsit, but all the words ought to be wholly respected according to the letter, so as because that no lease can be made according to the words of the consideration, no supply thereof shall be by any favorable construction: and so it was adjudged: but before the same imperfection was espied, judgment was entred, and therefore, the Court awarded that there should be a cesset executio, entred upon the roll, for it is hard as it was said by Wray to drive the party to a writ of error in Parliament, because Parliaments are not now so frequently holden as they have used to be holden, and the execution was staid accordingly.

PASCH. 26 ELIZ. IN THE KINGS BENCH.

CCCLXXIII. WILLIS AND CROSBYS CASE.

Error. Amercement.

In a writ of error, it was assigned for error, that whereas in the first action, the parties were at issue, and upon the venire facias one Gregory Tompson was returned; but upon the habeas corpora, George Tompson was returned, and the jury was taken, and found for the plaintiff; and judgment given accordingly; it was argued on the part of the plaintiff in the first action; that the same is a thing amendable: as 9 E. 4, 14, a jury was impannelled by the name of I. B. and in the habeas corpora he was named W. B. and by such name sworn, &c. And upon examination of the sheriff, it was found that he was the same person who was impannelled, and it was amended and made according to the pannel; but the opinion of the whole Court was, that as this case is it was not amendable, and it is not like the case of 9 E. 4, for there the examination was before the verdict when the sheriff was in Court, but here it is after verdict, and the sheriff is out of Court, and cannot be examined, and for these causes the judgment was reversed.

PASCH. 26 ELIZ. IN THE EXCHEQUER.

CCCLXXIV. OGNELL AND THE SHERIFFS OF LONDONS CASE.

Escape.

Ognell brought debt upon an escape by bill in the Exchequer against the Sheriffs of London, the case was, that one Crofts was bound to the now plaintiff in a recognisance, and afterwards committed for felony to the prison of Newgate, of which he was attainted and remained in prison in the custody of the sheriffs: afterwards Ognell sued a sc. fac. upon the said recognisance against Crofts, the sheriffs returned a cepi, and the especial matter aforesaid, and after judgment given against Crofts for Ognell, Crofts got his pardon, and escaped: it was argued, that notwithstanding this attainder, Crofts is subject to the execution obtained upon the recognisance: see the case of escape betwixt Maunser and Annesley, 16 Eliz. in Bendloes case, 2 E. 4, 1. It is said by Watman, that a man outlawed for felony shall answer, but shall not be answered: see 6 E. 4. 4. One condemned in redisseisin, was taken by a capias pro fine, and committed to prison, and afterwards outlawed of felony, the King pardons the felony, yet he shall remain in execution for the party, if he will; but if the party be once in execution for the party, and then outlawed of felony, it seems by 6 E. 4. Fitz. Execution, 13. that the execution is gone. And all the barons were clear of opini-**[277]**-on in the principal case for the plaintiff. And they also said, that if one who hath a protection from the King be taken in execution, and escape, the gaoler shall answer for the escape, and that was one Hales case. And afterwards judgment was given for the plaintiff, and one of the causes of the judgment was, because that the sheriffs had returned cepi upon the process.

1 Cro. 164.

HILL. 26 ELIZ. IN THE KINGS BENCH.

CCCLXXV. BISHOP AND REDMANS CASE.

Words which amount to Covenant.

Bishop, a doctor of the civil law, brought an action of covenant against Redman Archdeacon of Canterbury, and declared upon an indenture, by which the defendant did constitute the plaintiff officialem suum of his archdeaconry for three years, and gave to him by the said indenture, authoritatem admittendi, & inducendi quoscunque clericos ad quæcunque beneficia ecclesiastica infra archidiaconatum prædict', and also probate of wills; and further granted to him, omnen & omnimodam archidiaconatum jurisdictionem suam prædict' absque impetitione, denegatione, restrictione, &c. after which Doctor Young was created Bishop of Rochester, which is in the jurisdiction of the said archdeaconry; and the defendant took upon him to enthronize the said bishop in his said church, and took of him for his fee twenty nobles, whereupon the plaintiff brought this action. It was moved for the defendant, that upon the matter the action doth lye; for the office of enthronizing or enstalling of a bishop doth not pass by the said indenture, nor is there any word in the indenture that doth extend unto it, for the bishop is not a clark, and the plaintiff by the indenture hath not to do but with clarks, not with bishops; and it appeareth by the grant of subsidies, by the clergy in Parliament, that a bishop and a clark are distinct things. See instrumentum hereof, prælatus & clericus, &c. Also the plaintiff hath not to do with a bishoprick, but with benefices, and a bishoprick is not a benefice, but a higher thing: and further the plaintiff hath power to admit and induct, which doth not extend to installing, or inthronization, for that belongs to a bishop; and the Court was clear of opinion, that by this grant there did not pass any power to instal or inthronize bishops; and the general words, i.e. omnem & omnimodam jurisdictionem archidiaconatum prædictam, did not mend the matter, for the word (prædictam) doth not

restrain the words, omnem, & omnimodam, &c. but admitting that; it was moved, if upon this indenture covenant lieth, for there is not any express covenant, yet the words absque impetitione, denegatione, restrictione, do amount to so much, to make the defendant subject to his action, if the matter in itself would have served for him, and so was the opinion of the Court.

HILL. 26 ELIZ. IN THE KINGS BENCH.

CCCLXXVI. LADY LODGES CASE.

Prohibition.

The Lady Laxton of London by her will bequeathed to Matthew Luddington, and Andrew Luddington, several legacies in monies to be paid to them respectively at their several ages, &c. and made the Lady Lodge her daughter her executrix and died, Andrew died before his full age, Matthew took letters of aministration of the goods of Andrew, and sued the Lady Lodge in the Spiritual Court for the legacy [278] bequeathed to Andrew; before which suit begins, the Lady Lodge, with Sir Thomas her husband, gave all the goods which she had as executor of the said Lady Laxton to Sir William Cordel Master of the Rolls, and to William Lodge son of the said Sir Thomas and his lady, depending which suit the Lady Lodge died, after which sentence was given against her being dead, and now a citation was out of the Spiritual Court against William Lodge executor of the said Lady Lodge, to shew cause why the sentence given against the said Lady Lodge should not be put in execution against him; and sentence was given against the said William Lodge, who appealed to the delegates, and there the sentence was affirmed. And now came William Lodge into the Kings Bench, and set forth the grant of the said Lady Lodge, as aforesaid, and that the same was not examinable in the Spiritual Court, and thereupon prayed a prohibition: and Awbrey, Doctor of the Civil Law, came into Court to inform the justices, what their law was in certain points touching the case in question; and as to the sentence given against the Lady Lodge, after her death he said, that if the defendant died before issue joyned, which is called Litis contestationem, the suit shall cease, but if he dieth after litis contestationem, it is otherwise, for in such case the suit shall proceed; for after litis contestationem, the right of the suit is so vested in the proctor, that he is a person suable until the end of the suit: and also he reported their law to be (Bro. Devise, 27, 45), that if a legacy be bequeathed to an infant to be paid when he shall come to the age of twenty-one years, if such a legatory dieth before such age, yet the executor or administrator of such legator shall sue for the said legacy presently, and shall not expect until the time, in which if the infant had continued in life he had attained his full age, and as to the prohibition it was argued by Egerton Solicitor-General, that the grant aforesaid is not triable in the Spiritual Court: as if the said Lady Lodge had suffered a recovery to be had against her as executor by covin, &c. the same is not examinable in the Spiritual Court, but belongs to the temporal conusans, and therefore he prayed a prohibition: but on the other side it was said, that if the prohibition be allowed, the legatory hath no remedy; but that was denied, for the party might sue in the Chancery. And after the prohibition granted, the Court awarded a special consultation, quatenus non extendat ultra manus executoris, & quatenus non agitur de validitate facti, i. the grant aforesaid.

Poph. 1, 1. Dyer, 59. Swinburn, 212. Office of Exec. 347. Shep. Touchstone, &c. 454. Plowd. 345. Orphans Legacy, 281. Note, it was adjudged contrary to this, Mich. An. Dom. 1653, in the Kings Bench, in Doomlowes case.

HILL. 28 ELIZ. IN THE KINGS BENCH.

CCCLXXVII. HUDDY AND FISHERS CASE.

Debt. Attaint.

Debt was brought upon a bond, the condition of which was for the performance of covenants, grants and agreements in an indenture: and in the indenture it was recited, that in consideration that the said Huddy should build a mill upon the land demised by the defendant to the plaintiff by the same indenture, and a water-course by the land demised, the defendant leased the said land to the plaintiff, and the lease was by the words dedi & concessi. And the plaintiff assigned the breach of the said covenant in law, in that the defendant had stopped the said water-course so made by the plaintiff, upon which they were at issue, and it was found for the plaintiff, upon which the defendant brought attaint, and the false oath was found; and it was moved in arrest of judgment, that here is no issue, and then by consequence no verdict, and then no false oath, and then no cause of attaint; for here the issue is taken upon the stopping of the water-course, which upon the shewing of the party is not any cause of action, for in the indenture there is not any **[279]** express covenant, clause, or agreement, that the lessee should enjoy the water-course so to be made, only there is a covenant in law rising upon these words dedi & concessi, which cannot extend to a thing not in esse at the time of the making the indenture. Coke, who argued for the defendants in the attaint resembled this case to the case in 23 E. 3. Garr. 27. where it is holden, that the warranty knit to the manor shall not extend to the tenancy escheated: and 30 E. 3. 14. the recovery in value shall not be in larger proportion than the land warranted was at the time of the warranty made. So in our case, this covenant shall not extend to anything which was not in esse at the time of the covenant made: and see 25 Ass. 2. where the Court shall reject a verdict, or part of a verdict, &c. And because the now plaintiff might after the verdict have alledged the same in arrest of judgment, which he did not, he shall not be helped by attaint, but it shall be accounted his folly that he would not for his own ease, and to avoid circuity of action shew the matter in stay of judgment; as 9 E. 4. 12 by Littleton: if a man be indicted of felony, if the judgment be insufficient, but he takes not advantage of it, but pleads the general issue, and is acquitted, he shall never after have a writ of conspiracy, &c. And for another cause judgment ought not to be given in this case, because it doth not appear that execution hath been sued, and then here is no party grieved: and then this action being conceived upon the statute of 23 H. 8. cap 3. which gives it to the party grieved doth not lye, for a party grieved cannot be intended without execution sued. See 21 H. 6. 55 by Paston; false oath, judgment, and execution do entitle the party grieved to attaint. And see the stat. of 23 H. 8. which enacts, that the party shall be restored to as much as he hath lost, therefore he ought to lose (by execution) before he be a person able to bring this action: but as to that matter, see the statute of 1 E. 3. 6. by which it is enacted, that the justices shall not leave to take attaint for the damages not paid, so as before the said statute no attaint lay before execution, 33 H. 6. 21. by Prisoit 5 H. 7. 22. t. E. 1. Attaint 70. 8 E. 2. Assize 396. And it was moved, that for another cause the attaint doth not lye, as it is pursued in process upon it, for the plaintiff hath not pursued the statute, upon which the attaint is grounded, for the said statute gives special process in this case against the petit jury, grand jury, and the party, viz. summons, re-summons, and distress infinite; but in this case the plaintiff hath sued otherwise, which is against the direction of the statute. And that was taken to be a material exception by Clench and Gawdy Justices, for the verdict doth not save the matter of process in this case by the statute of 18 Eliz. which doth not extend to proceedings in penal causes; which see, by the words of the statute, by an express proviso: but quære, if it be a penal statute, because a lesser punishment is enacted by it, than that which was before inflicted upon such offenders: and as to the matter of execution, quære, if the plaintiff be not pars gravata in hoc only, that he is subject to the said judgment, and so liable to execution.

HILL. 28 ELIZ. IN THE KINGS BENCH.

CCCLXXVIII. PENRUDDOCK AND NEWMANS CASE.

Execution. Return of the Sheriff. Surrender.

In an ejectione firmæ, the plaintiff declared upon a lease made by the Lord Morley, and upon not guilty pleaded, this special matter was found, that William Lord Mountegle, seised of the manor of D. whereof &c. became bounden in a statute in such a sum to A. who died, the executors of A. sued execution against the said lord, i. upon the extendi facias, a libertate issued forth, upon which the said manor was **[280]** delivered to the said executors, but was not returned. It was further found that the said executors being so possessed of the said manor, the said lord commanded a court baron to be holden there, which was holden accordingly by the sufferance of the executors, and the said executors were also present, at which time the executors in the presence of the said lord said these words, viz. We have nothing to do with this manor. And upon this verdict two things were moved, if because the liberate was not returned, the execution was good: and as to that divers books were cited, 21 H. 6. 8. 18 E. 3. 25. And it was said that there was a difference betwixt a liberate, and a capias ad satisfaciendum, and a fieri facias, for these writs are conditional, ita quod habeas corpus, &c. Ita, quod habeas denarios hic in curia, 3 H. 7. 3. 16 H. 7. 14. But contrary in the writ of liberate, habere facias seisinam, for in such writs there is not such clause, and therefore if such writs be not returned, the execution done by virtue of them is good enough: and see 11 H. 4. 121. If the sheriff by force of an elegit delivers to the party the moiety of the land of the defendant, and doth not return the writ; if now the plaintiff will bring an action of debt de novo, the defendant may plead in bar the execution aforesaid, although the writ of execution were not returned, and yet the execution is not upon the record. And see the case there put by Hankford: and it is not like to the case of partition made by the sheriff, the same ought to be returned, because that after the return thereof, a new and secondary judgment is to be given, i. quod partitio prædicta firma & stabilis maneat in perpetuum, firma & stabilis in perpetuum teneatur, see the Book of Entries 114. And Egerton solicitor cited a case lately adjudged betwixt the Earl of Leicester and the widow Taufield, that such execution without return was good enough. Another matter was moved; admit, that here be a good execution, if now the executors being in possession of the said manor by force of that execution and permitting and suffering the conusor to hold a court there in the manor-house, and saying in his presence the words aforesaid, if the same doth amount to a surrender by the executors to the said conusor, or not. And Wray Chief Justice said, that here upon this matter is not any surrender, for here the words are not addressed to the said conusor who is capable of a surrender, nor to any person certain: and it is not like to the case of 40 E. 3. 23, 24. Chamberlains Assize, where tenant for life saith to him in the reversion, that his will is that he enter, the same is a good surrender, for there is a person certain who can take it; but contrary in this case, for here it is but a general speech. It was adjorned.

2 Len. 49. 4 Co. 67.

PASCH. 28 ELIZ. IN THE COMMON PLEAS.

CCCLXXIX. BASKERVILE AND THE BISHOP OF HEREFORDS CASE.

Quare Impedit. Averment.

In a quare impedit by Walter Baskervile, against the Bishop of Hereford, &c. the plaintiff counted, that Sir Nicholas Arnold was seised of the advowson as in gross, and granted the same to the said Baskervile and others, to the use of himself for life, and afterwards to the use of Richard Arnold his son in tail; proviso, that if the said

Nicholas die, the said Richard being within age of twenty-three years, that then the grantees and their heirs shall be seised to them and their heirs until the said Richard hath accomplished the said age: Nicholas dieth, Richard being of the age of fourteen years, by force of which the grantees were possessed of the said advowson, and afterwards the church became void, and so it belonged to them to present: and exception was taken to the count, because the plaintiff had not averred the life of **[281]** Richard, upon whose life the interest of the plaintiffs doth depend. And Gawdy Serjeant, likened it to the case of the parson which hath been adjudged, that where the lessee of a parson brought an ejectione firmæ, and it was found for him, and in arrest of judgment exception was taken to the declaration, because that the life of the parson was not averred, and for that cause judgment was stayed. Anderson Chief Justice: Upon the dying of Sir Nicholas Rich, being but of the age of fourteen years, an absolute interest for nine years vests determinable upon the death of Richard, or rather, they are seised in fee determinable upon the coming of Richard to the age of twenty-three years. Rhodes and Windham contrary: that here is an interest in the grantees, determinable upon the death of Richard within the term, for if Richard dieth without issue within the term, the remainder is limited over to a stranger. And as to the exception to the count, it was argued by Puckering Serjeant, that the count was good enough, for although the life of Richard be not expressly averred, yet such averment is strongly implied, and so supplied: for the count is, that dictus Nicholas obiit dicto Ric. being of the age of fourteen years, & non amplius, by force of which the plaintiff was possessed of the said advowson, quo quidem sic possessionato existente, the church became void, and possessed he could not be, if the said Richard had not been then alive, and the same is as strong as an averment. See 10 E. 4. 18. In trespass for breaking his close, the defendant pleads, that A. was seised, and did enfeoff him; to which the plaintiff said, that long time before A. had anything, B. was seised and leased to the said A. at will, who enfeoffed the defendant, upon which B. did re-enter, and leased to the plaintiff at will, by force of which he was possessed until the defendant did the trespass, and the same was allowed to be a good replication, without averring the life of B. who leased to the plaintiff at will, for that is implied by the words, i. virtute cujus; the plaintiff was possessed until the defendant did the trespass. And see also 10 H. 7. 12 in an assize of common, the plaintiff makes title, that he was seised of a messuage, and of a carve of land, to which he and all those whose estate, &c. have had common appendant, &c. And doth not say, that he is now seised of the messuage: but this exception was disallowed by the Court, for seisin shall be intended to continue until the contrary be shewed. It was adjorned.

Dyer. 304. a. 2 Cro. 622, 637. 10 Co. 59. 1 Cro. 766.

Pasch. 28 Eliz. In the Exchequer.

CCCLXXX. Caries Case.

Tithes.

In an information in the Exchequer, by the Queen againt Cary, the case was this; a man grants situm rectoriæ cum decimis eidem pertinent. habend. situm prædict. cum suis pertinentiis, for twenty years, the first grantee dieth within the term. If now because the tithes are not expressly named in the habendum, the grantee shall have them for life only, was the question. It was moved by Popham Attorney-General, that the grantee had the tithes but for life, and to that purpose he cited a case adjudged 6 Eliz. in the Common Pleas: a man grants black acre and white acre, habendum black acre for life, nothing of white acre shall pass but at will; and in the argument of that case, Anthony Browne put this case; Queen Mary granted to Rochester such several offices, and shewed them specially, habendum two of them, and shewed which in certain, for forty years. It was adjudged that the two offices which were not mentioned in the habendum, were to Rochester but for life; and determined by his death: and so he said in this case, the tithes not mentioned in **[282]** the habendum shall be to the grantee for life, and then he dying, his executors taking

the tithes are intrudors: but as to that, it was said by Manwood Chief Baron, that the cases are not alike, for the grants in the cases cited are several, intire, and distinct things, which do not depend the one upon the other, but are in gross by themselves. But in our cases the tithes are parcel of the rectory; and therefore for the nearness betwixt them, i. the rectory and the tithes, the tithes upon the matter pass together with the site of the rectory for the term of twenty years, and judgment was afterwards given accordingly.

More Rep. 222.

PASCH. 26 ELIZ. IN THE COMMON PLEAS, MICH. 27 & 28 ROT. 2432.

CCCLXXXI. THE LORD DARCY AND SHARPES CASE.

[See *Aldous* v. *Cornwell*, 1868, L. R. 3 Q. B. 576.]

Debt. Razure of Deeds.

Thomas Lord Darcy, executor of John Lord Darcy, brought debt upon a bond against Sharpe, who pleaded that the condition of the bond was, that if the said Sharpe did perform all the covenants, &c. contained within a pair of indentures, &c. By which indentures the said John Lord Darcy had sold to the said Sharpe certain trees growing, &c. And by the same indentures Sharpe had covenanted to cut down the said trees before the seventh of August 1684, and shewed further, that after the sealing and delivery of the said indenture, the said Lord Darcy now plaintiff, caused and procured I. S. to raze the indenture, quod penes prædict. querentem remanebat, and of 1684. to make it 1685. and so the said indenture become void: and the opinion of the whole Court was clear against the defendant, for the razure is in a place not material, and also the razure trencheth to the advantage of the defendant himself who pleads it; and if the indenture had become void by the razure, the obligation had been single and without defeasance.

11 Co. 27.

PASCH. 28 ELIZ. IN THE COMMON PLEAS.

CCCLXXXII. ROLLSTON AND CHAMBERS CASE.

Costs where Damages are given.

Rollston brought an action of trespass upon the Statute of 8 H. 6. of forcible entry against Chambers, and upon issue joyned it was found for the plaintiff, and damages assessed by the jury, and costs of suit also, and costs also de incremento were adjudged; and all were trebled in the judgment with this purclose, quæ quidem damna in toto se attingunt ad, &c. and all by the name of damages. It was objected against this judgment, that where damages are trebled, no costs shall be given, as in wast, &c. But it was clearly agreed by the whole Court, that not only the costs assessed by the jury, but also those which were adjudged de incremento should be trebled, and so were all the presidents, as was affirmed by all the prothonotaries, and so are many books, 19 H. 6. 32. 14 H. 6. 13. 22 H. 6. 57. 12 E. 4. 1. And Book of Entries 334. and judgment was given accordingly. And in this case it was agreed by all the justices, that the party so convicted of the force at the suit of the party should be fined, notwithstanding that he was fined before upon indictment for the same force.

2 Len. 52.

[283] HILL. 29 ELIZ. IN THE COMMON PLEAS. INTRAT. TRIN. 27 ELIZ. ROT. 1606.

CCCLXXXIII. JENNOR AND HARDIES CASE.

Devises.

The case was, Lands were devised to one Edith for life, upon condition that she should not marry; and if she died, or married, that then the land should remain to A. in tail, and if A. died without issue of his body in the life of Edith, that then the land should remain to the said Edith, to dispose thereof at her pleasure: and if the said A. did survive the said Edith, that then the lands should be divided betwixt the sisters of the devisor, A. died without issue living Edith. Shutleworth Serjeant; Edith hath but for life; and yet he granted, that if lands be devised to one to dispose at his will and pleasure without more saying, that the devisee hath a fee-simple; but otherwise it is when those words are qualified and restrained by special limitation: as 15 H. 7. 12. A man deviseth, that A. shall have his lands in perpetuum during his life, he hath but an estate for life, for the words (during his life) do abridge the interest given before. And 22 Eliz. one deviseth lands to another for life, to dispose at his will and pleasure, he hath but an estate for life: and these words (if A. dieth without issue in the life of Edith, that then the lands should remain to Edith to dispose at her pleasure) shall not be construed to give to Edith a fee-simple, but to discharge the particular estate of the danger, penalty, and loss, which after might come by her marriage, so as now it is in her liberty. And also he said, that by the limitation of the latter remainder, i. that the lands should be divided betwixt the daughters of his sister, the meaning of the devisor was not, that Edith should have a fee-simple, for the remainder is not limited to her heirs, &c. if A. dieth in the life of the said Edith; for the devisor goeth further, that if A. overlives Edith, and afterwards dieth without issue, that the said land should be divided, &c. Walmesley contrary: and he relyed much upon the words of the limitation of the remainder to Edith. Quod integra remaneat dictæ Edithæ, and that she might dispose thereof at her pleasure, for the said division is limited to be upon a contingent, i. if A. survive Edith, but if Edith survive A. then his intent is not that the lands should be divided, &c. but that they shall wholly remain to Edith, which was granted by the whole Court, and the justices did rely much upon the same reason; and they were very clear of opinion, that by those words Edith had a fee-simple: and judgment was given accordingly. Anderson conceived, that it was a condition; but although that it be a condition, so as it may be doubted, if a remainder might be limited upon a condition, yet this devise is as good as a new devise in reversion upon the precedent condition, and not as a remainder, quod Windham concessit; but Periam was very strong of opinion, that it is a limitation. Two joyntenants of a term, A. and B. A. grants his part to B. nothing passeth by it, for (as a grant) it cannot be good; for as one joyntenant cannot enfeoff his companion, no more can he vest any thing in him by grant, for he cannot grant to him a thing which he hath before; for joyntenants are seised and possessed of the whole, all which was granted per Curiam; and Anderson said, that if lands be granted to A. and B. and the heirs of A. B. cannot surrender to A. for a surrender is as it were a grant; and as a release it cannot enure, for a release of a right in chattels cannot be without a deed.

Goldsb. 135. Shepherds Touch-stone 439. Ante 156. Owen 102. 1 Cro. 314. 1 Inst. 186.

[284] HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCCLXXXIV. HOLLINGSHED AND KINGS CASE.

Debt. Priviledges of London.

Hollingshed brought debt against King, and declared, that King was bounden to him in a recognizance of two hundred pounds before the Mayor and Aldermen

of London, in interiori camera de Guildhall London, upon which recognizance the said Hollingshed heretofore brought a scire facias before the said mayor, &c. in exteriori camera, and there had judgment to recover, upon which recovery he hath brought this action; and upon this declaration the defendant did demur in law, because that in setting forth of the recognizance he hath not alledged, that the Mayor of London hath authority by prescription or grant to take recognizances, and if he hath not, then is the recognizance taken coram non judice, and so void: and as to the statute of West. 2. cap. 45. it cannot be taken to extend to recognizances taken in London, which see by the words, de his quæ recordat. sunt coram cancellario domini Regis and ejus justiciariis qui recordum habent, & in rotulis eorum irrotulatur, &c. And also at the time of the making of that statute, London had not any sheriffs, but bayliffs; and the said statute ordains, that process shall go to sheriffs, &c. But the whole Court was clear of a contrary opinion, for they said, we will know that those of London have a Court of Record, and every Court of Record hath an authority incident to it to take recognizances, for all things which concern the jurisdiction of the said Court, and which arise by reason of matters there depending. Another matter was objected, for that the recognizance was taken in interiori camera, but the Court was holden in exteriori camera, and therefore not pursuant. But as to that, it was said by the Lord Anderson, that admit that the recognizance was not well taken, yet because that in the scire facias upon it, the defendant did not take advantage then thereof, he shall be bounden by his said admittance of it, as if one sue forth a scire facias, as upon a recognizance, whereas in truth there is not any recognizance, and the party pleads admitting such record, and thereupon judgment is given against him, it is not void, but voidable. Fleetwood, Recorder of London, alledged many cases, to prove that the Courts of the King are bounden to take notice, that they of London have a Court of Record, for if a quo warranto issueth to justices in eyre, it behoves not them of London to claim their liberties, for all Courts of the King are to take notice of them. And at last, after many motions, the opinion of the Court was for the plaintiff. And it was said by Anderson, and in manner agreed by the whole Court, that if depending this demurrer here, the judgment in London upon the scire facias be reversed, yet the Court here must proceed, and not take notice of the said reversal.

1. Cro. 186, 187.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCCLXXXV. BEDINGFEILD AND BEDINGFEILDS CASE.

Dower. Primer seisin.

Dower was brought by Anne Bedingfeild against Thomas Bedingfeild. The tenant out of the Chancery purchased a writ, de circumspecte agatis, setting forth this matter, that it was found by office in the county of Norfolk, that the husband of the demandant was seised of the manor of N. in the said county, and held the same of **[285]** the Queen by knights service in chief, and thereof dyed seised, the tenant being his son and heir of full age, by reason whereof the Queen seised as well the said manor as other manors, and because the Queen was to restore the tenements, tam integre, &c. as they came to her hands, it was commanded the Judges to surcease, domina Regina inconsulta: it was resolved, per Curiam, that although the Queen be entituled to have primer seisin of all the lands, whereof the husband of the demandant dyed seised, yet this writ did not extend unto any manors not found in the office, for by the law, the Queen cannot seise more lands than those which are contained in the office: and therefore as to the land not found by the office, the Court gave day to the tenant to plead in chief: and it was argued by Serjeant Gawdy for the tenant, that the demandant ought to sue in the Chancery, because that the Queen is entituled to have her primer seisin, and cited the case of 11 R. 2. and 11 H. 4. 193. And after many motions, it was clearly agreed by the Court, that the tenant ought to answer over, for the Statute de Bigamis cap. 3. provides that in such case, the justices shall proceed notwithstanding such seisin of the King, and where the King grants the custody of the tenant himself, 1 H. 7. 18. 19. 4 H. 7. 1. A multo fortiori against the

heir himself where he is of full age notwithstanding the possession of the King for his primer seisin: by the Statute of Bigamis after the heir was of full age, the wife could not be endowed in the Chancery: but now by the prerogative of the King, such wives may be endowed there, si viduæ illæ voluerint, and after many motions, the Court awarded, that the tenant should plead in chief at his peril, for the demandant might sue at the common law if she pleased.

CCCLXXXVI. Hill. 28 Eliz. In the Common Pleas.

Exchange.

The case was, The husband was seised of lands in the right of his wif, the husband and his wife both joyned in exchange of the lands with a stranger for other lands, which exchange was executed, the husband and the wife seised of the lands taken in exchange, aliened the same by fine, it was holden by Rhodes and Windham Justices, that the wife after the death of her husband might enter into her own lands notwithstanding that fine; and Rhodes resembled it to the case reported by my Lord Dyer, 19 Eliz. 358. The husband after marriage assured to his wife a joynture, they both levy a fine, sur conusans de droit come ceo que il ad of the gift of the husband; that the same is not any bar to the wife of her dower, for the election is not given to the wife to claim her joynture, or her dower, until after the death of her husband: and so in the principal case judgment was given for the wife.

1 Inst. 36. b.

Pasch. 26 Eliz. In the Kings Bench.

CCCLXXXVII. Lees Case.

Devise.

Nicholas Lee by his will devised his lands to William his second son; and if he depart this world not having issue; then I will that my sons in law shall sell my lands, the devisor at the time of his devise having six sons in law, dyed, William had issue John, and dyed, John dyed without issue, one of the sons in law of the devisor dyed, the five surviving sons in law sold the lands: first it was clearly resolved by the whole Court, that although the words of **[286]** the will are (ut supra) if William my son depart this world not having issue, &c. And that William had issue who dyed without issue; here, although it cannot be litterally said, that William did depart this world not having issue, yet the intent of the devisor is not to be restrained to the letter, that such construction shall be made, that whensoever William dyeth, in law, or upon the matter without issue, that the land shall be subject to sale, according to the authority committed by the devisor to his sons in law: and now upon the matter William is dead without issue: as in a formedon in reverter or remainder, although that the donee in tail hath issue, yet if after the estate tail be spent, the writ shall suppose that the donee dyed, without issue, a fortiori in the case of a will, or devise, such construction shall be made. As to the other point, concerning the sale of the lands, Wray asked, if the sons in law were named in the will, and the clerks answered, No: see 30 H. 8. Br. Devise, 31. and 39 Ass. 17. Executors, 117. such a sale good in case of executors: see also 23 Eliz. Dyer, 371. and Dyer 4 & 5. Phil. and Mary, lands devised in tail, and if the devisee shall dye without issue, that then the land shall be sold, pro optimo valore, by his executors, una cum assensu A. if A. dyeth before sale, the power of the executors is determined: and afterwards it was clearly resolved by the whole Court, that the sale for the manner was good, and judgment was given accordingly.

1 Cro. 26. 3 Len. 106.

PASCH. 20 ELIZ. IN THE KINGS BENCH.

CCCLXXXVIII. SIR GILBERT GERRARD AND SHERRINGTONS CASE.

Sir Gilbert Gerrard Master of the Rolls, libelled in the Spiritual Court, against Sherrington, and A. his servant for tithes parcel of a rectory, whereof the said Sir Gilbert was fermor to the Queen; it was moved by Egerton Solicitor General, that against the Kings fermor a prohibition doth not lye: but the opinion of the whole Court was, that a prohibition doth lye, and so it hath been adjudged before. And afterwards, exception was taken to the surmise, because the said Sir Gilbert had libelled against the said Sherrington and his servant severally, and now in the Kings Bench they both had made a joynt surmise, whereas they ought to have severed in their surmises according to the several libels: and it was so adjudged by the Court, and therefore they were driven to make several surmises: and afterwards exception was taken, because the said Sherrington and his servant, had delivered their surmises and suggestions by attorney, where they ought to be in proper person: see the statute of 2 E. 6. cap. 13. The party shall bring and deliver to the hands of some of the justices of the same Court, &c. the true copy of the libel, &c. subscribed or marked with the hand of the party, &c. and under the copy shall be written the surmise or suggestion; and although it was affirmed by the Clerks of the Court, that the common use and practice for twenty years had been, not to exhibit such surmises or suggestions by attorney: yet it was resolved by the whole Court, that it ought to be by attorney.
Owen Rep. 13. Yelv. Rep. 128.

[287] PASCH. 26 ELIZ. IN THE KINGS BENCH.

CCCLXXXIX. SHORT AND SHORTS CASE.

Request.

In an action upon the case upon assumpsit to pay mony to the plaintiff upon request: it was agreed, that the plaintiff by way of declaration ought to alledge an actual request, and at what place, and at what day the request was made: and it is not sufficient to say, as in an action of debt, Licet sæpius requisitus, &c. and so it was adjudged.

CCCXC. PASCH. 26 ELIZ. IN THE KINGS BENCH.

Indictment upon the Statute of News.

One was endicted in the county of Linc. upon the Statutes of West. 1. cap. 33. and 2 R. 2. cap. 5. of News, and the words were, that Campian was not executed for treason, but for religion, and that he was as honest a man as Cranmer; the bill was endorsed, billa vera, but whether, ista verba prolata fuerunt, malitiose, seditiose, or e contr. ignoramus: the same indictment being removed into the Kings Bench, the party, for the causes aforesaid, was discharged.

PASCH. 26 ELIZ. IN THE KINGS BENCH.

CCCXCI. COLE AND FRIENDSHIPS CASE.

Leases. Assignment.

In ejectione firmæ, the case was, that Fricarrock was seised, and by indenture betwixt himself of the one part, and one Friendship, his wife and the children betwixt them begotten at the assignment of the husband of the other part, leased the said land

to the said husband his wife and their children, at the assignment of the husband, for years, they having at the time of the said lease but one child, i. a son; afterwards they had many children, the wife dyed, the husband by his will assigned his second son born after the making of the lease, to have the residue of the said term, and by the opinion of the Court nothing can come to the said son by that lease, or by that assignment, for if the interest doth not vest at the beginning, it shall never vest; and afterwards it was moved, in as much as nothing could vest in any of the children born after the lease made, if these words (at the assignment of the husband) should be void, and then the case should be no more, but that land is devised to the father and mother, and their children: at another day, viz. Trin. 26 Eliz. the case was moved again, and as to the first point, the Court was of opinion as before, that the child assigned after the lease made, should not take: and then it was moved, that because Friendship and his wife at the time of the making of the said lease had one son, that he should take with his father and mother; and that the words (at the assignment of Friendship) should be void, is matter of surplusage, and the word children a good name of purchase: but the whole Court was against that conceit, for these words in the case, at the assignment of Friendship are not void, but shew what person should take, if the intent of the party should take effect, i. he who the father by assignment should enable, for no child shall take but he who the father shall assign, that is part of the contract; and although by such assignment no title accrues to the child assigned, yet without assignment no child is capable, for by the lease the father hath such liberty that he may assign what child he will: and **[288]** by Wray, If the words of the lease had been (at the assignment of the father within one month) and the father surcease his month, the interest should not vest in any of the children: and by Ayliff Justice, If the words of the lease had been (to the husband and wife and their son John, where his name is William) nothing should vest: and peradventure in this case at the Bar, if the father had assigned his son then born, and had assigned him before or at the time of the lease, i. the delivery of the lease, it had been well enough: note that this action was brought by Cole lessee of the son of the husband and wife born at the time of the lease made: and afterwards Wray, with the assent of all the rest of the justices, gave judgment that the plaintiff nihil capiat per billam.

4 Len. 64. Antea 275.

CCCXCII. Pasch. 26 Eliz. In the Kings Bench.

Execution where joynt, where several.

Note, it was agreed by the whole Court and affirmed by the clerks: that if debt be brought upon an obligation against two upon a joynt præcipe, and the plaintiff hath judgment to recover, that a joynt execution ought to be sued against them both: but if the suit were by one original and several præcipes, execution might be sued against any of them.

CCCXCIII. Trin. 26 Eliz. In the Kings Bench.

Replevin.

In a replevin, the defendant doth avow for damage feasant, and shewed that the Lady Jermingham was seised of such a mannor whereof, &c. and leased the same to the defendant for years, &c. The plaintiff said, that long before King H. 8. was seised of the said manor, and that the place where is parcel of the said manor demised and demisable by copy, &c. and the said King by his steward demised and granted the said parcel to the ancestor of the plaintiff whose heir he is, by copy in fee, &c. upon which it was demurred, because by this bar to the avowry, the lease set forth in the avowry is not answered, for the plaintiff in the bar to the avowry, ought to have concluded, and so was seised by the custom, until the avowant, prætextu of the said term for years entred: and so it was adjudged.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

CCCXCIV. THE LORD DACRES CASE.

Stewardship of a Manor: Office of Trust. Grants per Copy, Deputy Steward.

In ejectione firmæ, the case was, that the Lord Dacres was seised of the manor of Eversham, and that I. S. held the place where of the said manor by copy for term of his life, and the said lord granted the stewardship of the said manor to the now Marquess of Winchester, who appointed one Chedle to be his deputy to keep a Court, & ad tradendum, the said lands (I. S. being now dead) to one Wilkins by copy for life, afterwards, the said Chedle commanded one Hardy his servant to keep the said Court, and grant the said land by copy, ut supra, which was done accordingly, the copy was entred, and the Lord Dacres subsigned it & confirmed it: it was further found, that Hardy had many times kept the said Court both before and after, and that the custom of the manor was, that the steward of the said manor for the time being, or his deputy might take surrenders, and grant estates by copy: and if this estate so granted by Hardy were good or not, was the question, because by the servant of the deputy, whereas the custom found did not ex-[289]-tend further than the deputy: it was argued that the estate granted, ut supra, was void, for a deputy cannot transfer his authority over, for it is an office of trust: see 39 H. 6. 33, 34. 14. E. 4. 1. and 6 Eliz. it was adjudged, that the Duke of Somerset had divers stewards of his lands, and they, in the name of the said duke made diverse leases of the lands of the said duke, rendring rent, and the duke, afterwards assented to the said leases, and received the rents reserved upon them, and yet after the death of the said duke, the Earl of Hertford his son and heir avoided them: so here, the assent, and the subsignment of the copy by the Lord Dacres, doth not give any strength to the copy which was void at the beginning; against which it was said, that to take a surrender, and to grant an estate by copy is not any judicial act, but meerly an act of service, and no matter of trust is transferred to Hardy, for trust is reposed in him who may deceive, which can't be in our case, for here is an express commandment, which if Hardy transgress it is absolute void, for nothing is left to his discretion: and the admitting of a copy-holder is not any judicial act, for there need not be any of the suitors there who are the Judges: and such a Court may be holden out of the precinct of the manor, for no pleas are holden, which was concessum per totam Curiam: and by Ayliff Justice, if the lord of such a manor makes a feoffment of a parcel of his manor which is holden by copy for life, and afterwards the copy-holder dyeth, although now the lord hath not any Court, yet the feoffee may grant over the land by copy again. And the whole Court was clear of opinion, that the grant for the manner of it was good, especially because the Lord Dacres agreed to it; and judgment was given accordingly.

Ante 227. 1 Cro. 48. 49.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

CCCXCV. BURGESSE AND FOSTERS CASE.

Surrenders.

In ejectione firmæ, the case was, that the Dean and Chapter of Ely were seised of the manor of Sutton, whereof the place where, &c. is parcel, demised and demisable by copy according to the custom, and by their deed granted the stewardship of the said manor to one Adams to execute the said office, per se vel legitimum suum deputatum eis acceptabilem: afterwards Adams made a letter of deputation to one Mariot, ad capiendum unum sursum redditionem of one I. W. and I. his wife, and to examine the said I. aforesaid, ea intentione, that the said I. W. and A. might take back an estate for their lives, the remainder over to one John Buck in fee (note, the surrender ought be, de duobus messuagiis) Mariot took two several surrenders from the said

husband and wife, the remainder over to the said John Buck in fee, upon condition to pay a certain sum of money, &c. It was moved, that the surrender is void, and without warrant, for the warrant was, ad capiendum unum sursum redditionem, and here are two several surrenders, and so the warrant is not pursued, and then the surrender is void: another matter was because the remainder to John Buck by the words of the deputation was absolute and without condition, and now in the execution of it, it is conditional, so as this conditional estate is not warranted by the deputation: but the whole Court was clear of a contrary opinion in both the points, and that all the proceedings were sufficient and well warranted by the deputation: another matter was objected, because that this surrender and regrant is entred in the roll of a Court, dated to be holden the second of Maij, and the letter of deputation bears date the third of June after: but as to that, the Court was clear of opinion, that the mis-entry **[290]** of the date of the Court should not prejudice the party, for this entry is not matter of record, but is but an escape, and if the parties had been at issue, upon the time of the surrender made, or of the Court holden, the same should not be tryed by the rolls of the manor, but by the country, and the party might give in evidence the truth of the matter, and should not be bound by the roll, and according to this resolution of the Court, judgment was given.

1 Cro. 48, 49.

CCCXCVI. Mich. 26 & 27 Eliz. In the Kings Bench.

Fines levied. Scire facias.

The case was: tenant in tail leased for sixty years, and afterwards levied a fine to Lee and Loveday, sur conusans de droit come ceo, &c. with a render to him and his heirs in fee; and upon a scire facias against the conusees, supposing the lands to be ancient demesn, the defendants made default for which the fine was avoided, and now the issue in tail entred upon the lessee for years, and he brought an ejectione firmæ, and it was found, that the land was frank fee; and all the question was, if by the reversal of the fine by writ of disceit, without suing forth a scire facias against the ter-tenant should bind him, or should be void only against the conusee, and not against the lessee? Atkin. It shall not bind the lessee for years: for a fine may bind in part, and in part not: as bind one of the conusees, and not the other, 7 H. 4 111. A fine levied of lands, part ancient demesn, and part at the common law, the same was by writ of disceit reversed in part, as to the land in ancient demesn, and stood in force for the residue, 8 H. 4. 136. And there by award of the Court issued forth a scire facias against the ter-tenants, and the justices would not adnul the fine, without a certificate that the land was ancient demesn, notwithstanding that the defendant had acknowledged it to be so, but as to them who were parties to the fine, the fine is become void as to the said parties, and he who had the land before might enter, i. And he said it should be a great inconvenience, if no scire facias, or other proces should be awarded against the ter-tenant, for he should be dispossessed and disinherited without privity, or notice of it, where upon a scire facias he might plead matter of discharge, in Bar of the writ of disceit, as a release, &c. which see Fitz. N. B. 98. And so although the fine be reversed, yet he might retain the land, and he resembled this case to the case of 2 H. 4, 16, 17. In a contra formam collationis against an abbot, a scire facias shall issue forth against the feoffee, and so by the same reason here: and for the principal matter he said, that the fine should be avoided against the parties, but not against the lessee: Kingsmill, The scire facias brought against the parties only is good enough, for they were parties to the disceit, and not the ter-tenants: it was adjorned.

3 Len. 117.

CCCXCVII. MICH. 26 & 27 ELIZ. IN THE KINGS BENCH.

Error. Appearance by Attorney. If the Grantee of Tenant after possibility shall atturn.

A writ of error was brought upon a judgment in a quid juris clamat; it was assigned for error, that the tenant did appear by attorney, whereas he ought not but in person, because he is to do an act in proper person, if it be not in case of necessity, where the attorney may be received by the Kings writ, or plead matter in bar of the attornment, as if he claim fee, &c. or other peremptory matter, after which plea pleaded he may make attorney, 48 E. 3. 24. 7 H. 6. 69. 21 E. 3. 48. 1 H. 7. 27. Another error was, because it is not shewed in the quid juris clamat, what estate the tenant hath: another matter was, if the grantee of the estate of tenant in tail after possibility of issue extinct shall be driven to attorn, and it was **[291]** said he should not, for the priviledge doth pass with the grant: see 43 E. 3. 1. Tenant in tail after possibility of issue extinct shall not be driven to attorn, 46 E. 3. 13. 27. Ergo, neither his grantee: Williams contrary, As to the appearance of the tenant by attorney, because the same is admitted by the Court, and the plaintiff, the same is not error, which see 1 H. 7. 27. by Brian and Conisby, 32 H. 6. 22. And he said, that the grantee should be driven to attorn, for no other person can have the estate of the tenant in tail after possibility of issue extinct, but the party himself, therefore not the priviledge; and although he himself be dispunishable of wast, yet his grantee shall not have such priviledge. As if tenant in dower, or by the curtesie, grant over their estates, the heir shall have wast against the grantors for wast done by the grantee, but if the heir granteth over his reversion, then wast shall be brought against the grantees: see Fitz. N. B. 56. And if two coparceners be, and the one taketh a husband and dieth the husband being tenant by the curtesie, a writ of partition lyeth against him, but if he granteth over his estate, no writ of partition lyeth against the grantee, 27 H. 6. Stathams Aid. Tenant in tail after possibility of issue extinct shall not have aid, but his grantee shall have aid. Clark, The grantee of tenant in tail shall not be driven to attorn. If tenant in tail grant totum statum suum, the grantee is dispunishable of wast; so if his grantee grant it over his grantee is also dispunishable, &c. It was adjorned.

Dyer 135. b. 2 Len. 40.

MICH. 26 & 27 ELIZ. IN THE KINGS BENCH.

CCCXCVIII. GRAVENOR AND MASSEYS CASE.

Error.

Gravenor brought a writ of error upon a common recovery against Massey: and in the said recovery four husbands and their wives were vouched, and now the plaintiff brought this writ of error as heir to one of the husbands, and exception was taken to his writ, because the plaintiff doth not make himself heir to the survivor of the four husbands. Egerton, The writ is good enough, for there is a difference betwixt a covenant personal, and a covenant real, for if two be bound to warranty, and the one dyeth, the survivor and the heir of the other shall be vouched, and he said each of the four and their heirs are charged, and then the heir of each of them being chargeable, the heir of any of them may have a writ of error. And afterwards the writ of error was adjudged good: and error was assigned because the vouchees appeared the same day that they were vouched by attorney, which they ought not to do by law, but they might appear gratis the first day without proces in their proper persons, and so at the sequatur sub suo periculo: see 13 E. 3. Attorn, 74. and 8 E. 2. ib. 101. Another error was assigned, because the entry of the warrant of attorney for one of the vouchees is po. lo. suo, I. D. against the tenant, where it should be against the demandant, for presently when the vouchee entreth into the warranty, he is tenant in law to the demandant. Coke, As to the first error, although he cannot

appear by attorney, yet when the Court hath admitted his appearance by attorney, the same is well enough, and is not error: as to the other error, I confess it to be error, but we hope that the Court will have great consideration of this case as to that error, for there are one hundred recoveries erronious in this point, if it may be called an error: and then we hope, to avoid such a general mischief, that the Court will consider and dispense with the rigor of the law: as their predecessors did, 39 H. 6. 30. in the writ of mesne: but I conceive, that the writ of error is not well brought, for the voucher in the said recovery is of four husbands and their wives, and when voucher shall be intended to be in **[292]** the right of their wives, which see 20 H. 7. 1. b. 46 E. 3. 28. 29 E. 3. 49. And so by common intendment, the voucher shall be construed in respect of the wife; so also the plaintiff here ought to entitle himself to this writ of error as heir to the wife: and for this cause, the plaintiff relinquished his writ of error; and afterwards he brought a new writ, and entituled himself as heir to the wife.

Ante 86.

MICH. 26 & 27 ELIZ. IN THE KINGS BENCH.

CCCXCIX. THE QUEEN, AND THE DEAN OF CHRISTCHURCH CASE.

Præmunire.

The Queens Attorney General brought and prosecuted a præmunire for the Queen and Parret, against Doctor Matthew Dean of Christchurch in Oxford, and others, because they did procure the said Parret to be sued in the City of Oxford, before the commissary there in an action of trespass, by libel according to the ecclesiastical law, in which suit Parret pleaded, son franktenement, and so to the jurisdiction of the Court, and yet they did proceed, and Parret was condemned and imprisoned: and after that suit depended, the Queens Attorney withdrew the suit for the Queen; and it was moved, if notwithstanding that the party grieved might proceed: see 7 E. 4. 2. b. The King shall have præmuire, and the party grieved his action: see Br. Præmunire 13. And by Brook none can have præmunire but the King: Coke, There is a president in the Book of Entries 427. In a præmunire, the words are (ad respondendum tam domino Regi, quam R. F.) and that upon the statute of 16 R. 2. and ib. 428, 429. Ad respondendum tam domino Regi de contemptu, quam dict. A. B. de damnis: but it was holden by the whole Court, that if the Kings Attorney will not further prosecute, the party grieved cannot maintain this suit, for the principal matter in the præmunire is, the conviction and the putting of the party out of the protection of the King, and the damages are but accessary, and then the principal being released, the damages are gone: and also it was holden by the Court, that the presidents in the Book of Entries are not to be regarded, and there is not any judgment upon any of the pleadings there, but are good directions for pleadings, and not otherwise.

3 Len. 139.

CCCC. MICH. 26 & 27 ELIZ. IN THE KINGS BENCH.

Fines levied. Forfeiture. Conditions.

The case was, A. gave lands in tail to B. upon condition, that if the donee or any of his heirs alien, or discontinue, &c. the land or any part of it, that then the donor do re-enter: the donee hath issue two daughters and dieth: one of the two daughters levieth a fine, sur conusans de droit come ceo, to her sister: Heale Serjeant, The donor may enter, for although the sisters to many intents are but one heir, yet in truth they are several heirs, and each of them shall sue livery, 17 E. 3. If one of the sisters be discharged by the lord, the lord shall lose the wardship of her, and yet the heir is not discharged: and if every sister be heir to diverse respects, then the fine

by the one sister is a cause of forfeiture: Harris contrary, For conditions which go in defeating of estates shall be taken shortly, and here both the sisters are one heir, and therefore the discontinuance by the one, is not the act of the other: Clench Justice, The words are, Or any of his heirs, therefore it is a forfeiture, quod fuit concessum per totam Curiam: and judgment was given accordingly.

1 Cro. 35.

[293] CCCCI. MICH. 26 & 27 ELIZ. IN THE KINGS BENCH.

Assumpsit.

The case was, a woman seised of a rent-charge for life took husband, the rent was arrear; the wife died, the tenant of the land charged, promised to pay the rent in consideration that the rent was behind, &c. and some were of opinion, because that this rent is due and payable by a deed, that this action of the case upon assumpsit will not lye, no more than if the obligor will promise to the obligee to pay the mony due by the obligation, an action doth not lye upon the promise, but upon the obligation. But it was holden by the whole Court, that the action did well lye, for here the husband had remedy by the statute of 32 H. 8. And then the consideration is sufficient, and so judgment was given for the plaintiff.

Hutt. Rep. 34. Hob. 284. 3 Cro. 5.

HILL. 27 ELIZ. IN THE KINGS BENCH.

CCCCII. WILLIAMS AND BLOWERS CASE.

Error. Joynder in Action. Regula. Deprivation. Scire facias.

Reignold Williams and John Powell brought a writ of error against the Bishop of Hereford and Blower, upon a recovery had in a writ of disceit by the said bishop and Blower against the said Williams and Powell, for that the said Williams had before brought a quare impedit against the said Blower and the bishop, and had recovered against them by default, whereupon Williams had a writ to the metropolitan to admit his clerk, and in the writ of disceit judgment was given for the plaintiffs: for it was found, that the summons was the Friday to appear the Tuesday after, and so an insufficient summons, and in that writ of disceit the defendants Williams and Powell pleaded, that Blower the incumbent was deprived of his benefice in the court of audience, which sentence was affirmed upon appeal before the delegates; and notwithstanding that plea, judgment was given against Williams and Powell defendants in the said writ of disceit: and upon that judgment this writ of error is brought. Beaumont assigned four errors, first, because the bishop and Blower joyned in the writ of disceit, for their rights are several, 12 E. 4. 6. Two cannot joyn in an action of trespass upon a battery done at one time to them: so if one distrain at one and the same time, the several goods of divers persons, they according to their several properties shall have several replevins, 12 H. 7. 7. By Wood: So if lands be given to two, and to the heirs of one, and they lose by default in a præcipe brought against them, they shall have several writs, the one quod ei deforceat, the other a writ of right: 46 E. 3. 21. A fine levied to one for life, the remainder to two husbands and their wives in tail, they have issue and die; tenant for life dieth, the issues of the husbands and wives shall have several scire facias's to execute the fine by reason of their several rights: lands in ancient demesn holden severally of several lords are conveyed by fine, the lords cannot joyn in a writ of disceit, but they ought to have several writs; so here the plaintiffs in this writ of disceit, and the bishop claims nothing but as Ordinary, and he loseth nothing in the quare impedit; and therefore by the writ of disceit he shall be restored to nothing. The second error was, because the bar of the defendants in the writ of disceit was good, i. the deprivation, &c. and the Court adjudged it not good, for the clerk being deprived, he could not enjoy the benefice, if the judgment

in the qu. impedit had been reversed, and where a man cannot have the effect of his suit, it is in vain to bring any action. Lessee for the life of another loseth [294] by erronious judgment; cestuy que use dieth, his writ of error is gone, for if the judgment be reversed he cannot be restored to the land, for the estate is determined, 31 E. 3. Incumbent 6. The King brought a quare impedit against the incumbent and the bishop, the bishop claimed nothing but as Ordinary: the incumbent traversed the title of the King, against which it was replyed for the King, that the incumbent had resigned pendant the writ, so as now he could not plead any thing against the title of the King, for he had not possession, and so could not counterplead the possession of the King. And here in our case, by this deprivation the incumbent is disabled to maintain this action of disceit, 15 Ass. 8. If the guardian of a chappel be impleaded in a præcipe for the lands of his chappel, and pendant the writ he resign, the successor shall have a writ of error, and not he who resigns, for he is not to be restored to the lands, having resigned his chappel. So in our case, a deprivation is as strong as a resignation. The third error, because in the writ of disceit, it is not set forth that Blower was incumbent, for the writ of disceit ought to contain all the special matter of the case, as an action upon the case, 4 E. 3. Disceit 45. The fourth error, that upon suggestion made after verdict, that Blower was incumbent, and in, of the presentment of the Lord Stafford, and that he was removed; and Griffin in by the recovery in the quare impedit by default, a writ to the bishop was awarded without any scire facias against Griffin, for he is possessor, and so the statute of 25 E. 3. calls him, and gives him authority to plead against the King, and every release or confirmation made to him is good, 18 E. 3. Confirmation made by the King after recovery against the incumbent is good: and 9 H. 7. if a recovery be had in a contra formam collationis, the possessor shall not be ousted without a scire facias, so in audita querela upon a statute staple, scire facias shall go against the assignee of the conusee, 15 E. 3. Respon. 1. See also 16 E. 3. Disceit 35. 21 Ass. 13. A fine levied of lands in ancient demesn shall not be reversed without a scire facias against the ter-tenant. Walmesley contrary, The case at the Bar differs from the case put of the other side, for they are cases put upon original writs, but our case is upon a judicial writ, and here nothing is demanded, but the defendant is only to answer to the disceit and falshood. And in this case the issue is contained in the writ which is not in any original writ, and the Judges shall examine the issue without any plea or appearance of the tenant, and here the defendant is not to plead any thing to excuse himself of the wrong: and here the judgment is not to recover any thing in demand, but only to restore the party to his former estate and possession, and if he hath nothing, he shall be restored to nothing; and he put many cases where persons who have several rights may joyn in one action, as a recovery in an assize against several tenants, they may joyn in one writ of error, 18 Ass. Recovery in assize against disseisor and tenant, they shall both joyn in error, why not also in disceit? 19 E. 3. Recovery against two coparceners, the survivor and the heir of the other shall joyn in error. As to the second error, Williams and the sheriff ought not to joyn in the plea, and also the plea it self is not good, for the writ of disceit is, that Williams answer to the disceit, and the sheriff shall certifie the proceedings, and therefore he shall not plead: and also the plea it self is not good, for although the interest of the incumbent be determined in the church, yet his action is not gone; as if in a præcipe quod reddat, the tenant alieneth pendant the writ, and afterwards the demandant recovereth, yet the tenant although his interest be gone by the feoffment, yet he shall have a writ of error, and so here; and as to the scire facias, there needs none here against the new incumbent, for he comes in pen-[295]-dant the writ, and that appears by the record; but if it had been in before the writ brought, then a scire facias would lye. See 9 H. 6. It was adjorned.

Dyer 353. b. 354. 1 Cro. 65. Post. 330. 6 Co. 52.

MICH. 26 & 27 ELIZ. IN THE KINGS BENCH.

CCCCIII. FLEMMINGS CASE.

Indictment upon the Statute of 1 *Eliz.*

Flemming was indicted upon the statute of 1 Eliz. because he had given the sacrament of baptism in other form than is prescribed in the said statute, and in the Book of Common Prayer, and the said indictment was before the justices of assize. Wray and Anderson, Of such offence done before, and now he is indicted again; for which it was awarded, that he suffer imprisonment for a year, and shall be adjudged ipso facto, deprived of all his spiritual promotions: and upon the indictment Flemming brought a writ of error, and assigned error, because in the second indictment no mention is made of the first indictment, in which case the second indictment doth not warrant such a judgment. Wray, Justice, If the first indictment be before us, then is a second judgment well given; contrary, if it be before other justices. Clench, The second indictment ought to recite the first conviction; and if one be indicted for a rogue in the second degree, the first conviction ought to be contained in such indictment; in an indictment the day and time are not material as to true recovering in facto: and it might be, that this last indictment was for the first offence for any thing appeareth. Coke, who argued to the same intent, compared it to the case of 2 R. 2. 9. and 22 E. 4. 12. 12 H. 7. 25. Indictment certified to be taken coram A. B. Justiciariis Domini Regis ad pacem, &c. without saying, necnon ad diversas felonias, &c. is void, and if a man hath been once convicted, he shall not have his clergy if it appeareth upon record before the same justices, that he had his clergy before.

HILL. 27 ELIZ. IN THE KINGS BENCH.

CCCCIV. THE MAYOR OF LYNNS CASE.

Indictments.

The Mayor of Lynn was indicted, for that he had received twenty four shillings of one A. for giving of judgment in an action of debt, depending before him against one B. and he was indicted thereof as of extortion, in contemptum dictæ Dominæ Reginæ, & contra formam statuti. Coke, the indictment is insufficient, for there is not any statute to punish any Judge for such a matter: for the statute of West. 1. cap. 26. is made against sheriffs, cap. 27. Clerks of justices, cap. 30. The marshal and his servants, statute 23 H. 6. against sheriffs, and other statutes against Ordinaries: but no action lies against a Judge, for that which a Judge receives is bribery and not extortion, et satis pœnæ est, judici quod deum habeat ultorem, and therefore he said the party indicted ought to be discharged. Gawdy Justice, If in the indictment there be words of extortion or bribery, although such an offence in a Judge be not materially extortion, if these words, contra pacem, &c. had been in the indictment, it had been good, quod Clench concessit: and afterwards the party was discharged.
3 Inst. 145.

[296] MICH. 28 & 29 ELIZ. IN THE KINGS BENCH.

CCCCV. CRISP AND GOLDINGS CASE.

Assumpsit.

In an action upon the case by Crisp against Golding, the case was, that a feme sole was tenant for life, and made a lease to the plaintiff for five years, to begin after

the death of tenant for life, a[illegible] afterwards the 18. of October made another lease to the same plaintiff for 21 yea[illegible], to begin at Michaelmas next before; and declaring upon all the said matter, he [illegible]id, virtute cujus dimissionis, i.e. the later lease, the plaintiff entred and was poss[illegible]sed Crast. Fest. S. Mich. which was before the lease made; and further declared, [illegible]at in consideration that the plaintiff had assigned to the defendant these two lease[illegible]he defendant promised, &c. and upon non assumpsit it was found for the plaintiff, a[illegible]l damages taxed 600l. Coke argued for the plaintiff against the Solicitor-General, [illegible]ho had taken divers exceptions to the declaration, i. where two or many consider[illegible]ions are put in the declaration, although that some be void, yet if one be good the action well lieth, and damages shall be taxed accordingly; and here the consideration that the plaintiff should assign totum statum, titulum, & interesse suum quod habet in terra prædict'. 2. Exception, that the lease in possession was made after Michaelmas, i. 18 October, and the declaration is, virtute cujus dimissionis, the defendant entred Crastino Mich. and then he was a disseisor, and could not assign his interest and right, which was suspended in the tortious disseisin, and so it appeared to the Judges; and he said there was not here any disseisin, although that the lessee had entred before that the lease was made; for there was an agreement and communication before of such purposed and intended lease, although it was not as yet effected, and if there were any assent or agreement that the lessee should enter, it cannot be any disseisin, and here it appeareth that the lease had his commencement before the making of the lease, and before the entry: but put case it be a disseisin, yet he assigned all the interest quod ipse tunc habuit, according to the words of the consideration, and he delivered both the indentures of the said demises, and quacunque via data, be the assignment good or void it is not material as to the action, for the consideration is good enough. Egerton solicitor contrary. In every action upon the case, upon assumpsit, there ought to be a consideration, promise, and breach of promise, and here in our case the consideration is the assignment of a lease, which is to begin after the death of the lessor, who was but tenant for life, which is meerly void, and that appeareth upon the record; and as to the second part of the consideration, and the assignment of the second lease, it appeareth, that the plaintiff at the time had but a right; for by his untimely entry before the making of the lease, he was not to be said lessee, but was a wrong-doer, &c. in 19 Eliz. in the Kings Bench this difference was taken by the justices there, and delivered openly by the Lord Chief Justice, i. when in an action upon the case, upon assumpsit, two considerations or more are laid in the declaration, but they are not collateral, but pursuant, as A. is indebted to B. in 100l. and A. promiseth to B. that in consideration that he oweth him 100l. and in consideration that B. shall give to A. 2s. that he will pay to him the said 100l. at such a day, if B. bring an action upon the case upon this assumpsit, and declares upon these two promises, although the consideration of the 2s. be not performed, yet the action doth well lye: but if they be collateral considerations, which are not pursuant, as if I in consideration that you are of my counsel, and shall ride with me to York, promise to give to you 20l. in this case all the considerations ought to be proved, otherwise the action **[297]** cannot be maintained: so in our case, the considerations are collateral, and therefore they ought to be proved; and afterwards judgment was given for the plaintiff.

1 Cro. 50. 2 Len. 71.

Hill. 28 and 29 Eliz. In the Common Pleas.

CCCCVI. Fooly and Prestons Case.

In an action upon the case the plaintiff declared, that whereas John Gibbon was bound unto the plaintiff in quodam scripto obligatorio, sigillo suo sigillat. and coram, &c. recognito in forma statuti Stapul. The defendant in consideration that the plaintiff would deliver to him the said writing to read over, promised to deliver the same again to the plaintiff within six days after, or to pay to him 1000l. in lieu thereof, upon which promise the plaintiff did deliver to the defendant the said writing; but the defendant had not, nor would not deliver it back to the plaintiff, to the great delay of the execution thereof, and the defendant did demur in law upon the declara-

tion. It was objected, that here is no sufficient consideration appearing in the declaration upon which a promise might be grounded; but it was the opinion of the whole Court, that the consideration set forth in the declaration was good and sufficient; and by Anderson, It is usual and frequent in the Kings Bench: if I deliver to you an obligation to rebail unto me, I shall have an action upon the case without an express assumpsit; and afterwards judgment was given for the plaintiff.

1 Cro. 206. 2 Len. 105.

HILL. 28 AND 29 ELIZ. IN THE COMMON PLEAS.

CCCCVII. WALLPOOL AND KINGS CASE.

Attachment in London.

William Wallpool was bound to King by recognizance in the sum of 400l. and King also was bound to Wallpool in a bond of 100l. Wallpool according to the custom of London, affirmed a plaint of debt in the Guildhall London against the said King, upon the said bond of 100l. and attached the debt due by himself to Wallpool in his own hands, and now King sued execution against the said Wallpool upon the said recognizance, and Wallpool upon the matter of attachment brought an audita querela, and prayed allowance of it; and by Gawdy Serjeant, Such a writ was allowed in such case, 26 Eliz. Anderson at the first doubted of it; but at last the Court received the said writ de bene esse, and granted a supersedeas in stay of the execution, and a scire facias against King; but ea lege, that Wallpool should find good and sufficient sureties, that he would sue with effect, and if the matter be found against him, that he pay the execution.

CCCCVIII. HILL. 28 AND 29 ELIZ. IN THE COMMON PLEAS.

Copyholder. Surrender.

A copy-holder with license of the lord leased for years, and afterwards surrendred the reversion with the rent, to the use of a stranger, who is admitted accordingly. It was moved, if here need any attornment, either to settle the reversion, or to create a privity; and Rhodes and Windham Justices were of opinion, that the surrender and admittance are in the nature of an inrolment, and so amount to an attornment, or at least do supply the want of it.

Hob. 177. 1 Roll. 294. 3 Len. 197.

[298] MICH. 28 ELIZ. IN THE COMMON PLEAS.

CCCCIX. RUDDALL AND MILLERS CASE.

Devise. Conditions.

In trespass, the case was this, William Ruddall Serjeant at Law, 18 H. 8. made a feoffment in fee to divers persons to the use of himself and his heirs, and 21 H. 8. declared his will, by which he devised his lands to Charles his younger son, and to the heirs males of his body, the remainder to John his eldest son in fee, upon condition, that if Charles or any of his issue should discontinue or alien, but only for to make a joynture for their wives for the term of their lives, that then, &c. and died; the statute of 27 H. 8. came, Charles made a lease to the defendants for their lives, according to the statute of 33 H. 8. And levied a fine with proclamation, sur conusans de droit come ceo, &c. to the use of himself and his wife, and the heirs males of their two bodies begotten, the remainder to himself and the heirs males of his body, the remainder to the right heirs of the devisor. John the eldest son entred for the condition broken upon the defendants, who re-entred, upon which re-entry the action was brought. Gawdy, Fleetwood, and Shuttleworth Serjeants for the plaintiffs: This condition to restrain unlawful discontinuance is good, as a condition to restrain wast,

tion. It was objected, that here is no sufficient consideration appearing in the declaration upon which a promise might be grounded; but it was the opinion of the whole Court, that the consideration set forth in the declaration was good and sufficient; and by Anderson, It is usual and frequent in the Kings Bench: if I deliver to you an obligation to rebail unto me, I shall have an action upon the case without an express assumpsit; and afterwards judgment was given for the plaintiff.

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or felony. See 10 H. 7. 11. 13 H. 7. 23. And before the Statute of Quia Emptores terrarum: if A. had enfeoffed B. upon condition, that B. nor his heirs should alien, the same was a good condition by Fleetwood (which was granted per Curiam). And this condition was annexed to good purpose, for the serjeant well knew, that cestuy que use might have levied a fine, or suffered a recovery by the statutes of 1 R. 3. 4 H. 7. And this condition annexed or tied to the use by the will is now knit to the possession, which is transferred to the use by the said statute: although it may be objected, that the condition was annexed to the use, and now the use is extinct in the possession, and by consequence the condition annexed unto it, as where a seignory is granted upon condition, and afterwards the tenancy escheats, now the seignory is extinct, and so the condition annexed to it: but as to that it may be answered, that our case cannot be resembled to the cases at common law, but rests upon the statute of 27 H. 8. scil. cestuy que use shall stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in such lands to all intents, constructions and purposes in law, of and in such like estates as he had in the use, and that the estate, right, title, and possession that was in the feoffee shall be clearly deemed and adjudged to be in cestuy que use, after such quality, manner, form and condition as he had in the use: and therefore in the common assurance by bargain and sale by deed enrolled, if such assurance be made upon condition: as in case of mortgage, the possession is not raised by the bargainee; but by the bargain an use is raised to the bargainee, and the possession executed to it by the statute, and the condition which was annexed to the use only is now conjoyned to the possession, and so it hath been adjudged. So if the feoffees to use before the statute had made a lease for life, the lessee commits wast, the statute comes, now cestuy que use which was, shall have an action of wast, as it was adjudged in Justice Southcotes case: so a title of cessavit in the feoffees shall be executed by the statute. So if the King grants to the feoffees in use, a fair, market, or warren, these things shall be executed by the statute, as it was holden in the case of Clarentius. As to the condition, they conceived, that it is broken; for where the devisor had allowed to the devisee to discontinue for life, to make a [299] joynture to his wife, now he hath exceeded his allowance, for he might have made a joynture to his wife indefeisable by fine upon a grant upon a render for life, &c. But this fine with the proclamations is a bar to the former entail which was created by the devise, and hath created a new entail, and the former tail was barred by the fine against the intent of the devisor: also by this fine he hath created a new remainder, so as his issue inheritable to this new entail might alien and be unpunished, which was against the meaning of the devisor: and as to the lease for lives to the defendants, the same is not any breach of the condition, for that is warranted by the statute of 32 H. 8. which enables tenant in tail to make such a lease, so as it cannot be said a discontinuance, which Anderson and Periam granted: but the fine levied after is a breach of the condition, and then the re-entry upon the lessees, who have their estates under the condition is lawful: as where the wife of the feoffee upon condition is endowed, and afterwards the condition is broken, now by the re-entry of the feoffor the dower is defeated. And Shutleworth put this case, a feoffment is made upon condition, that the feoffee shall lease the lands to A. for life, and afterwards grant the reversion to B. in fee, the feoffor may re-enter, for by this conveyance he in the reversion is immediate tenant to the lord, where, by the intended assurance, the particular tenant ought to be. Puckering, Fenner, and Walmesley contrary: and by Walmesley, By this devise the use only passeth, and not the land it self, for the statute of 1 R. 3. extends only to acts executed in the life of cestuy que use, and not to devises which are not executed till after the death of the devisor, which see 4 Ma. Dyer 143. Trivilians case. See also 6 E. 6. Dyer 74. The Lord Bourchiers case; but 10 H. 7. cestuy que use deviseth, that his executors shall sell the land, now by the sale of the land in possession, for the same is in a manner an act in his life, for the vendee is in by cestuy que use, and here is a condition, and not a limitation, for the nature of a condition is to draw back the estate to the feoffor, donor, or lessor; but a limitation carrieth the estate further. And he conceived, that the condition is not broken by this act, for the intent of the devisor is pursued, for his meaning was, that the wife should have a joynture indefeisable against the issue in tail, and that the inheritance should be preserved; that both should be observed: and he said, that this

fine being levied by him in the reversion upon an estate for life is not any discontinuance, but yet shall bar the estate tail. And the justices were clear of opinion, that the condition is broken, and also that the intent of the condition is broken; for it might be that Charles had issue by a former wife, which by this fine would be disinherited, and a new entail set on foot against the meaning of the devisor, &c. and afterwards judgment was given for the plaintiff.

HILL. 31 ELIZ. ROT. 355. IN THE KINGS BENCH.

CCCCX. SIMMES AND WESCOTS CASE.

In an action upon the case, the plaintiff declared, that in consideration, that he would marry the defendants daughter, the defendant promised to give him 20l. and also to procure him all the corn growing upon such lands, and to provide necessaries for the wedding dinner; the defendant did confess the communication betwixt them, and that he promised to give the plaintiff 20l. so as he would procure a lease of certain lands to his daughter for her life absque hoc, that he promised modo & forma: the jury found the promise of the 20l. but not any other thing; it was moved in arrest of judgment, that **[300]** the assumpsit whereof the plaintiff hath declared, although it consist of divers things, yet it is entire, and if the whole is not found nothing is found; and the case of 21 E. 4. 22. was cited touching variance of contract, as where an action of debt is brought upon a contract of a horse, and the jury found a contract for two horses, the plaintiff shall never have judgment; on the other side it was said, that the plaintiff shall recover damages for the whole that is found, i. for the 20l. See 32 H. 8. Br. Issue 90. In an action upon the case, the plaintiff declared, that the defendant did promise to deliver four woollen-cloaths; the defendant pleaded, that he did promise to deliver four linnen-cloaths, absque hoc, that he promised, &c. the jury found, that the defendant did promise to deliver two woollen-cloaths, and the plaintiff did recover damages for the two. So in wast, the wast is assigned in succidendo 20 oaks, upon which they are at issue, the jury find but ten oaks, the plaintiff shall have judgment for so much, and shall be amerced for the residue. Gawdy Justice, Here are several assumpsits in law, as Br. 5 Ma. Action sur le case 108. a man in consideration of a marriage assumes to pay 20l. per annum for four years, two years incur, the party brings an action upon the case for the arrearages of the two years. Wray, In an action upon the case, the plaintiff ought not to vary from his case, as if a promise be grounded upon two considerations, and in an action upon it, the plaintiff declares upon one only, he shall never have judgment, and here the jury have not found the same promise. Clench, If promise be made to deliver a horse and a cow, and the horse is delivered, but not the cow; the party shall have an action for the cow, but he shall declare upon the whole matter and afterwards judgment was given, quod querens nihil capiat per billam.

1 Cro. 147.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCCXI. STILE AND MILLERS CASE.

Tithes.

A parson leased all his glebe lands for years, with all the profits and commodities, rendring 13s. 4d. pro omnibus exactionibus & demandis, and afterwards libelled in the Spiritual Court against his lessees for the tithes thereof, the lessee obtained a prohibition. See 32 H. 8. Br. Dis. 17. 8 E. 2. Avowry 212. Wray, Tithes are not things issuing out of lands, nor any secular duty, but spiritual; and if the parson doth release to his parishioner all demands in his lands, his tithes thereby are not extinct, and afterwards a consultation was granted.

1 Cro. 161, 578. 11 Co. 13.

TRIN. 31 ELIZ. ROT. 902. IN THE KINGS BENCH.

CCCCXII. LEE AND CURETONS CASE.

Debt. Error.

In debt upon an obligation the defendant pleaded non est factum, and it was found for the plaintiff, and judgment given, and afterwards the defendant brought error, and assigned for error, that the declaration was per scriptum suum obligat. without saying, hic in curia prolat. to which it was answered by Coke, that the same was but matter of form, for which a judgment ought not to be reversed, for that the clark ought to put in without instruction of the party, and so it was holden in a case betwixt Barras and King, M. 29 & 30 Eliz. Another error was assigned, because the judgment is entred de fine nihil quia perdonat. where it should be quod capiatur, although the plea were pleaded after the general pardon, and for that cause the judgment **[301]** was reversed, for if the pardon be not specially pleaded, the Court cannot take notice of it, as it was holden in Serjeant Harris case.

1 Cro. 153. 1 Cro. 768. 778. 3 Cro. 22.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCCXIII. LACY AND FISHERS CASE.

Trial. Exposition of Stat. 21. *H.* 8. *cap.* 19.

In a replevin, the taking is supposed in S. which land is holden of the manor of Esthall; the defendant made conusans, as bailiff of the lord of the manor aforesaid, and issue was taken upon the tenure, and it was tryed by a jury, out of the visne of Esthall only. Tanfield, The trial is good, for the issue ought not to have been tried by both visnes, S. and Esthall, for two things are in issue. If it be holden, or not. 2. If it be holden of the manor of Esthall, for which cause the visne ought to be from both places; and the opinion of the Court was, that for the manner of it, it was not good, as if an issue be joyned upon common for cause of vicinage, it shall be tried by both towns, see 39 H. 6. 31. by Littleton and Danby, and the case in 21 E. 3. 12. was cited in a per quæ servitia, the mannor was in one county, and the lands holden in another county, the tenant pleaded, that he did not hold of the conusor, and that he was tried by a jury of the county where the land was, see 2 H. 4. Gawdy denied the book cited of 21 E. 3. to be law, and the reason wherefore the visne shall come from both places, is because it is most likely, that both the visnes may better know the truth of the matter, than the one only. Another exception was taken, because the conusans (as it seems) is made according to the statute of 21 H. 8. 19. and yet the party doth not pursue the said statute through the whole conusans: for by the statute in avowry or conusans, the party needs not to name any person certain to be tenant to the land, &c. nor to make avowry or conusans upon any person certain; and now in this conusans he hath not made conusance upon any person certain, but yet he hath named a person certain to be tenant, &c. and in as much as this conusans is not made, either according to the common-law, or according to the statute, it cannot be good. But that exception was disallowed by the Court, for if the statute remedieth two things, it remedieth one, and the conusance made in form as above, was well enough by the opinion of the whole Court.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCCXIV. DIERSLY AND NEVELS CASE.

In an action of trespass, the defendant pleaded not-guilty, and if he might give in evidence, that at the time of the trespass, the freehold was to such an one, and he as his servant, and by his commandment entred was the question; and it was said by Coke, that the same might so be well enough, and so it was adjudged in Trivilians

case; for if he by whose commandment he entreth hath right, at the same instant that the defendant entreth the right is in the other, by reason whereof he is not guilty, as to the defendant, and judgment was given accordingly.

2 Roll. 682.

[302] MICH. 29 AND 30 ELIZ. ROT. 546. IN THE KINGS BENCH.

CCCCXV. SAVAGE AND KNIGHTS CASE.

Error.

A writ of error was brought upon a judgment given in Leicester, in debt. Tanfield assigned for error, because in that suit there was not any plaint, for in all inferior Courts, the plaint is as the original at the common law, and without that no process can issue, and here upon this record nothing is entred, but only that the defendant summonitus fuit, &c. and the first entrie ought to be, A. B. queritur versus C. &c. Clench Justice, A plaint ought to be entred before process issueth forth, and this summons which is entred here, is not any plaint, and for that cause the judgment was reversed.

Ante 185. 1 Cro. 106. 2 Cro. 109. 654. Sty. 91. Yelv. 164. Sty. 115.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCCXVI. RAWLINS CASE.

In trespass for breaking his close by Rawlins, with a continuando, it was moved by Coke, that the plaintiff needed not to shew a regress to have damages for the continuance of the first entry, scil. for the mean profits, and that appears by common experience at this day. Gawdy Justice, Whatsoever the experience be, I well know that our books are contrary, and that without an entry he shall not have damages for the continuance, if not in case where the term or estate of the plaintiff in the land be determined, and to such opinion of Gawdy, the whole Court did incline, but they did not resolve the point, because a regress was proved, see 20 H. 6. 15. 38 H. 6. 27.

Post. 319.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCCXVII. HARRIS AND BAKERS CASE.

Accompt. Damages.

In an accompt damages were given by the jury, and it was moved that damages ought not to have been given by way of damages, but the damages of the plaintiff shall be considered by way of arrearages, but see the case, H. 29 Eliz. in the Common Pleas, betwixt Collet and Andrews, and see 10 H. 6. 18. In accompt the plaintiff shall count to his damage, but shall not recover damages, vide 2. H. 7. 13. 21 H. 6. 26. The plaintiff shall not recover damages expresly, but the Court shall add quoddam incrementum to the arrearages. Coke, It hath been adjudged, that the plaintiff shall recover damages ratione implicationis, non retentionis.

3 Len. 192. 2 Len. 118. 3 Len. 149.

CCCCXVIII. MICH. 26 ELIZ. IN THE KINGS BENCH.

The words of the Statute 32 H. 8. cap. 37. of Rents are, that the executor of a grantee of a rent-charge may distrain for the arrearages of the said rent incurred in the life of the testator, so long as the land charged doth continue in the seisin or possession of the tenant in demesn, who ought immediately to have paid the said rent so behind to the testator in his life, or in the seisin or possession of any other person [303] or persons claiming the said lands only by and from the said tenant, by purchase,

gift, or discent, in like manner as the testator might or ought to have done in his life time. And now it was moved to the Court. If A. grant a rent-charge to B. the rent is behind, B. dyeth A. infeoffeth C. of the lands in fee, who diverse years after infeoffeth D. who divers years after infeoffeth E. It was holden by Walmesey, Periam, and Windham Justice, against Anderson Lord Chief Justice, that E. should be chargeable with the said arrearages to the executors of A. But they all agreed, that the lord by escheat, tenant in dower, or by the curtesie, should not be charged, for they do not claim in by the party only, but also by the law.

HILL. 32 ELIZ. IN THE COMMON PLEAS.

CCCCXIX. WIGOT AND CLARKS CASE.

Writ of Right.

In a writ of right by Wigot against Clark for the manor of D. in the county of Glocester, the four knights gladiis cincti did appear, and took their corporal oath, that they would choose 12, &c. ad faciendum magnam assisam, and by direction of the Court they withdrew themselves into the Exchequer Chamber, and there did return in parchment the names of the recognitors, and also their own names, and at the day of the return of the pannel by them made, the 4 knights and 12 others were sworn to try the issue, and it was ordered by the Court, that both the parties, scil. the demandant and the tenant, or their attornies, attend the said 4 knights in the Exchequer Chamber, and to be present at the making of the pannel, so as each of them might have their challenges, for after the return of the pannel, no challenge lieth, and thereupon the said 4 knights went from the Bar, and within a short time after, sitting the Court, they returned the pannel written in parchment, in this form, Nomina recognitorum, &c. inter A. petentem, & B. tenentem, and so set down their names, six other knights, ten esquires, and four gentlemen, and the justices did commend them for their good and sufficient pannel, and thereupon a venire facias was awarded against the said parties.

TRIN. 30 ELIZ. ROT. 611. IN THE COMMON PLEAS.

CCCCXX. PORY AND ALLENS CASE.

Surrender.

The case was, that lessee for 30 years, leased for 19 years, and then the first lessee, and one B. by articles in writing made betwixt them, did conclude and agree, that the lessee for 19 years should have a lease for three years in the said lands and others, and that the same should not be any surrender of his first term, to which articles the said lessee for 19 years did after agree and assent unto, and it was the opinion of all the justices of the Court, that the same was not any surrender, and they also were of opinion, that one termor could not surrender to another termor.

1 Cro. 173. Owen 97. Post. 322, 323. 1 Cro. 302.

TRIN. 31 ELIZ. ROT. 321. IN THE COMMON PLEAS.

CCCCXXI. GLANVIL AND MALLARYS CASE.

Audita Querela. Loves Case.

Glanvil was plaintiff in audita querela, against Mallary upon a statute staple, for that the conusor was within age at the time of the acknowledging of it, it was moved for the defendant, that **[304]** the Court ought not to hold plea of this matter, because there was no record of the statute remaining here, and therefore by law he was not compellable to answer it, &c. and a president was disallowed 5 H. 8. where such a pleading was allowed, and judgment given, that the defendant eat sine die,

vide 16 Eliz. Dier 332. But on the other side divers presidents were shewed, that divers such writs had been shewed in the Common Pleas, as 30 Eliz. Loves case, and the Lord Dudley and Skinners case, and thereupon it was adjudged that the action did well lye in this Court.

1 Cro. 208.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCCXXII. PET AND CALLYS CASE.

Debt.

In debt upon a bond for performance of covenants, the case was, I. S. by indenture covenanted with I. D. that such a woman, viz. R. S. at all times at the request and charges of I. D. should make, execute, and suffer such reasonable assurances of such lands to the said I. D. or his heirs as the said I. D. or his heirs should reasonably devise or require. I. D. devised a fine to be levied by the said woman, and required her to come before the justices of assise to acknowledge it, and the woman came before the said justices to that intent, and because the said woman at that time was not compos mentis the said justices did refuse to take the conusans of the said fine, and this was averred in the pleading in an action brought upon the said bond for performance of covenants, where the breach was assigned in not acknowledging of the said fine, and upon the special matter the party did demur in law, and the opinion of the whole Court was, that the condition was not broken, for the words are general to make such reasonable assurances which, &c. but if the words had been special to acknowledge a fine, there if the justice doth refuse to take such acknowledgment, the bond is forfeited, for the party hath taken upon him that it should be done.

MICH. 22 ELIZ. IN THE COMMON PLEAS.

WANGFORD AND SEXTONS CASE.

Executions.

The plaintiff had recovered against the defendant in an action of debt and had execution: the defendant after the day of the teste of the fieri facias, and before the sheriff had medled with the execution of the writ, bona fide for money sold certain goods and chattels, and delivered them to the buyers; it was holden by the Court, that notwithstanding the said sale, that the sheriff might do execution of those goods in the hands of the buyers; for that they are liable to the execution, and execution once granted or made shall have relation to the test. of the writ.

1 Cro. 174. Kel. 87. a.

TRIN. 29 ELIZ. ROT. 2715. IN THE COMMON PLEAS.

CCCCXXIV. WILMER AND OLDFIELDS CASE.

Award.

In debt upon a bond, the condition was to perform the award of I. S., &c. the arbitrators make award, that the defendant before such a day shall pay to the plaintiff 100l. or otherwise procure one A. being a stranger to the bond to be bound to the obligee for the payment of 12l. per annum to the plaintiff for his life, the defendant pleaded the performance of the award generally, the plaintiff assign-**[305]**-ed the breach of the award in this, that the said A. had not paid the said 100l. without speaking of the cause of the award of the 12l. per annum, upon which the defendant did demur in law; it was holden by the whole Court, that the replication was good, for the award, as to the second point was meerly void, as if no such award at all had been, because A. was a stranger to the award and the submission; but as to the point

of the 100l. the same is good, and shall bind the parties, and the plaintiff had judgment to recover, vide 21 E. 4. 75. 18 E. 4. 22, 23.
Antea 140. 1 Cro. 4.

MICH. 31 AND 32 ELIZ. ROT. 814. IN THE COMMON PLEAS.

CCCCXXV. FABIAN AND WINDSORS CASE.

Leases. Demand of Rent. Conditions taken strictly.

In trespass for entring into his house or inn at Uxbridge, it was found by special verdict, that the plaintiff leased to the defendant the said house for seven years, rendring rent at the Feasts of the Annunciation of our Lady and Saint Michael, &c. with condition, that if the said rent shall be behind by the space of ten days, &c. that it shall be lawful to the lessor to re-enter: and afterward at the Feast of the Annunciation, 31 Eliz. the rent was behind, and the tenth day after the lessor came to the said house a quarter of an hour before the sun setting and demanded the rent in these words, I demand three pound ten shillings for a half years rent of this house now due, and there continued till the sun was set, but no rent was paid: but note, that the issue was, if he came to the house half an hour before sun set, and there continued demanding the half years rent of the premises due at the Feast of the Annunciation of our Lady then last past. It was moved by Fenner, that upon this verdict the issue is not found for the plaintiff, i. the issue was upon the half hour, and the quarter part of the hour was found, 2. the issue was, if the demand were of the rent due at the Feast of the Annunciation passed, and the verdict is for rent due at the time of the demand; &c. And it was the opinion of Anderson, Periam, and Walmesley, that as to the first point the verdict was good enough for the plaintiff: Windham contrary. But it was agreed by them all, that if in demand of rent (ut supra) the lessor, or any on his part doth demand one penny more or less than is due, or in his demand doth not shew the certainty of the rent, and the day of payment of it, and when it was due, the demand is not good, for a condition which goes in defeazance of an estate is odious in law, and no re-entry in such case shall be given, unless the demand be precisely and strictly followed.
1 Cro. 209.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCCXXVI. ELMES AND MELDCALFES CASE.

It was holden for law by the whole Court, that if one of the witnesses after the jury are departed from the Bar, doth repeat unto the jury the same evidence which he gave before and no more, that that doth make the verdict to be void.
1 Cro. 189.

[306] MICH. 32 & 33 ELIZ. IN THE COMMON PLEAS.

CCCCXXVII. CARTER AND CLAYCOLES CASE.

Leases. Special Statutes ought to be pleaded.

In ejectione firmæ by Carter against Claycole, the plaintiff declared upon a lease made by the wardens and fellows of All-souls Colledge, 1. July, 10 Eliz. And it was found by special verdict, that Overden warden of the said colledge, and the fellows, &c. leased unto the plaintiff, to have and to hold from the Feast of the Annunciation next following, to the end of twenty years, and made a letter of attorney to one to enter into the said manor, and to seal and deliver the deed of the said lease in their names to the plaintiff, who by force thereof entred into part of the demised premises, and there did seal and deliver the same, &c. But it was not found that any rent was reserved thereupon; and if this lease were good, then the jury found for the plaintiff;

but if not, then for the defendant: Cooper Serjeant, It hath been objected, that this lease being but for twenty years, is not warranted by the statute of 13 Eliz. cap. 10. for the words of the statute are, Other than for the term of 21 years; as to that, it was not the intent of the statute, but only to abridge the great and long leases heretofore made by colledges, and to limit such leases to a certain measure of time, ut supra, for twenty-one years or three lives, & non ultra, but on this side as much as they would, which was granted by the whole Court: another matter was because it is not found, that the due rent was reserved upon the said lease (accustomed yearly rent or more) and yet the same is good enough, for if the other party will take advantage of such defect he ought to shew the same, otherwise it shall be intended, because it is found that such lease was made, that it was made according to the statute: for if a man is to make title to himself by a conditional lease, he is not to plead the condition, but only the lease; and if the other party will defeat the lease by the condition, he shall shew the same. And in this case, the defendant also ought to have shewed the statute: by which such defective leases are made void: also it hath been objected, that by the statute of 18 Eliz. the third part of the rent ought to be reserved in corn, and here is not found any corn; as to that, it is to be considered, that the said statute is not a general law, whereof the Judges are bounden to take notice, but it ought to be pleaded, for it extends but to four places, viz. Cambridge, Oxford, Winchester, and Eaton, and therefore such a statute ought to be pleaded, or given in evidence, and found by verdict: as where a man pleads a general pardon, in which divers persons are excepted, he ought to plead it specially, and shew, that he is not any of the persons excepted, 8 E. 4. 7. 28 H. 7. So special customs ought to be pleaded, gavelkind, borough-English, 21 E. 4. 55. 36. The King grants to the citizens of Norwich, &c. And afterwards by Act of Parliament, all their liberties, &c. are confirmed by a general confirmation to all cities and boroughs, this is a special Act, and ought to be pleaded; by Brian, 59, 13 E. 4. 8. The Lord Saies case, an Act of Parliament, that all corporations made by the King H. 6. shall be void, is a special Act, and ought to be pleaded: and see 28 H. 8. 27. & 28. Dyer. If the statute of 21 H. 8. cap. 13. of lands taken to ferm by ecclesiastical persons be a special law: Yelverton contrary; The statute of 13 Eliz. is a special law and ought to be pleaded, but the statute of 13 Eliz. is now a general law, which see Hollands case, 39 Eliz. and Damports case, 45 Eliz. and this Act of 13 Eliz. is general in respect of time, for it extendeth to all time after (from henceforth) and to all persons to whom such leases shall be made, the words the statute are, scil. To any person or **[307]** persons, in respect of persons who shall lease, all spiritual persons: general in respect of the end, which is the maintenance of learning, which extends to the common profit, &c. Drew Serjeant, That this act of 13 Eliz. is general in respect of restraint only, and extends only to spiritual persons, and therefore ought to be pleaded, for otherwise the Court shall not take notice of it; as the statute of 23 H. 6. of Sheriffs ought to be pleaded, which see in the case of Dive and Manningham, Plowden, 64, 65. And although the statute ought to be pleaded, yet this lease is not void against the warden who made it, but against his successor, although no rent be reserved upon it, notwithstanding that the perclose of the statute be (utterly void and of none effect, to all intents, constructions, and purposes) so upon the statute of 1 Eliz. concerning leases made by bishops, the law had been so taken in the case of the Bishop of Coventry and Lichfeild upon a grant of the next avoidance, that although it doth not bind the successors, yet it shall bind the grantor himself. So here this lease being made by the present warden and fellows of the colledge aforesaid, although it be not sufficient to bind the successor, yet it shall bind the warden who made the lease. Puckering contrary: And as to the case of 13 E. 4. 8. the reason there is, because there is an exception in the said statute of divers grants made by King H. 6. and therefore the said Act ought to be specially pleaded: and see 34 H. 6. 34. by Prisoit: but in this Act of 13 Eliz. there is not any exception, and although it be a general Act with a restraint, yet such an act ought not to be pleaded, and therefore 27 H. 8. 23. in an action upon the statute of 21 H. 8. for taking of lands to ferm by spiritual persons, he need not make mention of the statute: and afterwards, the justices did advise upon this point, whether the lease be so void, that it be void against a stranger: so as the defendant who doth not claim under the colledge, and who hath no title to the land may avoid it. And Periam Justice denied

the case put by Puckering: A. mortgages lands to B. upon a usurious contract for one hundred pounds, and before the day of payment B. is ousted by C. against whom B. brings an action, C. cannot plead the Statute of Usury, for he hath no title: for the estate is void against the mortgagor. Another exception was taken to the declaration, because the plaintiff had declared, upon a lease by the warden and fellows, without naming any name of the warden, 13 E. 4. 8. 18 E. 4. 8. in trespass the defendant doth justifie, because that the free-hold was in the dean and chapter, and he as servant, and by their commandment entred; and exception was taken to that plea, because he hath not shewed the name of the dean, scil. the proper name: so if a lease be made by dean and chapter in these words, Nos decan. & capituli, the same lease is void, which was granted by the Court: and 12 H. 4. 251. a provost granted an annuity by the name of provost of such a colledge, without any name of baptism, and afterwards the grantee brought a writ of annuity against the successor of the said provost; and by Hull, The writ is well enough, but the Christian name ought to be set down in the writ: so here, because that the name of baptism of the warden is not in the declaration, the same is not good: but the opinion of the whole Court was, that the declaration is good enough, and they did rely especially upon the book of 21 E. 4. 15. 16. where debt is brought by the dean and chapter without any Christian name, and the writ holden good: Anderson: It stands with reason, that for as much as the colledge was incorporated by the name of warden and fellows, and not by any Christian name that they may purchase and lease by such name without any Christian name, and may be impleaded, and implead others by such name, and as the fellows in such case need not to be named by their Christian names, no more ought the warden: but of a parson, vicar, chauntry priest, it is otherwise, for in such case the name of baptism ought to be ad-
[308]-ded: it was also objected, that because the letter of attorney was to enter in the manor, and all the lands and tenements of the colledge in such a town, and to seal the indenture of lease in the name of the lessors, and to deliver it to the plaintiff as their deed; now the attorney in executing of this warrant hath not pursued it, for he hath only entred into the lands, but it is not found that he entred into the manor, and so the lease is void. And it was said by Puckering, That if I lease two acres in two several counties, rendring for the one acre 10s. and for the other acre 10s. and make a letter of attorney to make livery in both; if the attorney entreth into one acre and makes livery, the same is void, for the attorney hath not pursued his authority, for peradventure I would not have leased the acre whereof livery is made for such rent of 10s. being perhaps of greater value, but with the other acre which was of lesser value, and so the mis-executing of my warrant shall prejudice me. Windham, Perhaps if one entire rent had been reserved out of both acres, it may be that by the livery in one acre all is void: but by Puckering, One entire rent cannot be reserved upon such a lease of two acres in several counties. Walmesley denied the case put by Puckering, for the authority is executed well enough, for it doth not appear upon the verdict, but that the colledge was in possession at the time of the lease made, and then there needed not any such entry, but the bare sealing and delivery of the attorney is good enough. And also it doth not appear by verdict, that the colledge hath any manor, and therefore it shall be so intended; and then the case is no other but that, a man leaseth a manor, and certain lands in D. and makes a letter of attorney to make livery of them, where he hath nothing in the manor, and the attorney makes livery of the land without medling with the manor, the same is a good livery, and the authority duly executed: but if it had been expresly found, that the colledge had such a manor there, then the entry in the land only, without medling with the manor, and the livery made accordingly, should not be good: but yet afterwards he seemed to be of other opinion. And as to that which hath been objected, that the lease is void to all intents and purposes, according to the words of the statute (for by some it cannot be resembled to the case cited before, of the Bishop of Coventry and Lichfeild, that such a grant should bind him and not his successors;) for if this grant in our case shall not be void presently, it shall never be void; for the colledge never dieth no more than dean and chapter, mayor and commonalty. To that it was answered by Drew, that although there be some difference betwixt such corporations, and that the words of the statute are general (void to all intents, constructions, and purposes,) yet they shall be construed according to the meaning of the makers of the Act, whose scope was to provide for the successors, and not for the present incumbent,

and to the utter impoverishing of all successors, without any respect to the party himself, as it appeareth by the preamble of the said statute; where it is observed, that by long and unreasonable leases, the decay of spiritual livings is procured; for the remedying and preventing of which long leases this Act was made, and that the successors should not be bound thereby. And these leases are not void, simpliciter sed secundum quid, i.e. as to the successors: as upon the statute of 11 H. 7. cap. 20. Discontinuances made by women, &c. shall be void and of none effect; yet such a discontinuance made is good against the woman her self: so upon the statute of 1 Eliz. concerning bishops. See now Coke, Lincoln Colledge case, 37 Eliz. in the three reports 60. a lease made by dean and chapter not warranted by the said statute, shall not be void until after the death of the dean, who was party to the lease. So upon the Statute of 13 Eliz. of Fraudulent Conveyances, such fraudulent conveyance is [309] not void against the grantor, but against those who are provided for by the said statute, and that the lease in the principal case is not void, but voidable, all the justices agreed to be avoided by the colledge, or any other who claim by it; and by Anderson, If such a lease should be void, then great mischief would fall to the colledge, for whose benefit this statute was made, for if such lease be made rendring a small rent, then if before the defect be found or espied the rent was arrear, the colledge could not have remedy for the said rent. Also by Periam, Such a lessee might have an action of trespass against a stranger, who entreth upon the land, which proves that the lease is not void, but voidable; and afterwards notwithstanding all the objections, judgment was given for the plaintiff, and the chief authority which moved Periam Justice to be of such opinion was Lemans case, cited before 28 H. 8. Dyer 27. where a lease was made to a spiritual person against the statute of 21 H. 8. and a bond or obligation for performance of covenants, and thereupon an action was brought, and the plaintiff therein had judgment and recovered, which could not have been if the lease were utterly void against the lessor and lessee, as the very words of the statute are; and although it is not alledged in the book, that that was any cause of the judgment, yet in his opinion it was the greatest cause of the judgment in that case.

More 593. 4 Co. 76. 5 Co. 6. 1 Cro. 707. 708. Post. 333. Co. 1 Inst. 45.

Pasch. 35 Eliz. In the Common Pleas.

CCCCXXVIII. Bighton and Sawles Case.

In an action upon the case, it was agreed by the whole Court, that where judgment is given, that the plaintiff shall recover, and because it is not known what damages, therefore a writ issueth to enquire of the damages, that the same is not a perfect judgment before the damages returned and adjudged, and therefore they also agreed, that after such award, and before the damages adjudged, that any matter might be shewed in Court in arrest of the judgment; and by Periam Justice, the difference is, where damages are the principal thing to be recovered, and where not; for if damages be the principal, then the full judgment is not given until they be returned; but in debt where a certain sum is demanded it is otherwise.

1 Cro. 235.

Pasch. 33 Eliz. In the Common Pleas.

CCCCXXIX. Maidwell and Andrews Case.

Covenant. Traverse.

Maidwell brought an action of covenant against Andrews, and the case was this, That R. was seised of lands, and leased the same for life, rendring rent; and afterwards devised the reversion to his wife for life, and died. Andrews the defendant took to wife the wife of the devisor, the devisee of the reversion; afterwards Andrews

bargained and sold the said reversion to one Marland and his heirs during his own life, and afterwards granted the rent to the plaintiff, and covenanted that the plaintiff should enjoy the said rent during his term, absque aliquo legitimo impedimento of the said Andrews, his heirs or assigns, or any other person, claiming from the said Marland. Marland died seised, and the same descended to B. his heir, and the breach of the covenant was assigned, in this, i. in the heir of Marland, who hath the rent by reason of the grant of the reversion to Marland, ut supra, the defendant pleaded the grant of the reversion to Marland, per scriptum (without saying, sigillo suo sigillat. & hic in Curia prolat.) absque hoc, that the said reversion and rent descended to B. and thereupon the plaintiff did demur in law, and the causes of the demurrer was assigned by Yelverton Serjeant. 1. The grant of **[310]** the reversion is pleaded per scriptum, and he doth not say (sigillat.) for a reversion cannot pass without deed, although it be granted but for years; and a bare writing is not a deed without sealing of it, and therefore the pleading ought to be per scriptum suum sigillat. or per factum suum; for factum suum implies the ensealing and delivery. 2. It ought to be pleaded hic in Cur. prolat. for the Court is to see such deed, to the end they may know if it be a lawful deed, without razure, interlining, or other defects. 3. The defendant hath traversed the descent, where he ought to have traversed the dying seised; for of every thing descendable the dying seised is the substance, and the descent is but the effect: and although the grant of the reversion was but for the life of the grantor, yet the estate granted is descendable, as 27 E. 3. 31. tenant by the courtesie leaseth his estate to one and his heirs, the grantor dieth, his heir entreth, and a good bar against him in the reversion; and see 14 E. 3. Action 56. Annuity granted to one and his heirs for the term of another mans life, the grantor dieth, living cestuy que vie, the heir of the grantor brings a writ of annuity, and it was holden maintainable; and he said, that where the dying seised is confessed and avoided by the other side, there the descent is traversable, and not the dying seised, and that was the case betwixt Vernon and Gray. In an avowry Vernon conveyed the lands from the Lord Powes to him, as next heir to him, because the Lord Powes died seised in his demesn as of fee without issue, and the plaintiff conveyed from the said Lord Powes by devise, and traversed the descent to the avowant, for the dying seised was confessed and avoided by the devise, 22 Eliz. Dyer 366. See 21 H. 7. 31. In trespass the defendant saith, that T. was seised, and died seised, and that the lands descended to him as son and heir, and that he entred; the plaintiff said, that T. was seised, and took to wife K. and they had issue the plaintiff, and died seised, and the land descended to him, and traversed the descent to the defendant; and see Sir William Merings case, 14 H. 8. 22, 23. But if the parties do not claim by one and the same person, or the dying seised be not confessed and avoided, there the dying seised shall be traversed, and not the descent. Glanvil Serjeant, be the bar insufficient or not, if the declaration be not sufficient, the plaintiff shall not have judgment, and here is not any breach of covenant, viz. that the plaintiff shall enjoy it without any lawful impediment of the defendant, his heirs or assigns, or any claiming by Marland, and then if the heir of Marland cannot make any lawful claim, then there is not any breach of covenant assigned; and he said, because it is not shewed that the land is not holden in socage, the devise is not good, for it may be that the land is holden in capite: but admit the devise good, that when Andrews bargains and sells unto Marland, and the tenant never attorns, then nothing passeth, and then the heir of Marland cannot make any lawful claim or lawful impediment. Periam Justice, Here Marland was assignee of Andrews, and if he or his heirs make claim, although that the assignment be not sufficient in law, yet because he hath colour by this assignment his claim is lawful, and so there is a breach of the covenant; and although it is not alledged, that the land devised is holden in socage, yet the devise is good for two parts of the land. Anderson Justice, If it be good but for two parts, then is the reversion apportioned, and the rent destroyed, and so Marland hath not any rent by his purchase of the reversion, and so he can't lawfully disturb the plaintiff. The law doth create his apportionment, which grows by the devise, and therefore the rent shall not be destroyed; but if it had been done by the act of the party, it had been otherwise; and I would willingly hear, if the heir of Marland be assignee of Andrews, for otherwise he is not within the words of the covenant, for Marland hath an estate to him and his heirs for the life of another: **[311]** now after

the death of Marland, his heir is a special occupant, and vide H. 26 Eliz. Rot. 560. in the Common Pleas, such an heir shall not have his age.

1 Cro. 278.

PASCH. 33 ELIZ. IN THE COMMON PLEAS.

CCCCXXX. OGLETHORPE AND HIDES CASE.

Debt.

In debt upon a bond for the performance of covenants, it was holden by the whole Court, that if the defendant pleaded generally the performance of the covenants, and the plaintiff doth demur generally upon it without shewing cause of demurrer: judgment shall be given according to the truth of the cause, for that default in pleading is but matter of form, and is aided by the statute of 27 Eliz. But if any of the covenants be in the disjunctive, so as it is in the election of the covenantor to do the one or the other, then it ought to be specially pleaded, and the performance of it, for otherwise the Court cannot know what part hath been performed.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCCXXXI. TRACY AND IVIES CASE.

Dower.

In dower by Margaret Tracy against Ivie, the case was, that John Finch was seised, and enfeoffed Shipton and others of two parts of the lands to the use of himself and the defendant his then wife, and their heirs for ever, with condition, that if his said wife did survive him, she should pay such sums of money not exceeding two hundred pounds, to such persons which the feoffor by his last will should appoint; and afterwards he declared his will, and thereby appointed certain sums of mony to be paid to divers persons, amounting in the whole to the sum of one hundred and fifty one pounds, and by his said will devised the residue of his lands to divers of his kindred, having no issue, and died; the wife married Tracy, and they brought dower against the devisees, who pleaded the feoffment aforesaid, and averred the same was made for the joynture of the demandant, and because that no other matter or circumstance was proved to verifie the averment, the Court incited the jury to find for the demandant, which they did accordingly.

Co. 4. Vernons case.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCCXXXII. BOND AND RICHARDSONS CASE.

Debt.

In debt upon a bond, the condition was to pay a lesser sum such a day, and at such a place, the defendant pleaded payment according to the condition, upon which they were at issue: and it was found by verdict, that the lesser sum was paid such a day before the day contained in the condition of the bond, and then received; and upon this verdict judgment was given for the plaintiff, for the day is not material, nor the place, but the payment is the substance.

1 Cro. 142.

[312] TRIN. 32 ELIZ. IN THE COMMON PLEAS.

CCCCXXXIII. MARSHES CASE.

Trover and Conversion.

Goods came to a feme covert by trover, and she and her husband did convert them to their own use. It was holden per Curiam, that the action upon the case shall be brought against the husband and wife, and not against the husband only, for the action doth sound in trespass, and it is not like unto detinue; for upon a detainer by the wife, the action lieth against the husband only.

TRIN. 32 ELIZ. IN THE COMMON PLEAS.

CCCCXXXIV. CORBETS CASE.

Debt. Pleinment. Administred.

An action of debt was brought by original writ against an administrator in another county than where the administrator was commorant, and before notice of the suit he paid divers debts of the intestate due by specialty, and so he had not assets to pay the debt in demand, having assets at the day of the teste of the original. And now, the defendant appearing, pleaded this special matter, and concluded, so he had nothing remaining in his hands. And it was holden per Curiam, to be a good plea. See 2 H. 4. 21, 22.

2 Len. 60. 1 Cro. 793.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCCXXXV. GILLAM AND LOVELACES CASE.

Administration.

Katharine Gillam, administratrix of John Gillam, brought ejectione firmæ against Leonard Lovelace, and upon not guilty pleaded, it was found for the plaintiff. It was moved for the defendant in arrest of judgment, that the declaration was not good, because the granting of letters of administration is set forth in this manner, viz. Administratio commissa fuit querenti per Willielmum Lewen vicarium generalem in spiritualibus Epi. Roff. without averring, that at the time of the granting of the letters of administration, the bishop was in remotis agendis, for a bishop present in England cannot have vicarium: but as to that, it was said by the whole Court, that the vicar general in spiritualibus, amounts to a chancellor, for in truth the chancellor is vicar general to the bishop. Another exception was, because the declaration is not Epi. Roff. loci illius Ordinarii; but that was not allowed, for all the presidents and course of the Court is, that by way of declaration such allegation needs not, but by way of bar it is necessary. Another exception was taken, because the plaintiff hath declared of an ejectment, and also quod bona & catalla ibidem invent. cepit, &c. And here, in the verdict the damages, as well for the ejectment as for the goods and chattels, are entirely taxed. It was adjorned.

[313] MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCCXXXVI. GREEVES CASE.

Replevin. Devises.

In a replevin, the defendant made conusans as bayliff to one Greeves and Rockwood, &c. and said, that A. was seised of the lands, and 6 Eliz. enfeoffed certain persons in fee to the use of his last will, by which he willed, that his feoffees should

stand seised of the said lands, until the said Greeves had levied of the profits of the said lands the sum of one hundred pounds. It was objected against this conusans, that here is no devise, for A. at the time of the devise had not any feoffees; but the exception was disallowed by the Court: and they cited the case of 15 Eliz. Dyer 323. Lingens case, A. made a feoffment in fee to his use, and afterwards devised that his feoffees should be seised to the use of his daughter, that the same was a good devise of the land. See 29 H. 8. Br. Devises 48.

Poph. 188.

MICH. 31 & 32 ELIZ. IN THE COMMON PLEAS.

CCCCXXXVII. KEMPTON AND COOPERS CASE.

Bar.

In trespass for breaking of his close, the defendant pleaded, that before this he had brought an ejectione firmæ against the now plaintiff and recovered, and had execution, &c. Judgment, if action, &c. And by Periam, Windham and Anderson Justices, the same is a good bar, and the conclusion of the plea is also good. Judgment, if action, without relying upon the estoppel.

3 Len. 194.

MICH. 32 ELIZ. IN THE KINGS BENCH.

CCCCXXXVIII. LEIGH AND OKELEY AND CHRISTMASS CASE.

Custom.

Oliphe Leigh fermor of the Queen of a wood called Meerherst Wood in Warplesden in the county of Surrey, brought an action of trespass against Henry Okeley and Robert Christmass for breaking of the said wood, and therein entring and cutting down of two hundred loads of wood, and carrying away the same, &c. The defendants pleaded, that before the time in which the trespass was supposed, &c. that King H. 8. was seised of the manor of Warplesden, whereof the said wood was parcel, of which manor a close called Withybod containing eleven acres, eidem bosco adjacent. was parcel, and that the said wood is, and time out of mind, &c. was closed and separated with hedges and ditches from the said eleven acres, which said hedges and ditches, per totum tempus prædict. fuerunt & adhuc sunt prædict. bosco spectant. & pertinent. And that the said eleven acres are, and time out of mind were customary lands, parcel of the manor aforesaid, and demised and demisable in fee-simple: and that the said King H. 8. at a court holden 38 H. 8. by his steward demised the said eleven acres by copy, to John Goring and his heirs, and that within the said manor there is this custom, that every copyholder, tenant of the said eleven acres, &c. hath used and accustomed, per se vel servientes suos per eorum præcept. succidere, capere, & asportare subboscum in prædict. bosco in quo, &c. pro reparatione prædictarum sepium & defensionum inter prædict. boscum in quo, &c. and the said eleven acres, &c. quandocunque eædem sepes & defensiones in decasu extiterint; and shewed further, that at the time of the trespass, &c. the said **[314]** hedges and fences were in decay, and so justified: upon which the plaintiff did demur in law. It was argued by Godfrey, that the prescription is not good; for it appeareth, that this customary land is contigue adjacens to the said wood, i. where the trespass was done: and of common right, the making of the hedge doth appertain to the owner of the wood: and the prescription is no more, but to take wood in the lands of another adjoyning to my land, to make the hedges of the same land in which the wood groweth, which cannot be a good prescription, for it sounds in charge, and not to the profit of him who prescribes: which see 22 E. 3. Prescription 40. Trespass against an abbot, because where the plaintiff was farmor of the King of his hundred of D. and by reason thereof he might make attachment, and distrain for the debts of the King within the said hundred, and where for a certain debt of the King he distrained the beasts of one A. and the abbot made rescous; to which the abbot said, that he was lord of the manor of D. within which manor there was this custom, &c. That if any

distress be taken within the said manor, that the same should be put into the pound of the said abbot of the same manor, and not driven out of the manor, and there ought the distress to remain three days, so that if the party would agree within the three days, that then he should have his beasts; and he said, that the plaintiff would have driven the said beasts out of the said manor, and that he would not suffer him, upon which there was a demurrer, because it is not any profit to the abbot, but a charge to keep the beasts of another. Also he said, that the King shall not be bound by such a custom as another person shall, whereupon judgment was given for the plaintiff: so here in the principal case, there shall be no damage to the defendant if the wood be not fenced; for if his cattel escape into the wood he may justifie it, because it is in default of the plaintiffs inclosure: and if the beasts of the plaintiff escape into the lands of the defendant, he may take them damage feasant for the cause aforesaid, 21 H. 7. 20. A custom is pleaded, that if any tenants of the manor shall take the cattel of any one damage feasant, and shall therefore distrain them, that then the tenant so distraining them ought to bring them to the lords pound, which if he shall not do, at the next court he shall be amerced in a certain sum to the lord of a manor to be paid, and that was holden no good custom, because it is against common right, and the common law; for by the common law and common reason, every one finding cattel in his own land damage feasant may impound them in his own land, and the lord is not damnified thereby: so it is of a by-law, that every one who holdeth so many acres of lands in such a town, shall yearly pay a certain sum of mony to the church of the same town, and shall forfeit for every default of payment thereof twenty pounds, such by-law, although it hath continued time out of mind, yet it is not of any validity, because for not payment of the said sum to the church, the lord of the manor is not damnified, and therefore he shall not have any gain; contrary if the penalty had been limited to the church-wardens, because they are bound to repair the church. Another exception was taken to the form of the prescription (quandocunque eædem sepes & defensiones in decasu extiterint) and that is too general, for so they might be in decay by his own default, as if he himself wrongfully pull up the hedges, in which case there is no reason but that he should repair them at his own costs and charges, and therefore he ought to have pleaded cum in de casu extiterint in the default of the tenant of the wood. Another exception was taken, because that here this custom is pleaded particularly, and appropriated to the eleven acres only, and is not extended to the whole manor; and to that purpose the case of 40 E. 3. 27. was cited, where a custom is applied to **[315]** one part of a town, as to say that such a house within such a town is of the nature of gavelkind, and the rest of the town is guildable. See 21 Eliz. Dyer 363. It was adjorned, &c.

Hill. 20 Eliz. In the Common Pleas.

CCCCXXXIX. Hare and Okelies Case.

Trespass. Exposition of words.

Michael Hare, and others, brought an action of trespass against Okelie for breaking of their close, and carrying away their corn; and upon not guilty, it was found by special verdict, that the said Michael Hare was sole seised of the said close, where, &c. and so seised, exposuit ad culturam, Anglice, did put forth to tillage the said land to the other plaintiffs in form following, viz. That the said Michael should find one half of the corn sowed, and the other plaintiffs the other half, and that the said land should be ploughed and tilled, and the corn thereof coming should be reaped and cut at the charges of the other plaintiffs, and so cut should be divided by the shock, and the said Michael to have the one half, and the other plaintiffs the other half, &c. And it was the opinion of the whole Court, that notwithstanding these words (exposuit ad culturam) that no estate in the soil passed to the other plaintiffs, but the said Michael did remain sole seised as before; but by Anderson, upon the severance of the corn, peradventure a property in the said corn might be in all the plaintiffs: but because it appeareth, that Michael was sole seised, and the other plain-

tiffs had not any thing in the land: therefore it was adjudged, that they could not joyn in the action of trespass for breaking of the close; and therefore it was awarded by the Court, that the plaintiffs nihil cap. per breve.

TRIN. 30 ELIZ. IN THE COMMON PLEAS.

CCCCXL. BEARES CASE.

Formedon. Bar.

In a formedon by Beare, the defendant pleaded in Bar a warranty with assets: and upon the issue nothing by descent, it was found, that the ancestor of the defendant whose warranty was pleaded in Bar, was seised of land in the nature of gavelkind, and by his will devised the same to his two sons (whereof the defendant was the eldest) and their heirs equally between them to be divided; and it was adjudged no assets, wherefore the devisee had judgment to have seisin of the land.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CCCCXLI. AUSTIN AND SMITHS CASE.

Copyholder of Grants. Rents.

The case was, that Austin being a copyholder by license of the lord leased his copyhold to Smith for years, rendring rent, and afterwards by deed granted the rent to another, to have during the term, &c. to which grant the lessee did attorn, and paid the rent to the grantee: it was holden by Gawdy Justice, that the grant was good, but now it is but a rent-seek: and it was said by some, that the lessor cannot surrender such a rent, unless he surrender the reversion also. Quære, if the grantee may have an action of debt for it. It was conceived he could not, for he is not party nor privy to the contract, nor hath the reversion.

1 Cro. 637. 651. 895. 1 Roll. 598. 1 Inst. 317. a. Litt. 151. b. 152. a.

[316] PASCH. 31 ELIZ. IN THE KINGS BENCH.

CCCCXLII. UNDERHILL AND SAVAGES CASE.

Pluralities. Prohibition. Archdeaconry.

Savage was presented to a benefice, and afterwards was presented to another, and then purchased a dispensation (which was too late) and then was qualified, and afterwards accepted the Archdeaconry of Gloucester: and Underhill who had the archdeaconry libelled in the Spiritual Court against the said Savage, where it is holden that all ecclesiastical promotions in such cases are void, and now Savage sued a prohibition. It was argued by Atkinson, that the prohibition did lye, for the patron hath his remedy by our law, by a writ of right of advowson. See 29 E. 3. 44. If avoidance be by cession or deprivation, and the next presentment come in question, it shall be determined by the Kings Court; and here when he accepteth of another benefice, it is cession by the common law, but there ought to be a sentence; but now there needs not any sentence, for by the statute of 21 H. 8. 13. the church is ipso facto void. But it was objected, an archdeaconry is not within the statute, for it is not any cure with souls: also an archdeaconry is a late promotion, and therefore it cannot be void by the statute. Lewknor contra. The patronage here doth not come in debate; but if the defendant in the Spiritual Court will plead, that the plaintiff is not patron, but such an one, then a prohibition lieth: withal the justices granted, and it was said by Wray, that a doctor of the civil law had been with him, and affirmed to him that their law is, that if one having a benefice with cure of souls accepts an archdeaconry, the archdeaconry is void; but he said, that he conceived that upon the statute of 21 H. 8. the law is qualified by reason of a proviso there,

scil. provided that no deanry, archdeaconry, &c. be taken or comprehended under the name of a benefice, having cure of souls, in any article above specified.

CCCCXLIII. Pasch. 30 Eliz. In the Kings Bench.

Award.

One was bounden to stand to the award of two arbitrators, who award that the party shall pay unto a stranger or his assigns 200l. before such a day, the stranger before the day dieth, and B. takes letters of administration; and if the obligor shall pay the mony to the administrator, or that the obligor should be discharged was the question; and it was the opinion of the whole Court, that the mony should be paid to the administrator, for he is assignee: and by Gawdy Justice, If the word assignee had been left out, yet the payment ought to be made to the administrator, quod Coke affirmavit.

CCCCXLIV. Pasch. 30 Eliz. In the Kings Bench.

Steward.

One sued in the Kings Bench for costs given upon a suit depending in the hundred Court, and the sum of the costs was under 40s. and the plaintiff declared, that at the Court holden before the steward, secundum consuetudinem manerii prædict. it was objected, that the steward is not judge in such court, but the suitors; to which it was answered by the justices, that by a custom in a hundred court a steward may be judge, and so it hath been holden; and here the plaintiff hath declared upon the custom, for the declaration is secund. consuetudinem manerii, also the subject may sue here in the Kings Bench for a lesser sum than 40s. as if 10s. costs be given in any suit here, suit to such costs lieth here in this Court.

[317] Mich. 30 & 31 Eliz. In the Kings Bench.

CCCCXLV. Pigot and Harringtons Case.

Error. Attaint. Fine upon an Infant reversed.

Pigot brought a writ of error upon a fine levied by him within age, the case was, that the husband and wife were tenants for life, the remainder to the infant in fee, and they three levied a fine, and the infant only brought the writ of error. It was objected by Tanfield, that they all three ought to joyn in this writ, and the husband and wife ought to be summoned and severed. Atkinson contrary, for here the husband and wife have not any cause of action, but the infant only is grieved by the fine, 35 H. 6. 19, 20, 21, &c. In conspiracy against many, it was found for the plaintiff, and one of the defendants brought attaint, and assigned the false oath in omnibus quæ dixerunt, but afterwards abridged the assignment of the false oath, as to the damages, and so the attaint well lies. Two women are joynt-tenants, they take husbands, the husbands and their wives make a feoffment in fee, the husbands dye, the wives shall have several cui in vita's, for the coverture of the one was not the coverture of the other, 7 H. 4. 112. In appeal against four, they were outlawed, and two of them brought error upon it, and good, 29 E. 3. 14. In assize against three coparceners, they plead by bailiff, nul tenent de franktenement, &c. and found that two of them were disseisors and tenants, and that the third had nothing, and afterwards the three coparceners brought attaint, and after appearance, the third sister, who was acquit, was nonsuit, and afterwards by award the writ did abate. Tanfield, Although that the cause be several, yet the erronious act was joynt, and the receiving of the fine, and that record being entire, ought to be pursued accordingly, and then the husband and wife shall be summoned and severed, and it is not like to the case of 29 E. 3. cited before, for there the third coparcener had not any cause of

attaint, for no verdict passed against her. Wray, As the error is here assigned, the writ is well brought, for the error is not assigned in the record, but without it in the person of the infant, and that is the cause of the action by him and for no other. Two infants levy a fine, although they joyn in error, yet they ought to assign errors severally, and they may sue several writs of error; and afterwards it was holden by the Court that the writ was good, and the fine reversed as to the infant only.

1 Cro. 11.

MICH. 30 & 31 ELIZ. IN THE KINGS BENCH.

CCCCXLVI. SCOVELL AND CAVELS CASE.

Leases.

In ejectione firmæ by Scovell against Cavel, the declaration was general upon a lease made by William Pain, and it was found by special verdict, that William Leversedge was seised of the lands, &c. and leased the same to Stephen Cavel, John Cavel, and William Pain, habend. to them for their lives and for the life of the survivor of them; provided always, and it was covenanted, granted and agreed betwixt the parties, that the said John Cavel, and William Pain, should not take any benefit, profit or commodity of the land, during the life of Stephen Cavel, and further that the said William Pain should not take any benefit, &c. during the life of John Cavel, &c. Stephen Cavel, died, John Cavel entred, and afterwards William Pain entred, and made the lease to the plaintiff, upon whom the defendant entred; and if the entry of William Pain were lawful was the question. **[318]** Gawdy Serjant, His entry is not lawful. It will be agreed, that if a man lease to three for their lives, they are joynt-tenants, but if by the habendum the estate be limited to them by way of remainder, the joynt estate in the premises is gone, and the land demised shall go in remainder; and I agree that in deeds-poll, the words shall be taken strong against the grantor, contrary in the case of indentures, the words there shall be taken according to the intent of the parties, for there the words are the words of both: see Browning and Beestons case. 2 and 3. Ma. Plowd. 132. where by indenture the lessee covenanted to render and pay for the land leased such a rent, the same is a good reservation, although it be not by apt words; and here in our case, this proviso and covenant, grant and agreement doth amount to such a limitation by way of remainder, especially when such a clause followeth immediately after the habendum. Coke contrary: The office of the habendum is to limit and explain the estate contained in the premises, and here the habendum hath done its office, and made it a joynt estate, and therefore the clause afterward comes too late, and in truth is repugnant and utterly void, as to such purpose; but perhaps an action of covenant lies upon it. Wray, It hath been by me adjudged, if a lease be made to three habendum successive, the same is a void word, and the lessees are joynt-tenants; contrary of copyhold by reason of custom; and here the proviso and the clause following, is contrary to the habendum, and repugnant, and so void, as to the dividing of the estate by way of remainder, which Gawdy Justice granted. Heale Serjeant, This case hath been adjudged, 16 Eliz. A lease to three habendum to the use of the first for life, and after to the use of the second for life, and after to the use of the third for life, the same is good. Clench Justice, This proviso follows the habendum, and is a sentence to explain the sentence. Wray, & Shute, It is another sentence, although it immediately follows the habendum. Clench, If the words had been provided, that although it be limited, (ut supra) in the habendum, scil. the first named shall have the lands to himself for life, &c. it had been good by way of remainder. Wray, Our case at bar, is not that any person shall take the remainder, but that any of them shall not take the profits during the life of the other. Tanfield took exception to the verdict, because the life of Pain is not found in the verdict. Coke, This is a verdict and no pleading, and the opinion of the Court was, that the verdict was good, notwithstanding the said exception, and afterwards judgment was given for the plaintiff.

1 Cro. 89.

MICH. 30 & 31 ELIZ. IN THE KINGS BENCH.

CCCCXLVII. HUDSON AND LEIGHS CASE.

[S. C. 4 Co. Rep. 43. See *Midland Insurance Company* v. *Smith*, 1881, 6 Q. B. D. 561; *Brunsden* v. *Humphrey*, 1884, 14 Q. B. D. 147.]

Appeal of Maheim. Damages.

Robert Hudson brought an appeal of mayhem against Robert Leigh for maiming his right hand, and for cutting of his veins and sinews, which by that means are become dry, so as thereby he hath lost the use of his fingers. To which the defendant pleaded, that heretofore the plaintiff had brought against him an action of assault and battery, and wounding, and therein had judgment to recover, and execution was sued forth by scire facias, and satisfaction acknowledged upon record, of 200 marks assisted by the jury for the damages, and 11l. 10s. de incremento by the Court, with averment of all identities. Cooper Serjeant, The same is a good bar, and although that an appeal, and an action of trespass are diverse actions in nature, and in many circumstances, yet as to the recovery of damages, the one shall bind the other, see 38 E. 3. 17. a good case. In trespass for breaking of his close and battery, the defendant pleaded, that before that the plaintiff by bill in the marshalsey hath recovered his damages for the **[319]** same trespass, &c. and vouched the record, and the record was sent, the which was varying from the record pleaded; for the record vouched, was only of battery without any thing of breaking of the close: and also the battery is taxed at another day, &c. and with averment; yet as to the battery it was holden good enough with averment, and as to the breaking of the close the plaintiff had judgment, see 41 E. 3. brev. 548. 12 R. 2. Coronæ 110. and the case betwixt Rider plaintiff and Cobham defendant, Pasch. 19 Eliz. Rot. 74. it was clearly holden and adjudged, that after a recovery in trespass an appeal of maheim doth not lie; and the book which deceives the plaintiff is 22 E. 3. 82. where it is said by Thorp, that notwithstanding recovery in appeal of maheim, yet he may after recover in trespass, but non dicit e contra. Popham contrary, The plea in bar is not good, for the averment is, that the stroke and the wounding supposed in the writ of trespass, and in his appeal of maheim are all one, but it is not averred that any damages were given for the maheim, or that the maheim was given in evidence; for it might be, that there was not any maheim when the trespass was brought, but that after by the drying of the wound it became a maheim, and then the action did rise; as if a man upon a contract promiseth to pay me 10l. at Michaelmas, and other 10l. at Christmas, if he doth not pay the 10l. at Michaelmas, I may have an action upon the promise for the not payment of that 10l. and afterwards I may have another action and recover damages for the not payment of the 10l. at Christmas, but if I do not begin any action before Christmas, I cannot recover damages but once, for the whole promise, and damages shall be given in evidence; and if I be disseised, I may recover damages for the first entry, and notwithstanding that I shall have an assise, and if I do re-enter, I shall have trespass and recover damages for the mean profits, and the damages recovered for the first entry shall be recouped; and the book cited before Fitz. Coronæ 110, doth not make for the defendant, but rather for the plaintiff, for there it is averred, that the maheim was given in evidence, in the action of trespass, which it is not in our case. Egerton Solicitor, We have shewed, that succisio venarum, in this appeal specified is eadem succisio & vulneratio mentioned in the trespass. Coke, Although the identity of the wounding and cutting of the veins are averred, yet it is not averred, that the damages recovered in the trespass were given for this maheim. Wray Chief Justice, The jurors are to take consideration of the wound in an action of trespass, and to give damages according to the hurt, and we ought to think that they have done accordingly, and if they have not so done, the party may pray that the Court by inspection would adjudge upon it, and so increase the damages: but now when the jury hath given great damages, scil. 200 marks, with which the party hath been contented, it should be hard to give the plaintiff another

action, and if there be any such special matter, that it was not become a maheim at the time of the action of trespass brought, but it is become a maheim of later time by drying, the plaintiff ought to have shewed the same to the Court, and so have helped himself, for otherwise it shall not be so intended, but that the averment made by the defendant, is good enough to oust the plaintiff of this action ; and the judgment cited 19 Eliz. before, was given by me, after I was constituted Chief Justice, and this bar as I conceive was drawn out of the pleading in 19 Eliz. and afterwards judgment was given against the plaintiff.

4 Co. 43. Ante 302.

[320] MICH. 30 & 31 ELIZ. IN THE KINGS BENCH.

CCCCXLVIII. CROSMAN AND READS CASE.

Intermarriage. Debt by Executors.

The case was, that I. S. made his wife his executrix and dyed, I. D. being then endebted to the testator in sixty pounds upon a simple contract, the wife executrix took to husband the said I. D. I. D. made his executor and dyed, a creditor of I. S. brought an action of debt against the wife executrix of I. S. and upon the pleading, the matter in question was, if by the entermarriage of the wife with the debtor of the testator, the same was a devastavit or not : and if the said debt of sixty pounds due by I. D. should be assets in her hands : and per curiam, it is no devastavit, nor assets, as is supposed : for the woman may have an action against the executor of I. D. And it was agreed by the Court, that if a man makes his debtor and a stranger his executors, and the debtor dieth, the surviving executor may have an action of debt against the executor of the debtor ; and so it was adjudged in the principal case.

1 Cro. 114.

MICH. 31 & 32 ELIZ. IN THE KINGS BENCH.

CCCCXLIX. WOLLMAN AND FIES CASE.

Assumpsit.

In an action upon the case upon assumpsit that the plaintiff should enjoy such lands for so many years : the defendant pleaded the statute of 13 & 14 Eliz. because the land is the glebe land of such a parsonage, and in truth the defendant did misrecite the statute : for the statute is, no lease after the fifteenth day of May : and (the pleading is hereafter to be made) secondly, the statute is of any benefice with cure (the pleading is of any benefice :) thirdly, the statute is, without absence above eighty, and the pleading is (without absence by the space of eighty) days : and for these causes the plaintiff had judgment.

1 Cro. 179.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCCL. FROND AND BATTS CASE.

Debt. Payment to the Wife not Good.

In debt upon a bond upon condition to stand to the award of I. S. the defendant pleaded, that the said I. S. had arbitrated, that the defendant should pay to the plaintiff ten pounds, and he said he had paid it to the plaintiffs wife who received it, upon which the plaintiff did demur : and judgment was given for the plaintiff.

CCCCLI. Trin. 31 Eliz. In the Kings Bench.

Grants of the King of the Office of Marshal of the Kings Bench.

The Queen granted to George Earl of Shrewsbury, an. 15. of her reign, the office of Earl Marshal of England, and now came the said earl and prayed, that I. S. one of his servants, to whom he had granted the office of Marshal of the Kings Bench might be to it, because the same is an office incident to his office, and in his power to grant, and that Knowles, to whom the Queen had granted the said office of Marshal of the Kings Bench by the attainder of North. be removed: and a president was shewed 14 & 15 Eliz. betwixt Gawdy and Verney, where it was agreed, that the **[321]** said office was a several office from the said great office, and not incident to it; and as to the case of 39 H. 6. 33. 34. the truth is, the said office of Marshal of the Kings Bench was granted expresly by the duke by express words, and so he had it not as incident to his office of Marshal of England: on the other side, there were three presidents shewed, first in the time of E. 2. that the office of the Marshal of the Kings Bench was appendant to the said office of Marshal of England: secondly, 8 R. 2. when the said great office was in the King, he granted the said office of Marshal of the Kings Bench: but 20 R. 2. both offices were rejoyned as they were before in ancient time, and they were also shewed letters patents of 4 E. 4. and 19 H. 8. by which it appeared, that the said inferiour office had time out of mind been part of the great office; and it was moved, that when the said great office is in the Kings hands, and the King grants the said under office, if now this office be not severed from the great office for ever. Wray, It is no severance, for the chief office is an office of dignity, which may remain in the King, but this under office is an office of necessity, and the King himself cannot execute it, by which of necessity he ought to grant it. Another matter was moved, if the grant of the King unto the Earl of Shrewsbury were good, because in it the grant to Verney of the said under office, is not recited according to the statute of 6 H. 8. 9. As 26 E. 3. 60. the King seised of the honor of Pickring, to which a forrest was appendant, the bayliwick of which forrest he granted in fee rendring rent, and afterwards he granted the honor with appurtenances, and afterwards the bailiff committed a forfeiture, and that was found in eyre, the grantee of the honor shall seise it, yet the King shall have the rent: and here the Earl of Shrewsbury shall have this office in his power to grant; and so much the rather because it was granted but for life.

Trin. 31 Eliz. In the Kings Bench.

CCCCLII. Michill and Hores Case.

Attachment of Goods by Custom of Exeter. Error.

Michil did affirm a plaint in the Court of the city of Exeter against Hore for twenty pounds, and upon nihil returned, it was surmised; that Trosse had certain monies in his hands due to Hore, and according to the custom of Exeter the said monies were attached in the hands of Trosse, who appeared upon the attachment, and pleaded, that he owed nothing to Hore, upon which there was a demurrer, and judgment given against Trosse because that Trosse ought to have pleaded, not only that he owed him nothing, but further that he had not any goods of Hores in his hands: and thereupon Trosse brought a writ of error, and assigned the error in the principal matter, upon which it was demurred, and judgment given against the plaintiff, because that the plea of Trosse (that he owed him nothing) is good enough, for if there be not a debt, it is not attachable upon such attachment: and it is a good plea to a common intent, and altogether in use in London, where such custom is: another error was assigned, for that Michill had recovered costs against Trosse, where it ought not to be; and also judgment is not given, that Trosse should be discharged against Hore; and afterwards the judgment given in Exeter was reversed.

[322] MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS.

CCCCLIII. DENNIS AND SAINT JOHNS CASE.

Debt. Non est factum.

In debt upon an obligation, against Oliver Saint John, and Alice his wife, as heir of her father: the defendants pleaded, non est factum of the father: and it was found by special verdict, that the obligation was made by the father of the wife to the plaintiff and another, where as in truth, the plaintiff hath declared upon an obligation made to himself only without speaking of any other joynt obligee, and that the plaintiff as survivor hath brought the action, and if upon the matter it shall be said the deed of the defendant in manner as the plaintiff hath declared, the jury refer unto the Court: and the case, 14 E. 4. 1. b. If three enfeoff me, and I plead, that two did enfeoff me and the same be traversed, it shall be found against me, for the feoffment is a joynt act by them all: but if a man enfeoffeth me and two others, and they dye, so as I have all by survivor, in pleading I may shew the feoffment was made to me alone: so 46 E. 3. 17. a. Three joynt-tenants in fee make a lease for life, and afterwards two of the joynt-tenants release to the third, who brings an action of wast against the lessee, and the writ was, that he held of his lease only, and the writ was awarded good. Walmesley, This plea, non est factum, upon this matter is no good plea, for he hath not pleaded it respective as to the obligation, but generally, non est factum suum, which refers to the obligor only, and the issue is not whether he made the deed to the plaintiff or not, but generally whether he made it at all: for there is a difference, nihil debet, for that refers to the plaintiff, and where he pleads non est factum: which Shuttleworth granted: see 1 Eliz. Dyer, 167. Tawes case, this plea non est factum, hath not any respect to the obligee, for if the obligee be a monk, and there is another who bears the name of the obligee, yet in those cases, the obligor cannot safely plead non est factum; but where one is sued who bears the name of the obligor, there non est factum is a good plea: and see 10 Eliz. Dyer, 279. W. S. was bound in an obligation to one H. by the name of I. S. and upon that obligation an action was brought against him by the name of W. S. and he pleaded non est factum, and the special matter was found, and it was ruled, that upon that verdict the plaintiff should not recover, but the best way for the plaintiff was, to sue the defendant by the name by which he is bound, and then if he appear and plead (ut supra) he shall be concluded by the obligation: and the Court was clear of opinion, that the plaintiff ought to have declared upon the special matter.

1 Cro. 494.

HILL. 31 ELIZ. ROT. 1428. IN THE COMMON PLEAS.

CCCCLIV. WILLIS AND WHITEWOODS CASE.

Leases. Surrenders.

The case was, That A. was seised of certain lands holden in socage, and leased the same to I. S. for many years, and dyed, his heir within the age of fourteen years, the wife of A. being guardian in socage leased the same land by indenture to the same I. S. for years, if the first lease was surrendred, or determined was the question: Anderson, Surrendred it cannot be, for the guardian hath not any reversion capable of a surrender, but only an authority given to her by the law to take the profits to the use of the heir: but yet perhaps it is determined by consequence and operation of law: as if A. lease to B. for one hundred years, and afterwards granteth **[323]** the reversion to C. for two years, who leaseth to B. for two years, who accepts the lease, the same is not any surrender, for a term of one hundred years cannot be drowned in a reversion for two years, yet the first lease is determined, which Periam granted: and by Windham, If a lease be made to begin at Michaelmas, and before that time, the lessor makes a new lease to the same lessee to begin presently, the same is not any surrender, and yet thereby the first lease is determined, and so in the principal

case, which Anderson granted, but Periam doubted of it; and he said, guardian in socage hath such an estate in the reversion that he may enter for a condition broken: Anderson, The same is not in respect of any estate that he hath, but in the name and right of the heir, and not by reason of any reversion.

Ow. 45. 56. Hutt. 105. Ant. 158. Ante. 303.

TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CCCCLV. NORWOOD AND DENNIS CASE.

Quare Impedit.

In a quare impedit by Norwood against Dennis, the issue was, if the advowson was appendant to the manor of D. or in gross, and the jury found that it was appendant, and further found, that the Queen had right, and title to present, for she had presented at the two last avoidances. Anderson and Periam Justices, If it appeareth unto the Court upon the pleading, that the King hath title to present. The Court shall award a writ to the bishop for the King, but here appeareth no title for the Queen upon the pleading, but only upon the verdict, so as the one part or the other may answer to it: and because the jury have found for the plaintiff, the title found for the Queen shall not be respected, but as a meer nugation and surplusage, for the same was out of their issue, and their charge, and it is no more then if one comes into the Court, and informs us of any title for the Queen, there the Court ought not to regard it.

TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CCCCLVI. GREEN AND THE HUNDRED OF BUCCLE-CHURCHES CASE.

Action upon the Statute of Huy and Cry.

In an action upon the Statute of Huy and Cry, the case was, that Green did deliver a certain sum of money to a carryer, who put the same (amongst other things) in his cart, and sent a boy of the age of twelve years with the cart before, and he himself stayed a short time in the inn, and afterwards went his way, and before he could get to the cart, the cart was robbed and the money carryed away: the boy made huy and cry, and came unto a justice of peace, and prayed he would examine him, but he would not, but the carryer himself would not go to be examined, wherefore Green himself went to a justice of peace to be examined, and so was, and afterwards brought this action: and it was holden by the Court; that here the plaintiff had failed of his action for want of sufficient examination, for the servant who was robbed ought to be examined, and the examination of the master or owner of the goods who was not present at the robbery is not at any purpose to enable the plaintiff to this action, for the party robbed ought to be examined: and it was said by some, that where an action doth not lye upon the new statute of 27 Eliz. the party may have an action upon the old statute, but others were against it, for the statute of 27 Eliz. is in the negative, so as if the action doth not lye upon it, no action lyeth at all: and it was moved by Periam and Anderson, that the plaintiff might have an action upon his case framed upon the said statute of 27 Eliz. against the justice of peace who refused to examine the boy: **[324]** but Windham doubted of it, because the justice of peace is a Judge of Record, and for such thing as he doth as judge, no action lieth: to which it was answered by Periam and Anderson, that the examination in such case is not made by him as judge or justice of peace, but as a minister appointed for the examination by the statute, &c.

1 Cro. 14.

TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CCCCLVII. STEVINSON CASE.

Debt.

In debt upon a bond, the condition was, that whereas the plaintiff had covenanted with the defendant, that it should be lawful for the defendant to cut down wood for fire-boot and hedge-boot without making any wast, or cutting more than necessary: and the plaintiff assigned the breach in that covenant (which is in truth the covenant of the plaintiff) that the defendant had committed wast in felling wood, &c. And the condition was to perform all covenants and agreements: and exception was taken because that the condition ought to extend but unto covenants to be performed on the part of the lessee; but the exception was not allowed, for it is the agreement of the lessee, although it be the covenant of the lessor, the plaintiff.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCCLVIII. FOSTER AND WILSON AGAINST MAPES.

Covenant.

Foster and Wilson brought an action of covenant against Mapes, and declared, that by certain indentures of articles, it was agreed betwixt the plaintiffs and the defendant, whereof one part was sealed with the seal of the defendant, and the other with the seals of the plaintiffs, that whereas the defendant had leased to the plaintiffs the parsonage of B., he covenanted, that he would keep the plaintiffs harmless concerning the same against one N. B.: and declared further, that the said N. B. had entred upon them; and that at the time of the making of the indentures, he was parson of B. The defendant had pleaded non est factum, and it was found by special verdict, that the defendant sealed one part of the indentures, and that one of the plaintiffs only sealed the other part: exception was taken to the declaration because there is not set forth in it any sufficient breach, for when the defendant covenants to save the plaintiffs harmless against B. the same is to be intended of a lawful eviction: as in Puttenhams case, 13 Eliz. Dyer, 306. But if the covenant had been, that the lessee should peaceably enjoy the term, sine ejectione & interruptione alicujus personæ, upon an unlawful entry of a wrong doer, an action lieth: see 16 Eliz. Dyer, 328. And here the finding of N. B. to be parson at the time is to no purpose: and there is not layed any express title in N. B. but only by implication, for it might be that the parson had leased to the defendant rendring rent with clause of re-entry, and the parson had entred for the condition broken, and the plaintiffs ought to have shewed, and not generally, that he had entred, and that he was parson: also it is layed, that N. B. was parson at the time of the entry, but it is not shewed, what entry, which may be taken, that he was parson at the time the plaintiffs entred by virtue of their lease, and not when the said N. B. entred upon the plaintiffs: also the plaintiffs have not declared, that they had entred by force of the lease **[325]** aforesaid, and if not, then they cannot be ejected, &c. and then no breach of covenant. Pudsey contrary, We have declared, that the parsonage was demised to us, and that N. B. being parson hath entred; and the record was read. i. That where the defendant had demised to the plaintiffs the parsonage of B. it was agreed, that the defendant always should keep harmless the plaintiffs and the premisses against N. B. for and concerning omnibus pertinentiis, &c. Tanfield, The breach is well laid, and the words of the covenants amount to as much, as if he had said, that he would keep them from all interruption; and the difference is, when the covenant is general, i. keep harmless, &c. the same doth not extend but to a lawful interruption; but when it is special against such an one, there it extends to any interruption whatsoever. Gawdy Justice conceived, that the breach of covenant is well laid, i. that N. B. hath entred upon them, and removed them, and be it by wrong or by right, the same is a breach, for he hath not kept harmless the plaintiffs for the premisses and profits of them, against N. B. 2 E. 4. 15.

A bond was endorsed upon condition, that the obligor should defend to the obligee for such a time, such land whereof he had before enfeoffed him; it was holden, that if a stranger ousteth the obligee, without any title, the bond is forfeited by reason of the word (defend,) and although the plaintiffs have not laid in their declaration, that they have entred, the same is not material; for it is not the point of the action. Fenner Justice conceived, that the difference put at the Bar betwixt general covenant and special, is good law, and that in case of such a special covenant interruption without title gives an action: but he conceived, that because it is not alledged that the plaintiffs had entred, that there was no breach of covenant. See 9 Eliz. Dyer 257. Wray, The words of the covenant do amount to peaceable enjoying during the term, and so to an interruption without title. Fenner, 18 E. 4. 27. A. is bound to B. to save B. harmless from an obligation made by the plaintiff to one R. if R. affirm a plaint of debt against the said plaintiff upon the said bond, the bond of A. is forfeit; but here the plaintiffs cannot be harmed, for they have not entred. Gawdy, The conclusion of the declaration is, that N. B. entred upon the profits and removed them, so as they could not take the profits thereof; so it is implied, that the plaintiffs had entred, and afterwards judgment was given for the plaintiff.

Ow. 100. 1 Cro. 212. 1 Inst. 384.

Trin. 31 Eliz. In the Kings Bench.

CCCCLIX. Marshes Case.

Error by Executors to reverse an Attainder of the Testator.

Marsh, executor of one Nicholson, brought a writ of error to reverse an outlawry in felony had against his testator; the error assigned was plain; but it was moved, that this writ of error would not lye. Gawdy, The action will well lye, for by this suit the plaintiff intends to reverse, and so undo the outlawry, for which cause this matter ought not to be objected against him, for the executor may have this action as well as the heir. Fenner Justice, Where the principal reverseth the attainder, the same shall extend to the accessory. In assise against tenant and disseisor, each of them may have a writ of error, and the reversal by the one shall make void the record as to both, and he needs not any garnishment, for by intendment the King is to have all his goods, and the King is always presumed present in this Court, quod tota curia concessit; and therefore there needs not any garnishment by scire facias; but Wray said, We use in such cases to call the Attorney General of the King to know if he can say any thing wherefore the outlawry should not be reversed. **[326]** The error assigned was, that the exigent issued forth into London, and the sheriff returned, that he had proclaimed the party de com. in com. quousque, &c. where he ought say, de Hustingo in Hustingum, and that was holden by the Court clearly to be error; and afterwards at another day it was moved by Coke, that a man attainted of felony could not make executors, for he is dead in law, and as Bracton saith, solus Deus facit hæredes & homo nominat executores, and therefore the heir only shall have a writ of error: also an executor cannot have a writ of error, but only upon a judgment given in a personal action; but this attainder is a thing of a higher nature: as where a woman poysoneth her husband, the heir shall not have an appeal, for murder is changed into treason, and that offence is a thing of a higher nature; so this attainder is of a higher nature than in the personalty. Also it may be mischievous to the heir, for the executor may forthwith bring and pursue his writ of error, by which the judgment shall be affirmed, and so the right of the heir shall be bound; also when error is brought to reverse an outlawry of felony, a scire facias ought to be sued against the lords mediate and immediate, which cannot be here at the suit of the executors: also it was found by enquest of the coroner, that the testator fugam fecit, so that thereby if he had been acquitted, he shall lose his goods, and then the executors have not any reason to bring this writ of error; but see 11 H. 4. Error 51. that executors shall have a writ of error of an outlawry pronounced against their testator, and if it be reversed they shall have restitution of the goods of the testator; but it doth not

appear there that it was upon an indictment of felony. Altham, As well the executor as the heir is a person able for to sue a writ of error in such case, as 13 E. 4. where a false oath is given against one in assise and dieth, the heir shall have an attaint for the land, and the executor in respect of the damages. Popham Attorney-General, This outlawry is a real judgment, therefore the executor cannot have error upon it. Wray, It is good that this case be considered, for it may be mischievous, for thereby the executor shall avoid the attainder against the King and the lords. Fenner, That cannot be without a scire facias. Gawdy, The executors shall have this action; and as to that which hath been objected, that the party attainted cannot make executors, the same is no reason, for the executors do pretend that their testator was not lawfully outlawed, and so by this suit they do endeavour to take away that disability, and therefore it ought not to be objected against the executor; and if the case here be, that the testator had not lands, but only goods, there is no reason but that the executors should have a writ of error, otherwise the goods of the testator should be lost; and it was clearly holden by Wray Chief Justice, that the executor might have and pursue this writ of error, the outlawry of the testator notwithstanding; and afterwards the outlawry was reversed accordingly.

Owen Rep. 147. 1 Cro. 22.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCCLX. TRUSSELS CASE.

Habeas corpus. Executions.

Trussel was removed out of the counter of London by habeas corpus into the Kings Bench. Egerton, the Queens solicitor moved the Court, that Trussel was a person attainted of felony, and so had not any lands or goods to satisfie, &c. and also his life was not his own; and upon the return of the habeas corpus it appeared, that Trussel was detained in prison for an execution, and for divers actions; and it was the opinion of the Court, that as to the execution he ought not to be discharged, for then the party should lose his debt for ever; but as to **[327]** the other actions, it was the opinion of all the justices, that Trussel ought to be discharged of them; for a man so attainted ought not to be put to answer, nor taken in execution, and so are all our books; and they said that they had conferred with the justices of the Common Pleas, and with the Barons of the Exchequer; which were of a contrary opinion in this case upon the very matter, and not upon the manner of the pleading; but yet we will discharge our consciences as we have done, for there is not any book against us, Egerton stetit super semitas antiquas, and at last it was awarded, that Trussel should be discharged of all actions brought against him.

Owen Rep. 69. 2 Cro. 213, 516. Co. 3 Inst. 213, 215. Post 329, 330.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCCLXI. SOVERS CASE.

Indictments upon the Statute of 8 *H.* 6. *Restitution.*

Sover and others were indicted upon the statute of 8 H. 6. of forcible entry, because they had expulsed one A. out of his land, and disseised the Mayor and Commonalty of London, who were in reversion, and the same being removed hither, restitution was prayed thereupon, and White for the city, who was in reversion; and the lessor prayed that no restitution might be, for they had let the house to another, and that he who had procured this indictment claimed in by a custom of London, that the executor of the last termor should not be put out, if he shall give as much for it as any other will, whereas in truth there is not any such custom, and for that cause the restitution was stayed; and it was said by the Court, that restitution shall be always made to him in

the reversion, and not to the lessee for years, for he who is disseised shall be restored, and then the lessee may re-enter.

Yelv. 81. Dy. 141, 142.

Trin. 31 Eliz. In the Kings Bench.

CCCCLXII. Beal and Carters Case.

False Imprisonment.

In an action of false imprisonment, the defendant justified because the plaintiff brought a child of the age of six years, and not above, into the parish church of W. & eundem ibidem relinquere voluisset, & intendisset, without keeping or nourishment, to the danger and destruction of the child, & contra pacem, for which the defendant being constable of the said parish arrested the plaintiff, and put him in prison until he did agree and promise to carry the child from whence it came, upon which the plaintiff did demur in law. It was moved, that the justification was good, for every subject might do it, à fortiori a constable; and if in this case the child, being so exposed, should be famished for want of nourishment it had been murder, as it was holden at Winchester before the Lord Chief Baron, 20 Eliz. Another exception was taken to the plea, because he saith (quendam infantem) without naming him, and he ought to say quendam infantem ignotum; but that exception was not allowed. Another exception (ibidem relinquere intendisset) but he doth not say, that he did depart from it, and then his meaning is not traversable, or issuable, or to be tried by jurors. See 22 E. 4. 45. Gawdy Justice, It was a great offence in the plaintiff, but the same ought to be punished according to law; but the constable cannot imprison a subject at his pleasure, but according to law, i. to stay him and bring him before a justice of the peace to be there examined. Wray, If the defendant had pleaded, that he stayed the plaintiff upon that matter, to have brought him before a justice of peace, it had been a good plea. Fennor, The justification had been good, if **[328]** the defendant had pleaded, that the plaintiff refused to carry away the child, so all the justices were of opinion against the plea; but they would not give judgment by reason of the ill example, but they left the parties to compound the matter.

Owen Rep. 98, 287. Antea 50.

Pasch. 33 Eliz. In the Kings Bench.

CCCCLXIII. Cole and Walles Case.

Ejectione Custodiæ lieth not upon a Copyhold Estate.

In an ejectione custodiæ the plaintiff declared, that A. was seised of the manor of D. within which manor are diverse copyholds of inheritance; and that the custom of the manor is, that if any copyholder of inheritance of the said manor dieth, his heir within the age of 14 years, that then the lord of the manor might grant the custody of his body and lands to whom he pleased; and shewed, that one Clevertie a copyholder of inheritance of the said manor died, his son and heir within the age of 14 years, upon which the lord of the manor committed the custody of his body and lands to the plaintiff, and the defendant did eject him, and upon not guilty it was found for the plaintiff. It was moved in arrest of judgment, that this action would not lye upon a copyhold estate, quod tota curia concessit; and yet it was said, that an ejectione firmæ lieth upon a demise of copyhold land, by lease of a copyholder himself, but not upon a demise by the lord of the copyhold, quod fuit concessum; and afterwards the case was moved on the plaintiffs side, and it was said, that this was but an action upon the case, in the nature of an ejectione firmæ, and this interest is not granted by copy, but entred only into the court roll: so it is not an interest by copy, but by the

common law, for the words are, Quod dominus commisit custodiam, &c. and doth not say in curia ; and afterwards judgment was given for the plaintiff.

1 Cro. 224. Hob. 215. Dyer 302, 303.

TRIN. 33 ELIZ. IN THE KINGS BENCH.

CCCCLXIV. BOND AND BAILES CASE.

Judgment upon a Bond where satisfied before a Statute. Conny and Barhams Case.

Bond brought a scire facias against Bailes, administrator of one T. B. upon a recovery had against the intestate in action of debt. The defendant pleaded, that before the said judgment given, the testator did acknowledge a statute staple to one C. and that the son was not paid in the life of the testator nor after, and that they have not in their hands any goods of the intestate beyond what will satisfie the said statute ; upon which there was a demurrer in law. And Coke argued, that the bar is not good, for here is not pleaded any execution upon the statute, and then the judgment, the statute being of things of as high nature ; that of which execution is sued shall be first served : and if this action had been brought upon a bond the plea had not been good : for although that Brian saith, 21 E. 4. that recognizances shall be paid by executors before bonds, yet that it is to be intended when a scire facias is to be sued upon it, otherwise not : and 4 H. 6. 8. in a scire facias upon a judgment fully administred at the day of the writ brought is a good plea ; by which it appeareth, that if the executors had paid the debt upon the obligation before the writ brought, it had been good. See 12 E. 3. Executors 73. in a scire facias upon a judgment in debt given against the testator, enquiry shall be what goods the executors had the day of the scire facias : and he said, it was moved by Anderson, 20 Eliz. in this Court. In debt **[329]** upon a bond against executors ; the defendant pleaded, that the testator was indebted by judgment to A. and that they had not more than to satisfie the same, and it was holden no plea, if not that he pleaded further, that a scire facias was sued upon it. Wray said, The same is not law, and there is a difference when the judgment is given against the testator himself, and where against the executors ; for where judgments are given against executors, the judgment which was given before shall be first executed ; but if two judgments be given against the testator, he who first sues execution against the executors shall be first satisfied, because they are things of equal nature, and before suit it is in the election of the executor which of them he will pay. See 9 E. 4. 12. As if two men have tallies out of the Exchequer, he which first offers his tally to the officer shall be first paid ; but before that, it is in the choice of the officer which of them shall be first satisfied ; and therefore 19 H. 6. if the lease enrolled be lost, the enrolment is not of any effect, and Pasch. 20 Eliz. our very case was moved in the Common Pleas, in a scire facias upon a judgment given against the testator ; the executor pleaded, that the testator had acknowledged a statute before not satisfied, ultra quæ, &c. and it was holden no plea, for a statute is but a private and pocket record, as they called it ; and 32 Eliz. betwixt Conny and Barham the same plea was pleaded, and holden no plea. Also if this plea should be allowed, great mischiefs would follow : for then no debts should be satisfied by the executors, for it might be that the statute was made for performance of covenants, which covenants perhaps shall never be broken : and afterwards judgment was given for the plaintiff.

3 Len. 370. Roll. 926.

TRIN. 32 ELIZ. IN THE KINGS BENCH.

CCCCLXV. CREW AND BAILS CASE.

Error. Priviledge.

A writ of error was brought upon a judgment given in the Common Pleas, in a bill of priviledge brought by an attorney of the said Court upon an obligation ; and

upon the said judgment issued forth process of execution, upon which the defendant was outlawed; and the error was assigned in this, that upon that judgment process of outlawry doth not lie, for capias is not in the original action; and so was the opinion of the whole Court, being upon a bill of priviledge, and the outlawry was reversed, and the error was assigned in the first judgment, because there were not fifteen days betwixt the teste of the venire facias and the return of it; but that was not allowed, for it is helped by the statute of 18 Eliz. cap. 14.

1 Cro. 216.

Trin. 30 Eliz. In the Kings Bench.

CCCCLXVI. Wade and Presthalls Case.

Debt. Plea in disability of himself not allowed. Execution against a person attainted. Burchets Case. Regula. Abatement of writ. Cases where a man shall take advantage of his own wrong. Marbery and Worrals Case.

William Wade brought an action of debt against Presthall; the defendant pleaded, that he was attainted of treason, not restored, nor pardoned, and demanded judgment if he should be put to answer, upon which the plaintiff did demur. It was argued for the plaintiff, that the plea is not good, for the defendant shall not take benefit of his own wrong: a person attainted gives his goods, he shall not avoid it; a woman takes a husband, thereby she hath abated her own writ. It is true, that a person attainted is a dead man, it is so as to himself, but not as to others, 33 H. 6. a person attainted is murdered, his wife shall have an appeal, so as to all respects he is **[330]** not dead, and although as yet the plaintiff cannot have any execution against the defendant, yet here is a possibility to have execution, if the defendant get his pardon: as a man shall have warrantia chartæ although he be not impleaded, and yet cannot have execution, but there is a possibility to have execution, 22 E. 3. 19. A rent granted to one in fee upon condition, that if the grantee die, his heir within age, that the rent shall cease during the nonage, the grantee dieth, his heir within age, his wife brought dower presently and recovered, and yet she cannot have execution, but yet there is a possibility to have execution, viz. upon the full age of the heir. Coke contr. By his attainder he hath lost his goods, lands, life, degree, for he is now become terræ filius, and he cannot draw blood from his father, nor afford blood to his son or his posterity, so as he hath neither ancestor nor heir; and as to the possibility the same is very remote, for the law doth not intend that he shall be pardoned; and see 6 H. 4. 64. A man committed a felony, and afterwards committed another felony, and after is attainted of one of them, he shall not be put to answer to the other; but if he obtain his charter of pardon, he shall answer to the other. See also 10 H. 4. 227. tit. Coronæ. Popham Attorney General; the defendant ought to answer, for none shall have advantage of his own wrong: the plaintiff is made a knight pendant the writ, it shall abate because his own act; but here treasons are so heinous, that none shall have ease, benefit, or discharge thereby: and if the defendant shall not be put to answer until he hath his pardon, then the action is now suspended, and an action personal once suspended is gone for ever; and he cited 29 E. 3. 61. in the Book of Assizes, where it is said by Sharp, Execution upon a statute may be sued against a man attainted; and he said, that if the enemy of the King comes into England, and becomes bounden to a subject in twenty pounds he shall be put to answer, notwithstanding that interest that the king hath in him. Harris Serjeant to the same intent, he conceived by 33 H. 6. 1. that traitors are to answer; for if traitors break the goal, the goaler shall answer for their escape, for the goaler hath remedy against them, contrary of the Kings enemies; and he cited the case of one Burchet, who being attainted of treason struck another in the Tower, for which notwithstanding his attainder he was put to answer. Egerton Solicitor General: And he said, that the action is not suspended; but in as much as every action is used to recover a thing detained, or to satisfie a wrong, if it can appear that the party cannot be satisfied according to his case he shall not proceed: and in this

case the plaintiff, if he should obtain judgment could not have execution by the common law, for he hath no goods, nor by the statute of Westm. 2. by elegit, for he hath no lands, nor by the statute of 25 E. 3. by his body, for it is at the Kings pleasure, and then to what purpose shall the plaintiff sue; and it is a general rule, that in all actions where the thing demanded cannot be had, or the person against whom the thing is demanded cannot yield the thing, that the writ shall abate: as in a writ of annuity by grantee of an annuity for years the term expireth, the writ shall abate; tenant in special tail brings wast, and pendant the writ his issue dieth, the writ shall abate, &c. 2 E. 4. 1. A man outlawed of felony pleaded in dis-affirmance of the outlawry, and yet he was not put to answer until he had his pardon, and then he shall answer: and as to the case of 33 H. 6. 1. it doth not appear that the traitors were attainted, and then there is good remedy enough: and Burchets case cannot be resembled to our case, for although that by the attainder the body of the party might be at the Kings pleasure, yet his body may be punished for another offence, for the example of others. And as to Tressels case, who in such case was put to answer, I grant it, for he concluded judgment if action, and so admitted him **[331]** a person able to answer, and then it could not be a good plea in bar. And in Ognels case, the return of the sheriff shall bind them, for upon process against a person attainted they returned cepi, where they ought to have returned the special matter without a cepi; but now this general return shall bind them, and by that he shall be concluded to say, that the party was not in execution: and this plea is not any disabling of the defendant; but he informs the judges, that he is not a person able to answer to the plaintiff. As in a præcipe quod reddat the party pleads non-tenure, the same is no disabling of his person, but a shewing to the Court that he cannot yield to the party his demand: a man shall not take advantage of his own wrong, i. in the same thing in which the wrong is supposed, or against him against whom the wrong is supposed to be done; but in other cases he shall take advantage of his own wrong, as Littleton, If a lease for life be made, the remainder over in fee, and he in the remainder entreth upon tenant for life, and disseiseth him, the same is a good seisin, upon which he may have a writ of right, Littleton 112. 35 E. 3. Droit 30. And yet this seisin was by wrong. And there was a case betwixt Marbery and Worral in the Exchequer, the lessor entred upon his lessee for life, made a feoffment in fee with clause of re-entry, the lessee re-entred, the lessor at the day came upon the land and demanded the rent which was not paid; it was holden the same is a good demand of the rent, and yet he is a trespassor to the lessee. And in another case, a man shall take advantage of his own wrong, Fitz. N. B. 35. N. An infant hath an advowson by descent, the church becomes void, he who hath right paramount usurps, and presents to the church, and the 6 months pass; now by this tortious usurpation he is remitted, and the infant out of possession, and without remedy: and he cited the case 16 H. 7. 10. A scire facias out of a fine was brought against an abbot, by which fine the predecessor of the abbot granted to find a priest to sing mass in such a chappel, &c. and the abbot pleaded, that the said chappel was become ruinous and decayed, so as no priest could sing mass there; and it was prayed on the part of the plaintiff, that forasmuch as the covenant is confessed, that judgment be given, but that execution should cease until the chappel be rebuilt; but it was not allowed, for this is a good bar for the time, and no judgment shall be given, for it shall be in vain, for it cannot be executed because there is no chappel, and it may be the chappel shall never be built again: and so in the principal case, &c. It was adjorned.

Ante 326. Ante 213.

Trin. 33 Eliz. In the Kings Bench.

CCCCLXVII. Knightley and Spencers Case.

Prohibition. Unity of possession a discharge of Tithes. A Rent in esse to some purposes, and suspended to other.

In a prohibition betwixt Knightley and Spencer, the case was, that Ph. Abbot of Evesham, and all his predecessors time out of mind, &c. were seised as well of the

rectory impropriate of B. in the county of N. and also of the manor of B. in the same parish, &c. until the dissolution of his house; and that by reason thereof the said abbot and all the predecessors had holden the said manor discharged of payment of tithes until the dissolution, &c. and shewed the branch of the statute of 31 H. 8. and that the said abbot did surrender the possessions of the said house to the King, and that the King held the same discharged of the payment of tithes; and that afterwards the King granted unto the ancestor of Knightley the said manor, and to the ancestor of Spencer the said rectory, and although the plaintiff ought de jure to hold the said manor discharged of tithes, yet the defendant sued him in the Spiritual Court, &c. To which the defendant **[332]** confessing the impropriation, pleaded, that the said abbot was seised, ut supra; but that before the making of the said statute of 31 H. 8. the said abbot demised decimas rectoriæ prædict. to one Spencer for 70 years, who made the defendant his executor, and died, and that at the time of the said demise, and dissolution of the said Abby, one Goodman and others were possessed of the said manor until the year 1585, which was the year before the suit began in the Spiritual Court, and that at the time of the dissolution he paid tithes for it, and now the plaintiff refuseth to pay, &c. absque hoc, that the abbot and his predecessors held the said manor quit of the payment of tithes time out of mind, &c. upon which the plaintiff did demur in law. Coke, for the plaintiff, that this unity of possession is a discharge within the statute of 31 H. 8. the words of which are, that the King and his assigns shall have and enjoy the lands discharged and acquitted of tithes, as freely as the said abbot held the same at the day of the dissolution: and see before, whereas divers abbots were acquitted and discharged of, and for the payment of tithes; for the statute doth not intend a real discharge, as by composition or such manner, which is not here, but only a suspension, which is not any discharge in law; and yet in speaking of discharge ordinarily, an actual discharge is understood, as if I be bound by obligation to discharge one of such a bond, it is not enough to pay the mony, but I ought to procure an actual discharge where it is put generally, but where it is put secundum quid, as it is here referred to the dissolution, a suspension is a discharge intended in the said statute; but where the statute is indefinite there an actual discharge is understood, but restrained to a time a suspension sufficeth, and truly it is a discharge within the intent of the statute; for if the statute shall be intended of an absolute discharge, and a discharge in law only, the statute had been superfluous, for the law said so much before; for without such provision the King and his assigns held discharged from payment of tithes. But the makers of the statute knew well enough, that the abbot might have such discharge by divers means, and it should be infinite for the party interessed to enquire of them all; and therefore they did enact briefly, that if at the time of the dissolution they were in any manner freed of payment of tithes the same should be sufficient, and so here is not any wrong unto any, for the parson had all as he had before, and the same is like to the case betwixt Wharton and Morley, 7 Eliz. in the Exchequer, the report of which Mr. Plowden communicated unto me, and it was upon the Statute of 1 E. 6. cap. 14. of Monasteries, that all grants made to the King by any provost, governour, &c. of any manor, &c. shall be good, &c. and the case was, that a prebend of the church of York surrendred to the King, but the surrender was never enrolled, and yet adjudged good upon the statute; for if it was a lawful surrender the same had been good of it self, without any aid of the statute, which was made to supply insufficient assurances, and so in our case for the cause aforesaid, and it should be injurious to drive the jury to enquire of the manner of the discharge, if it were by composition upon the foundation, or by dispensation of the Pope, as cisterc. templarii: and here the plaintiff hath declared of an impropriation before time of memory; and so before the council of Lateran, which was within those 400 years; and 25 Eliz. there was a Sussex case, where the plaintiff declared as here, but they would not proceed; and see Dyer 10 Eliz. 277, 278. The prior of St. John hath priviledge from Rome, that he shall not pay tithes for any land quas propriis manibus aut sumptibus excolant, but their farmers have paid tithes; and it was holden, that in the hands of the farmers tithes should be paid, but after the term ended the patentee should hold discharged, so as the statute hath a favourable construction upon this point. Now it is to see **[333]** if the lease of the rectory by which the defendants claim be good or not, and then admitting that tithes are due in

this case, yet if his lease be void he shall not have a consultation, especially if it appeareth upon his own shewing, as it was holden in a Hampshire case betwixt Sutton and Dowze, which see Mich. 25 & 26 Eliz. and in that case the lease is void, for it was made within a year after the statute of 31 H. 8. the January before, and the statute in April after, for he hath not averred, that the usual rent is reserved, nor that the land was usually let to farm, for which leases otherwise made within the year are absolutely void by the said statute: but it will be objected, that this matter shall come in of our part, and it is sufficient for them to plead the case; but it is not so, as it was lately agreed in Heydons case in the Exchequer, where the case was, that the warden and canons of the colledge of Otery leased certain lands to Heydon for years, and he in pleading of his lease did not shew that the ancient rent was reserved, and therefore naught; and so was the opinion of the justices of the Common Pleas, in the case betwixt the Lord Cromwel and All-Souls Colledge, upon the statute of 18 Eliz. cap. 6. upon a branch of it, by which it was provided, that the third part of the rent reserved upon any lease should be paid in corn, &c. and the leases made to the contrary should be void; and in an ejectione firmæ brought upon such lease, because it was not shewed in the declaration, that the corn was reserved according to the statute, judgment was arrested, and we need not to plead the statute; for although the statute be particular, yet because the King hath interest in it, it shall be holden in law a general Act, and the Judges shall take notice of it, although it be not alledged by the party, as it was ruled in the Lord Barcklays case, 4 Eliz. Plow. 231. but if such rent was reserved, yet the lease cannot be good, for the King cannot have his rent, because it is not incident to the reversion, nor passeth by the grant of the reversion; for it is not a rent, but rather a sum due by reason of contract, which see 30 Ass. 6. A man leaseth a hundred, rendring rent, or grants a rent out of a hundred, the same is not a good rent, but merely void; for a hundred is not manorable, nor can be put in view, nor any assize lieth of such rent. See 9 Ass. 24. and in 20 Eliz. in the case betwixt Corbet and Cleer, the Dean and Chapter of Norwich leased a parsonage and common of pasture, rendring rent, 1 E. 6. they surrendred their possessions to the King, and afterwards the King granted the parsonage without speaking of the common of pasture. It was holden, that the patentee of the parsonage should have all the rent, and no apportionment should be in respect of the common; for all the rent issueth out of the parsonage, and nothing out of the common: so here, for tithes are not an hereditament, which cannot support a rent within this statute, for which cause the lease is void: also he said, that the traverse of the defendant was not well taken, for the plaintiff hath said, that time out of mind, &c. the abbot and his predecessors were seised of the rectory and manor aforesaid, simul & semel, and ratione inde, was discharged, &c. at the time of the dissolution; the defendant traverseth absque hoc, that the abbot and his predecessors held discharged of tithes time out of mind, &c. which is not good, for he hath traversed our conclusion; for our plea is an argument, wheresoever is unity time out of mind, &c. there is a discharge of tithes, but in the abbot was such an unity, ergo he held discharged of tithes, as 21 E. 3. 22. In a præcipe quod reddat, the tenant saith, that the land in demand is parcel of the manor of D. which is ancient demesn, and, &c. to which the plaintiff saith. That it is frank-fee, and the same was not good, for he denies the conclusion; but he ought to plead to the nature of the manor, that it is not ancient demesn, or that the land in demand is not parcel of it. Another matter was, because it is pleaded fuit in **[334]** tenura & occupatione of Goodman and others; but he did not shew by what title, disseisin or lease, or other title, &c. Buckley contrary, And he said, this unity of possession is not any discharge of tithes by the said statute; and as to the case cited before, of 3 H. 7. 12. where tenant in tail of a rent entreth upon the tenant of the land, now is the rent suspended, and then after when he makes a feoffment in fee, by that feoffment the rent is extinguished, which was but suspended at the time of the feoffment; and therefore some have holden, that if after such entry he makes a lease for life of the land, that his rent or seigniory is utterly gone in perpetuum, for by the livery all passeth out of him, which he said cannot be law; and so it seemed to Gawdy Justice, then upon such feoffment with warranty he could not vouch as of land discharged of the rent generally, but as of land discharged at the time of the feoffment, which proves that the suspension is not a discharge, for it was

suspended before the feoffment, and discharged by the feoffment, and so suspension is not a discharge, à fortiori in the case of tithes, for in the case of common, and rent, although they are suspended so as they cannot be actually taken, yet they are to some intent in esse: as where lands holden of other lords are in the hands of the King for primer seisin by reason of prerogative, and during such seisin of the King the lord gets seisin, the same is a good seisin notwithstanding that it was suspended so as he could not distrain: and also in assize of land, damages as to the rent out of the land shall be recouped, therefore the rent in some sort is in esse, and à multo fortiori, this tithe (which is a thing of common right) shall be in esse, but goes with the land, and therefore by unity of possession shall not be suspended, 35 H. 6. he who hath liberty of warren in the lands of another entreth into the land, the warren is not suspended, nor by feoffment of the land is extinct; and in this case upon the matter, during the unity of possession the tithes were paid, although not in specie: also the abbot had the tithes as parson of B. and the land as abbot, and therefore no suspension, for the tithes were always in esse, although not taken in the manner, as tithes commonly are, but by way of retainer, 22 E. 4. 44. A writ of annuity is brought against a prior, and it appeared, that the prior and his successors have used to pay the annuity as parson of D. and not as priors, which parsonage was appointed to the said priory time out of mind, and in the writ the defendant was named prior only, and not parson, and therefore the writ was abated. See 14 E. 4. 4. 10 H. 7. 5. In an action of wast: so Bracebridges case, 14 Eliz. Plowd. 420. The case put by Catiline, if the parson, patron and ordinary make a lease for years, and afterwards the lessee becomes there incumbent, the term is not extinct, for he hath the term in his own right, and the inheritance in the right of his church, which see 30 H. 8. Dyer 43. A parson purchaseth, and after leaseth his parsonage, he himself shall pay tithes notwithstanding this unity; and as to the reason of the other side, that if such discharge of tithes be not intended by the statute, but only a discharge in law, the statute should be in vain, the same is not so; for if the abbot had been discharged by way of release or composition, for the monastery being dissolved the appropriation had been good, if it had not been supported by the statute, and then the release and composition of no force, and the King should not take advantage of it but by this statute; and as to Whartons case before cited, the same cannot be law, for it hath been holden upon the statute of 18 Eliz. of Confirmations, that if an infant maketh a lease to the King, the same is not made good by the statute, for the said statute extends to imperfections in circumstances, and not in substance. And although the lease be not good, yet because the matter of the surmise is naught, although our bar be naught, a consultation ought to **[335]** be granted, also our lease is well pleaded, and if such defect be in it, as hath been objected, the same ought to come in by plea on the other side; and it is not like Heydons case, for there it was found by special verdict, nor to Cromwells case, where such defect was in the declaration, and so no ground of action; as to the traverse it is good enough, as if special bastardy be pleaded against one born before the marriage, and so bastard, the other party shall traverse generally the bastardy, and not the special matter, but for the principal matter, i. this unity of possession, divers rules have been. 5 Eliz. in the Common Pleas, the case was, an abbot had a manor within the parish of D. and a composition was made betwixt the parson of D. and the said abbot, that the parson should have yearly certain loads of wood, out of thirty acres of the said manor, for, and in recompence of all the tithes of wood there, afterwards the parsonage was appropriated to the said abbot, and afterwards the house was dissolved, and the manor granted to one, and the rectory to another, and it was holden, that the portion of the tithes was removed, for he had them, scil. the manor and the tithes in several rights. And Manwood Chief Baron, and Periam Justice, to whom a case depending in the Chancery was referred concerning the discharge of tithes by unity of possession, delivered their opinions, that such an unity is not any discharge within the said statute. It was adjorned.

More Rep. 528. 2 Co. 47, 48. 2 Cro. 452. 2 Len. 55. 3 Len. 155, 164. Ante 306. 1 Cro. 707, 708. 7 Co. 5. 2 Co. 48.

MICH. 32 ELIZ. IN THE KINGS BENCH.

CCCCLXVIII. HOSKINS AND STUPERS CASE.

Assumpsit. Exposition of Words.

In an action upon the case, the plaintiff declared, that whereas the plaintiff had sold to the defendant 1000 couple of Newland fishes to the use of the defendant, and in consideration that he should ship, and should bring and carry the adventure of them from Bristol, in portum of Saint Lucar and should carry back again the value of the said fish to London or Bristoll secundum usum mercatorum, the defendant did promise, that upon the arrival of the said fish, in portum of St. Lucar, he would give to the plaintiff 112l. and said that he arrived with the said fish, ad portum of St. Lucar, and that afterwards he arrived with goods of the value of the said fish, ad portum of London, secundum usum mercatorum. It was holden by all the Judges, that in portum, and ad portum is all one, as the Statute of Wast is, quod vicecomes accedat ad locum vastatum, yet he ought to enter into the land; so the writ of accedas ad curiam, & in plena curia recordari facias, &c. Another exception was, because he declared, that he returned with goods to the value, and doth not say, whose goods they were; but the exception was not allowed, for these words secundum usum mercatorum imply that they were the goods of the defendant, quod fuit concessum per curiam, and afterwards judgment was given for the plaintiff.

TRIN. 32 ELIZ. IN THE KINGS BENCH.

CCCCLXIX. WALGRAVE AND AGURS CASE.

Action for scandalous Words. Savage and Cooks Case. Kinseys Case.

Sir William Walgrave brought an action upon the case against Agur upon these words spoken by the defendant to a servant of the plaintiff, It is well known that I am a true subject, but thou (innuendo the said servant) servest no true subject, and thine own conscience may accuse thee thereof. It was moved in arrest of judgment, that these words are not actionable, for no slander comes to the plaintiff thereby, for perhaps the party served no man, but the Queen, and if **[336]** the words may receive such sense, which is no pregnant proof of infamy, they are not actionable, as in the case betwixt Savage and Cook, these words: Thou art not the Queens friend, are not actionable, for it might be they were spoken in respect of some ordinary misdemeanours, as in not payment of subsidies, or the like: also it is not averred, that the party to whom the words were spoken, was the plaintiffs servant. Coke, Where a man is touched in the duty of his office, or in the course of life, an action lieth, although that otherwise the words are not actionable, and here is set forth in the declaration, that the plaintiff at the time of the speaking of the said words, was a justice of peace, and Sheriff of Suffolk, and captain of a troop of 120 horse to attend the preservation of the Queens person: so in respect of place and dignity in the commonwealth, as 2 H. 8. the Bishop of Winchester brought an action upon the Statute of Scandal. Magnatum, upon these words, My Lord of Winchester sent for me, and imprisoned me, until I made a release to J. S. and in respect of his place and dignity the words were holden actionable: and 9 Eliz. Dyer, in an action upon the case by the Lord Aburgaveney against Wheeler, my Lord of Aburgaveney sent for us, and put some of us into the coal-house, and some into the stocks, and me into a place in his house called Little Ease, and the words were holden actionable: so in our case, Lewes said, it was the case of one Kinsey; one said to a bailiff of a franchise, thou didst execute false warrants, without saying, they were falsified by him, adjudged an action did not lie. Wray Chief Justice, These words in themselves are not actionable, for the plaintiff might be untrue in small things, which gave no discredit, but the quality of the person of whom they were spoken, may add weight to them, as to call

one bankrupt generally, no action lieth upon it, but to call a merchant so is actionable. So to call one Papist, no action lieth for it; but if one call the Archbishop of Canterbury so, an action will lie, for he is governour of the church. Thou art an untrue man to the Queen, gives not an action to an ordinary subject, but such words spoken of one of the Privy Council, are actionable. Corrupt man, in themselves are not actionable, but being spoken of a Judge, an action lieth. It was Birchleys case, an attorney of this Court, thou art a corrupt man, and dealest corruptly, and it was adjudged per curiam, that the words were actionable, for that refers to his calling. Gawdy was of opinion, that the words were actionable of themselves, without respect had to the quality of the person of whom they were spoken, for the words are particular enough; and to touch him in the duty of a subject, which is to be faithful to his natural prince, is a great reproach and slander. Fenner conceived, that the words were not actionable. Wray, as before, Of themselves they are not actionable, for they are in general, for if he be indicted of trespass, he is not a good subject.

1 Cro. 191.

The Second Part of REPORTS and CASES OF LAW, Argued and Adjudged in the Courts at Westminster, in the time of the late Q. ELIZABETH, from the XVIII^th^ to the XXXIII^d^ year of Her Reign. Collected by that Learned Professor of the Law, WILLIAM LEONARD, of the Honourable Society of Gray's-Inn, Esq. 1687.

[1] MICH. 30 ELIZ. IN THE COMMON PLEAS. ROT. 30.

I. KIRKMAN AND REIGNOLD'S CASE.

Leases.

The case was, that a lease was made unto two, habendum to them, and to two others for four lives, and the longer liver of them; it was resolved by the whole Court, that the two named in the habendum did not take any thing; and that if the first two in the premisses of the deed die, that there shall be no occupancy; for the lives of the two in the habendum was intended an estate to them, and not a limitation of the estate of the first two: and so it was resolved, 28 Eliz. in the King's Bench, Rot. 509. in Hubbart and Windsmore's case.

1 Cro. 182.

MICH. 32 & 33 ELIZ. IN THE KING'S BENCH. ROT. 19.

II. THATCHER AND DAMPORT'S CASE.

Error. Judgement against the Bail.

Thatcher recovered against Damport as administrator of one Zouch, the defendant put in bail, and afterwards judgment was given against the defendant in this manner: ideo videtur justiciariis, quod querens recuperet debitum suum versus, &c. and thereupon a scire facias was sued against the bail, and a good and lawfull judgment given against them; and they brought a writ of error to reverse the judgment given against them, and assigned error, because judgment was entred against them before a good and lawfull judgment was given against the defendant himself; for videtur justiciariis quod querens recuperet, &c. is not any judgment; and the Court held, that the judg-[2]-ment given against the bail, ought to be reversed, but that the other judgment should stand such as it is, neither affirmed nor disaffirmed, but the bail should not cause the same judgment for their discharge to be entred, and afterwards came Thatcher and surmised the nullity of the said judgment, and prayed that judgment might be entred for him in forma juris, & habuit: and now upon this new judgment Damport brought a writ of error, and assigned for error the entry of that new judg-

ment, for before a judgment was entred, tiel queb. and Thatcher proceeded upon it, and had a scire facias against the bail, and judgment thereupon given against the bail: also the record was removed by writ of error, and this second judgment is merely erronious, for then there should be two judgments; and they should give judgment upon a record, which was not before them.

Gawdy Justice, The writ of error is to remove the record, si Judicium inde redditum sit, by which if judgment be not given, the record doth remain unremoved, and then they may well enough give judgment; for the former pretended judgment was no judgment at all, and the record is not removed, as 4 Eliz. Dyer 206. a certiorari to remove a record, capt. in curia nostra, whereas it was in curia of the predecessor, the record is not removed. The former writ of error was to remove the record of the scire facias against the bail which might be removed, although the other record did remain, for they are two distinct judgments. And such was the opinion of the other justices; and afterwards upon advice of the whole Court, the judgment against the defendant himself was affirmed, but that which was given against the bail was reversed, because given before judgment given against the defendant himself.

1 Cro. 145, 215. ib.

Trinit. 32 Eliz. In the King's Bench.

III. Werdman and Yate's Case.

Partition. Error. Diminution. Entry of Records. Estoppell.

Werdman brought a writ of partition against Yates and others, who all appeared and confessed the action, and afterwards brought error, which was entred, Pasch. 27 Eliz. Rot. 43. and they assigned errors, and the opinion of the Court was against them, and they seeing it, did discontinue their writ of error, and now they sued a new writ of error out of the Chancery, directed to the Lord Anderson, being dated 19 Nov. 31 Eliz. containing, that whereas a writ had been directed to him to remove such a record, that all the record is not yet removed; wherefore this was to remove the residue of the said record; upon which writ was sent hither a small parcell of the record, upon which the plaintiffs sued a new writ of error out of the Chancery, coram vobis resident, and that was Hil. 31 Eliz. and it was entred upon a new roll of the same term, and not upon the ancient roll, and thereupon new errors were assign'd in the judicial proces out of the body of the record.

1. That the plea was discontinued for pone was awarded against three of the defendants, and idem dies not given to the other two, nor any thing spoken of them.

2. Because there were not fifteen days betwixt the date of the pone, and the return of it, (scil.) the first day of the return, i. the first day of essoins, as ought to be by law.

3. Judgment was given that the defendant should be amerced, where they appear upon the first proces, and thereupon the plaintiff sued a new writ of diminution, one to the Lord Anderson, and the other to the custos brevium, and now came and pleaded all the matter aforesaid, viz. the former writ of error, the proceeding in it, and the **[3]** discontinuance of it, and demanded judgment if the plaintiff should have a new writ of diminution, upon which the plaintiff did demurr: Coke, This second writ of error is not maintainable: for the first writ sent to the Lord Anderson, could not be sued out of the Chancery, for it is not a writ of error, but a writ of diminution: for in the register there are but two writs of error, the first to remove record, the second quod coram vobis resident, 2 H. 7. 19. and in the writ there is not any mention of error, and therefore it cannot be a writ of error, and if there be not any such writ in the register, then it is a good argument to say there is no writ at all, as the Lord Dyer argued in the Lady Hale's case, 5 Eliz. 262. in Plowden in the case of the writ of escheat: also it is against all the precedents, that a writ of error, quod coram vobis resident, should be otherwise entred than upon the first record, and not upon a new record, and the writ of diminution is not an original writ, and ought always issue out of the Court where the writ of error is depending: and also the party cannot now

alledge diminution, i. after a scire facias ad audiendum errores, which see 22 E. 4. 45. by Hussey: for by the scire facias ad audiendum errores, he affirms the record to be full: so 7 E. 4. 25. After the defendant in the writ of error hath pleaded in nullo est erratum he shall not alledge diminution, for the parties are agreed upon the record, 28 H. 6. 10. after a scire facias, the plaintiff shall never assign errors in fact, &c. Tanfield contrary, he agreed, that a writ of diminution cannot be sued out of the Chancery, but that will not hurt us, for it is idle and utterly void: and when the record is removed, it is not material how it comes in, so as it be here, for they are both the King's Court, as it is in the common case of indictments: and then the writ of error is to examine the record, quod coram vobis residet, and although the same be in divers rolls, the same is no matter of exception; but if the roll be entred in a wrong office it is not good, but if all be in one office, the misfiling of the roll will be no hurt: so here, it is not so formal as it ought; yet it is not any prejudice to us. But the great matter is, if the plaintiff may assign new errors and have a new writ of diminution, two of the errors assigned in the mesne proces, but the third is in the record it self; i. the judgment. And there is no doubt but that a man may have divers writs of error, but he shall have but one supersedeas, and so divers errors, but one delay: also it is not a writ of diminution which we have sued, for I do not say that it is a thing below, which is not here, but I say that is not a thing below which ought to be, viz. there is not any discontinuance; but the Court awarded that writ for their satisfaction, for the non esse of the thing shall come on the other side, and 9 E. 4. the Court awarded a certiorare to enform themselves. And he said that after a scire facias, the plaintiff may assign new errors, Trin. 20 H. 7. Rot. 84. betwixt Edge-Court and London, a writ of error was brought against two, and after errors assigned, one of the defendants died, before a new writ of error could be assigned; but here the first record is discontinued and determined, for which there is not now any record which may be objected against us, nor any thing in it: as 20 H. 7. A man avows for a rent due at such a day, and is nonsuit; now he may avow for the same rent, and suppose the same to be due at another day, for he shall not be estopped by the record upon which he was nonsuit: and so here upon the whole matter the writ out of the Chancery is not material, and the roll is not misplaced, but is in the right office: also this is not a writ of diminution, but a writ to inform the justices, wherefore upon the whole matter the writ of error will well lie. It was adjourned.

1 Cro. 155, 281.

[4] MICH. 31 & 32 ELIZ. IN THE KING'S BENCH.

IV. SAVACRES CASE. ROT. 7.

Error.

A writ of error was brought by Savacre and the Bishop of Glocester upon a judgment given in a quare impedit for the Queen, and errors assigned. 1. Attachment was awarded against the defendants in the quare impedit, retornable Quind. Pasc. at which day Savacre appeared, and cast an essoyn; and notwithstanding that, a distress was awarded against them both, retornable Crastin. Trinit. and this awarding of the distress was erroneous, for the essoyn was, as appeareth, to save, &c. and therefore against him no distress ought to have been awarded: and upon alledging of diminution the record of the essoyn was certified, but the same doth not appear upon the plea roll. 2. This record is, ideo ipsi in misericordia, and so both the defendants are amerced for their default of appearance 15 Pasch. whereas Savacre was then essoyned, and so no cause to amerce him.

Coke, The original writ was sued Mich. 26 Eliz. retorned 15 Hilarii, and then both the defendants made default, for which an attachment was awarded, retornable 15 Pasc. and then Savacre appeared, and judgment given, quod ipsi sint in misericordia, in which point the error is apparent: but I conceive that it is not error, for upon the attachment the parties ought to put in sureties for their appearance; and the said sureties took upon them, that the defendants and each of them should appear; and if they or any of them make default, they shall be amerced: and so here, this judgment,

ideo ipsi in misericodia, doth refer to the sureties, not to the parties, for the defendants shall not be amerced until the end of the suit, and but once onely in an action: which see Book of Entries 464 where there was but one defendant: and therefore if the amercements shall be referred to the defendant, then it shall be ideo ipse, not ipsi, &c. And that is the reason wherefore the Queen, nor an infant, shall not find pledges, for no amercement shall be upon their default, therefore it were in vain for them to find pledges, &c. If the sureties be amerced where they ought not to be amerced by the law, yet the defendant shall not have a writ of error thereupon, for he is not the party grieved by the amercement: and upon that reason it is, if in a scire facias against the bail erroneous judgment be given, the defendant in the action shall not have a writ of error. The awarding of the distress upon the roll against both, where one of them only made default, is not error, especially as this case is: for although one of them was essoyned until the day aforesaid; yet at that day they make default, and so the distress well awarded against them: and although the writ was not well awarded, yet when they appear Crastin. Trinit. at the day of the retorn of the distress, all mesn defaults in the process are saved, and so the misawarding of the distress by appearance after is supplyed: as 39 E. 3. 7. The law requires, that in an action founded upon the Statute of Præmunire, &c. 27 E. 3. the defendant gave garnishment by two months, yet if the defendant, not having warning appear, now the process is good enough: So 9 E. 4. 18. where upon any process the defendant doth appear, although the day of appearance be not lawful, yet he shall be put to answer, and see many cases there to that purpose. And so was the opinion of the Court in the principal case.

As to the second error, that this judgment, ideo ipsi in misericordia, shall be reserved to the sureties onely, and not the party, and that the defendant shall be but once amerced in one action; true it is, he **[5]** shall be amerced but once for one default; but if there be many defaults, the defendant shall be amerced severally for the several defaults for every offence; and it should be unreasonable that the sureties should be amerced, and that the defendant, who is the principal, should be freed: which see in the Book of Entries 193. ipsique & plegii sui in misericordia, &c.

Post. 185.

TRINIT. 32 ELIZ. ROT. 76. IN THE KING'S BENCH.

V. NEVIL AND COOK'S CASE.

Covenant.

In an action of covenant the plaintiff declared, that where it was covenanted betwixt the plaintiff and the defendant, that each of them upon request should be accountable to the other for all the corn growing upon such a place, and that upon such account the one of them should deliver to the other the moiety of the corn, or the profit of it: and whereas the defendant had taken all the said corn, scil. twenty loads of wheat, forty loads of barley, and thirty loads of pease, growing upon the said lands, and had been required to render account of the said corn, which he refused to do: the defendant traversed the request, upon which they were at issue, and it was hereupon demurred: and it was moved, that the traverse was not good, but the defendant ought to say, that the plaintiff did not require him modo & forma; but the exception was not allowed, but the traverse was holden good by the whole Court and judgment was given for the plaintiff.

TRINIT. 32 ELIZ. IN THE KING'S BENCH.

VI. ELIZABETH DORMER'S CASE.

Elizabeth Dormer was indicted upon the statute of 23 Eliz. of recusancy; and exception was taken to the indictment, because that these words of the statute were

omitted out of the indictment, viz. [non habens aliquam rationabilem causam]. But the exception was not allowed; for Wray, Chief Justice, said, that upon conference betwixt himself and all his companions, it was resolved by them, that those words need not be put into the indictment, but are to come on the other side. Another exception was taken to the indictment, that she being of the age sixteen years refused to come to any church (contra formam statut. 1 Eliz. & in malum exemplum, &c. & contra formam statuti in hujusmodi casu editi & provisi) and the statute of 1 Eliz. doth not speak of sixteen years, but the same is mentioned in the statute of 23 Eliz. Fenner was of opinion, that the last contra formam statuti should be referred to the statute of 23 Eliz. Wray contrary, and that it should be referred to the statute of 1 Eliz. It was adjourned.

1 Len. 241.

16 ELIZ. IN THE COMMON PLEAS.

VII. CRANMER'S CASE.

The case was, That Thomas Cranmer, late Archbishop of Canterbury, made a feoffment in fee to the use of himself for life, without impeachment of waste, and after his decease to the use of his executors for twenty years, and after the twenty years to the use of his son and heir in tail. And afterward Thomas Cranmer was attainted of treason, and dyed, so as he could not make executors, but dyed **[6]** intestate without any assignment. (Note, the limitation was to his executors and assigns.) Queen Mary claimed the term limited as aforesaid, and granted the same over, the heir in tail entred, and leased the same for years, the patentee entred, and the lessee of the heir of the tenant in tail brought ejectione firmæ.

Manwood. All the doubt of this case is, if the said term was in Tho. Cranmer so as he might forfeit it; and he conceived, that the said term was in Tho. Cranmer, and that he had not power onely to dispose of it, but also had possession of it: 11 H. 4. 186. Scire facias 67. And Br. Annuity 17. Such a grant is good and effectual, and if he do not grant it his executors shall have it, and yet the term was not limited to him, but he shall have it by implication of law. 39 E. 3. A lease was made to one, his heirs and assigns during his life, and one year after, the executors shall have the said term after the death of the lessee, yet the said term was not limited to him: 7 E. 3. A lease made for term of live and a year after, in that case the term is conjoyned unto the estate for life by the act of the grantor himself; and there is a difference when the remainder is joyned to the particular estate by the act of the grantor, and by any purchase, grant, or any act after: for in the first case the remainder shall be executed, but in the latter not. A lease for life, the remainder in tail, the remainder to the right heirs of tenant for life; he in the remainder in tail dyeth without issue in the life of tenant for life, now the fee is executed to the freehold, &c. and the heir shall not have a scire facias where such conveyance is made by fine. See 17 E. 3. 29. In a cui in vita, A. executor of B. came and said, that the land in demand was leased to the said B. for the term of his life, the remainder for the term of eight years to his executors, and prayed to be received, and they were received. See 19 E. 3. A lease was made for life to A. the remainder to his executors for twelve years; the lessee for life died, the executors died, there it is agreed, that the executors of the executors should have an action of covenant, if they be ousted. And see 20 E. 3. Quid juris clamat 31. A lease is made to A. for life, and if A. dieth within twenty years, that his executors shall have the term until the end of such term: and in a quid juris clamat against A. he saved his term by protestation, which proves, that the term was quodam modo in him. 49 E. 3. A lease for life unto A. the remainder to his heirs and executors for twelve years, and afterwards the lessor confirms the estate of the lessee for life, to have and to hold the land to him for life, and thirteen years over to his executors; the lessee deviseth the term, and the devise holden good, which proves, that the term was in him.

Harper, Justice, contrary: Many cases put before may be answered; for in the said case the term is limited to begin immediately, and not by way of remainder, or

after the death of the lessee, and then the executors in the life of the testator are not known, nor able to seek any thing by the name of executors, and therefore that term shall take its beginning in the life of the testator: but in the case at bar the term is limited to the executors after the death of the testator, and the executor takes the term as a purchasor, and he hath it not as a chattel of the testator, but as his own chattel. And in the case of receipt before cited, the executor shall be received as executor, for the term was limited to him as executor. And here the statute of 27 H. 8. is to be considered, for it extends as well to chattels as to freehold, and the statute doth execute the possession to the use limited for years, as for life, or in fee: and here the use is limited to the executors, and not to the testator, and therefore it shall not be otherwise transferred. And therefore if a man seised in the right of his wife discontinueth, and afterwards the discontinuee makes a [7] feoffment in fee unto the use of the said husband and wife for their lives, in that case the wife shall not be remitted; for the statute doth transfer according to the use, and the use was limited for their lives, therefore they shall not be in of another estate.

Dyer, Chief Justice, to the same intent: The feoffer, i. Thomas Cranmer, limits all the uses, and therefore he shall not have that which he hath limited; and it is in the nature of a reservation, which shall be taken strictly and very strong against him who made the reservation; and he relied much upon the last reason urged by Harper upon the statute of 27 H. 8. that this was limited to the executors, and not to him who limited it, and therefore the possession shall be executed to the executors, to whom the use was limited; and this term shall not be assets in the hands of the executors: and he said, that he had seen a record, 2 H. 8. setting forth, that A. having feoffees to his use, devised, that his feoffees should sell his lands, who did accordingly; now the money coming by the sale shall be assets, &c. but it is not so limited in our case, therefore it shall not be assets. A lease is made to A. for life, the remainder to the right heirs of B. B. purchaseth the estate of A. the estate in remainder is not executed, for it is not conveyed by the grant of the first grantor, but by the act of another person after the grant. A lease for life to A. the remainder to a feme sole for years, they entermarry, waste is committed, the lessor brings an action of waste, he shall recover as well the estate for years as for life. A. leaseth unto B. for life, the remainder unto the executors of A. for years, the remainder over in fee to a stranger, the remainder for years is good, for the lessor cannot limit such an estate to himself, and the executors shall take the estate as purchasors, and the term shall be in abeyance untill the death of A.

There was a case before the Lord Brook in the time of Queen Mary, viz. a lease was made for life, proviso, that if the lessee dieth within the term of sixty years, that the executors shall have the lands, as in the right and title of the lessee, pro termino totidem annorum, which do amount to the number of sixty years, to be accounted from the said indenture. The opinion of the Justices of the Common Pleas upon the case was, that the term was not in the lessee for life. So this future term in the principal case was not in Tho. Cranmer. But see that case cited by Dyer, reported by himself 4 Ma. 150. and there the opinion of the Court was, that the same was not a lease, but a covenant.

And afterwards in the principal case judgment was given for the plaintiff, that the future term was not forfeited by the attainder of Cranmer.

1 Anders. 19. More Rep. 100. 1 Len. 196. 3 Len. 20. Dyer 309, 310. Office Executors, 118. Co. 1 Inst. 54. b. 1 Cro. 666. Co. 13. Rep.

VIII. 7 Eliz. In the Common Pleas.

Distress for Rent.

The case was, J. S. is seised of a close adjoyning to the close of J. D. and J. S. ought to enclose against J. D. J. S. leaseth his close to another for years, rendring rent, J. D. puts in his cattle into his own close, who for want of enclosure escape into the close of J. S. and before that they be levant and couchant, J. S. distrains them for his rent: it was said by Manwood, Justice, that the distress was not well taken;

for there is a difference when the cattel come upon the lands of another in the default of the owner of the cattel, as by escape or stray, and where in the default of another: for in the first case the lord may distrain them before they be levant and couchant; but in the latter case not: also a rent reserved upon a lease for years, is a new rent, and not like unto an ancient rent, due upon an ancient tenure betwixt the lord and the tenant: for, for a rent **[8]** reserved upon a lease for years, or for a rent charge a man cannot distrain the cattel, before they be levant and couchant upon the lands, although they come upon the lands by escape, estray, &c. Dyer, The lord cannot distrain the cattel which escape into the land of his tenant for want of enclosure of his tenant before they be levant and couchant: and yet the seignory is favoured for the antiquity of it: but here is new rent, not in respect of any seignory, but of reservation upon a lease for years, and therefore no distress before the cattel be levant and couchant upon the lands, quod Harper & Mounson concesserunt, and judgment was given accordingly.

Dyer 317. b. 318. a. Doctor & Student 150. 1 Inst. 476. Brown 1 part 170. Roll Tit. Distress 1 part in toto. Roll 1 part 672. acc. Hob. 265. Brown part 2, 170.

IX. 17 Eliz. In the Common Pleas.

Writ of Entry in the Per. Several Tenancy where no good Plea.

The case was, in a writ of entry in the per, against A. and B. A. pleaded several tenancy: it was holden by Dyer, Chief Justice, that it is not any plea. Harper Justice: In assise it is no plea; for here the land is not in demand; but here it is a good plea, and the demandant ought to maintain his writ; Manwood, In no action founded upon disseisin is this good; for although the demandant by policy will bring his writ against the tenant of the land, and another who he will name in the writ, upon trust and confidence, and that he will not agree with the tenant of the lord in dilatories, for the tenant of the lands shall not be received to plead dilatories; yet in that case several tenancy is no plea for the tenant, but in a formedon, or other such like action, which is not grounded upon disseisin, if the writ be brought in such manner as above, the tenant by policy, that he may have the view, and other reasonable delay, may plead several tenancy, and so enforce the demandant to maintain his writ, but contrary in the case at bar, and so it was adjudged per curiam.

19 Eliz. In the Common Pleas.

X. Creswell and Cokes Case.

Debt. Custome. Heriot.

Creswell brought debt against Coke, and demanded 200 marks upon the statute of 13 Eliz. of fraudulent deeds, gifts, &c. upon the second clause of the statute, viz. that all parties, or privies to such fraudulent deed, willingly putting in ure, avowing, &c. as true, simple, and given bona fide, shall forfeit, &c. And shewed that one A. held of the plaintiff 12 acres of customary lands, and died seised, and that by the custome of the manor, the lord was to have for a heriot, the best beast whereof his tenant died possessed, and farther shewed, that the said A. in his life time, and a little before his death, being possessed of 30 horses, of the value of 2000 marks, gave the said horses to the defendant, with intent to defraud the plaintiff, and other lords of their heriots, and that he went to the defendant's house to seise his heriot, and the defendant then strained the said horses, by reason of the gift aforesaid, for which the action is brought, to which the defendant pleaded, that the plaintiff had seised one of the horses nomine herioti: and as to the rest he did demurr in law. Mounson Justice, was of opinion, that the plaintiff should recover the whole 200 marks, although he was defrauded but of one heriot onely: as if a man be indebted to me in 20l. and he makes such a fraudulent deed of his goods, of the value of 2000l.

although I be defrauded but of the 20l. yet he shall forfeit the whole value of the goods so conveyed. Manwood Justice, was of opinion, that the plaintiff should recover the value of one of the horses; and the gift by the first branch is void, as to the plaintiff but [9] for one of the horses onely, and not for all the horses contained in the gift, for no more than one horse was fraudulently given: and as by the first branch the gift is void but for one horse, so by the second branch the penalty extends but unto one horse, for the fraud extends but to one horse, and no farther. And this action is not a popular action, but extends onely to the party grieved. And of the same opinion was Dyer Chief Justice, and he confessed the case put by Mounson Justice, where the debtor of 20l. makes a fraudulent deed of his goods of 3000l. &c. for the person of the debtor is chargeable, and peradventure, goods of the value of 2000l. may be put in execution for 100l. but here the person is not charged for the heriot. Barham Serjeant, The fraud goes to the whole (scil.) to all the horses: for although the plaintiff is to have but one horse, yet he is to have the choice of all the horses, which of them he will have for the best beast, and because the choice goes to all the thirty horses; and by this fraudulent gift, he is defrauded of his election, which of the horses he would have, therefore he shall have the value of the whole thirty horses. But Dyer and Mounson said to the serjeant, set a price upon any of the thirty horses, as the best horse in your election, and demand the value of that horse as forfeit by the statute, and then your election is saved to you.

Dyer 351.

19 Eliz. In the Common Pleas.

XI. Gregory's Case.

Assise. Receipt of the Wife.

In the assise against Arthur Gregory and his wife at Warwick, before Dyer and Barham, Justices of Assise, the husband made default, and the assise was awarded by default: and the wife came and prayed to be received, and the opinion of the said justices was, that receipt lay in that case; as in other cases of præcipe quod reddat; and therefore the wife was received. And now Dyer in Banco, demanded of his companions, the other justices if the receipt was well granted: and by Manwood and Mounson, Justices, clearly the receipt lies: for although that the statute doth not give receipt, but where the lands in demand are to be lost by such default of the husband, and in an assise the land shall not be lost by the default of the husband, but the assise shall be taken by default, yet because the husband and wife lose their challenges to the jury, because the assise is taken by default, it seemed to the justices, and also to the Preignothories, that receipt did well lie in this case.

1 Len. 86. Key's steds. case cont.

XII. 19 Eliz. In the Common Pleas.

No Costs upon Nonsuit in an Action upon Escape.

In an action upon escape, the plaintiff is nonsuit: It was holden, that the defendant should not have costs, by the statute of 23 H. 8. Note the words of the statute, i. (upon any action upon the statute) for any offence or personal wrong, supposed to be done immediately to the plaintiff, notwithstanding this action, is quodam modo, an action upon the statute, i. by the equity of the statute of West. 2. which gives expresly against the warden of the Fleet; yet properly it is not an action upon the statute: for in the declaration in such actions, no mention is made of the statute, which see in the Book of Entries, 169, 171. And here is not supposed any immediate personal wrong or offence to the plaintiff: and an action upon the case it is not: for then the writ ought to make mention of the escape, and that it doth not here; and yet at the common law, before the statute of West. 2. an action upon the case did lie for an escape: and so Dyer, Manwood, and Mounson, costs are not given in this

case. And by Manwood, upon the [10] nonsuit, in an action upon the statute of 8 H. 6. the defendant shall not have costs, for that is not a personal wrong, for the writ is dissesivit, which is a real wrong.

XIII. MICH. 19 AND 20 ELIZ. IN THE KINGS BENCH.

Prescription. Rectory quid.

In trespass for breaking of his close, the defendant justified, to have a way by prescription over the land in which the trespass is supposed, for carrying of such tithes usque ad rectoriam de D. from such a place: and it was holden by Wray, and the whole Court, that the plea was not good; for in pleading such a way, there ought to be set forth, terminus a quo, & terminus ad quem, and this word rectory, which ought to be terminus ad quem, is incertain; for a rectory is a thing which consists of divers things, as glebe, tithes, &c. But he ought to have said, the parsonage house, or other place certain: and afterwards it was shewed to the Court, that the said rectory did consist onely of tithes, and so there is not any place certain, as parsonage house, barn, &c. to which the tithes have used to be carried, for the tithes have used to be let to farm to divers persons, who have carried such tithes to their own houses, and the defendant is one of the farmers of the tithes. Wray, If your case be such, you are to plead in this manner; that J. S. is seised in fee of the rectory of D. and that time out of mind, he, and all those, &c. have used for them and theirs formerly to have a way to carry their tithes from such a place over the land where, &c. unto such a high way, and name a way, which is the next to the place where the trespass was done; the which cause the defendant pleaded so according to the direction of the Court.

Townsend Table 96. Hern. 709. Tit. Trespass ib. 803. 1 Cro. 898. Jones Rep. 230.

HILLAR. 20 ELIZ. IN THE COMMON PLEAS.

XIV. WINGFIELD AND SECKFORD'S CASE.

Debt for Rent. Pleadings.

In debt for arrerages of rent upon a lease for years, the truth of the case was, that before any arrerages incurred, the land leased was evicted upon an eigne title; the defendant pleaded, that he owed him nothing: if now he might give in evidence the said eviction was the question; and it was the opinion of Dyer, Manwood, and Mounson, that he could not, but he ought to have pleaded it especially; and they denied the opinion of the Preignothories, who said, that the defendant ought to have pleaded the eviction, and concluded judgment of action; and not rein luy doit, and the Court advised the defendant to plead accordingly.

Co. 3. Rep. 24.

HILLAR. 20 ELIZ. IN THE COMMON PLEAS.

XV. BEAMONT AND DEAN'S CASE.

Dower.

In dower brought by the wife of Beamont, Master of the Rolls, in the time of E. 6. the defendant said, that he himself, before the writ brought, did assign a rent of 10l. per ann. to the demandant, in recompence of her dower, upon which the demandant did demur in law; and the cause was, because the tenant had not shewed what estate he had in the lands at the time of the granting of the rent, as to say, that he was seised in fee, and granted the said rent; so as it might appear to the

Court upon the plea, that the tenant had a lawfull power to grant such a rent, which was granted by the whole Court, and the demur holden good.

Dyer 361.

[11] HILL. 20 ELIZ. IN THE COMMON PLEAS.

XVI. HINDE AND SIR JOHN LYON'S CASE.

Devises.

In debt by the plaintiff against the defendant as heir, he pleaded that he had nothing by descent but the third part of the manor of D. The plaintiff replied, assets; and shewed for assets, that the defendant had the whole manor of Dale by descent, upon which they were at issue: and it was given in evidence to the jury, that the manor was holden by knight's-service; and that the said Sir John, the ancestor of the defendant, by his will in writing devised the whole manor to his wife, until the defendant, his son and heir, should come to the age of 24 years; and that at the age of his said son of 24 years, the wife should have the third part of the said manor for term of her life, and her son should have the residue: and that if his said son do die before he come to his age of 24 years, without heir of his body, that the land should remain to J. S. the remainder over to another: the devisor died, the son came to the age of 24 years; and the question was, if the son hath an estate-tayl, for then for two parts he is not in by descent: and by Dyer and Manwood, Justices, here is not any estate tayl, for no tayl was to rise before his said age, and therefore the tayl shall never take effect; and the fee-simple doth descend, and remain in the son, unless he dieth within the age of 24 years, and then the entail vests with the remainders over. But now having attained his said age, he hath a fee-simple, and that by descent of the whole manor, and a general judgment shall be given against him, as of his own debt: and an elegit shall issue forth of the moyety of all his lands, as well those which he hath by descent from the same ancestor, as any else; and a capias lieth against him. But Manwood conceived, that if general judgment be given against the heir by default, in such a case a capias doth not lie, although in case of false plea it lieth. Dyer contrary; and the writ against the heir is in the debet & detinet, which proves, that in law it is his own debt: and he said, that he could shew a precedent where such an action was maintainable against the executors of the heir.

Dyer 124. a. 3 Len. 70. 3 Len. 64.

XVII. HIL. 20 ELIZ. IN THE COMMON PLEAS.

Covenant. Estoppell.

A man made a lease of lands by indenture, to begin after the expiration of a lease thereof made to one Duffam; and in an action of covenant brought by the second lessee against the lessor, the lessor said, that there was no such Duffam in rerum natura, at the time of the supposed lease made to Duffam: it was argued, that this plea doth not lie for the lessor, for he is estopped to say against the indenture, that there is no such Duffam, &c. And also if no such person was, then the first lease was void, and then the second lease shall begin presently, which Manwood and Mounson granted, and by Manwood, the defendant shall be estopped by the recital of the first lease, to say, that there was no such Duffam: and although the common ground is, that a recital is not an estoppel, yet where the recital is material, as it is here, it is otherwise, for here the second lease is to begin upon the expiration of the recited lease; and therefore in this case it shall be an estoppel.

Roll. 1. part. 870.

[12] XVIII. MICH. 20 ELIZ. IN THE KING'S-BENCH.

Action upon the Stat. of 5 *Eliz. for Perjury. Abatement of Writ.*

In an action upon the statute of 5 Eliz. for a perjury by three, the plaintiffs declared, that the defendant being examined upon his oath before commissioners, if a surrender was made at such a court of a copyhold to the use of A. and B. two of the defendants: the defendant swore there was no such surrender made, &c. Exception was taken to the declaration, because that the certainty of the copyhold did not appear upon the declaration: for the statute requires that in such case the party grieved shall have remedy, so as it ought to appear in what thing he is grieved; quod fuit concessum per totam curiam. Another exception was taken, because the action is given in this case to the party grieved, and it appeareth upon the declaration, that the surrender, in the negative deposing of which the perjury is assigned, was made to the use of two of the plaintiffs onely, and then the third person is not a party grieved, for he claims nothing by the surrender: and therefore forasmuch as the two persons grieved have joined with the party not grieved, the writ shall abate against them all, which Wray and Southcote granted.

3 Len. 68.

XIX. 19 ELIZ. IN THE COMMON PLEAS.

Action upon the Stat. of 13 *E.* 1. *of Winchester.*

In an action upon the statute of Winchester 13 E. 1. against the men of the hundred of A. Barham, Serjeant, took exception to the declaration, because it appeareth upon it, that the half year after the robbery is not yet come; for by the said statute it is ordained, that the countrey have no longer time than half a year after the robbery done, within which time facent-gree of the robbery, or respondent the body of the misfeasors. And here the action is brought within the half year: and for this cause the declaration was holden to be insufficent by the whole Court. And the Lord Dyer spake much in commendation of that statute being made for the publick benefit of the whole commonwealth: for the law intends when a robbery is done, that if the countrey will not pursue the malefactors, that some of them are receivors or abettors of the felons.

Manwood, Justice, said, when I was a servant to Sir James Hales, one of the Justices of the Common-Pleas, one of his servants was robbed at Gadds Hill, within the hundred of Gravesend in Kent, and he sued the men of the hundred upon this statute; and it seemed hard to the inhabitants there, that they should answer for the robberies done at Gadds Hill, because robberies are there so frequent, that if they should answer for all of them, that they should be utterly undone. And Harris, Serjeant, was of councill with the inhabitants of Gravesend, and pleaded for them, that time out of mind, &c. felons had used to rob at Gadds Hill, and so prescribed, and afterwards by award they were charged: and note, that the case was, that three men were robbed, and they three joined in the action against the inhabitants.

2 Inst. 569.

20 ELIZ. IN THE COMMON PLEAS.

XX. COLSHIL AND HASTINGS CASE.

Execution executed.

An extent was sued forth upon a statute-merchant by Colshil against Hastings, for lands in his possession in the county of Southampton: the sheriff put the plaintiff the conusee in possession of **[13]** parcel of a house and of lands, and suffered Hastings to continue in the rest of the house, by reason whereof Hastings kept the possession of the whole, and held the conusee out; the conusee, to the intent that he might have

full and perfect possession of the whole, caused the sheriff, that he did not retorn the writ of extent, upon which it is entred on the roll, quod vice-comes nihil inde fecit, nec misit breve. Whereupon issued an alias extendi facias, upon which the new sheriff did retorn, that in the time of the old sheriff, a writ of extent issued forth, &c. and that the said sheriff had extended the lands, by reason whereof the now sheriff could not extend them upon the new writ. It was moved for the conusee, that the retorn was not good; for although that the lands be extended by the first writ, yet because it is not retorned, it is not any execution in law, nor could the conusee have an assise, which Manwood, Justice, denied: Loare Preignothory, Our course is, when no retorn of such writ is made, to grant an alias, at the prayers of the party, and to enter upon the roll, that the sheriff upon the first writ, nihil inde fecit, nec misit breve. And that was taken by the Court to be a good and lawful course in such case; for upon such surmise, that no execution hath been done, and that upon such entry on the roll, an alias breve might be well awarded. And afterwards, this second writ of extent was not filed by order of the Court: and note, that the new sheriff was examined upon his oath by the Court of the action, and he said, that he made the retorn by the advice of Master Plowden, who told him, that he might safely retorn, that the land was formerly extended, and although that the said extent was not retorned; yet it is an execution for the party. Manwood, Certainly this is an insufficient retorn: but, perhaps Master Plowden did not know of this entry in the roll, as aforesaid, for now it appeareth upon record, that no execution was done. If this entry had not been, I should well agree with Master Plowden, that the same is an execution for the party, although it be not retorned.

1 Leon. 145.

19 Eliz. In the Common Pleas.

XXI. Steward's Case.

The case was, A. seised of certain lands in fee, granted a rent-charge out of the same to another, and afterwards aliened the lands to a stranger. The grantee in a replevin did avow for the rent, and the other party pleaded, that nothing passed by the deed: it was holden by the whole Court to be no plea, nor can any issue be joined upon it, but the plaintiff ought to have said, that he did not grant by the deed: for the same is a rent newly created, and which had not his essence before the grant, and it cannot properly be said, that nothing passed by the deed, but not of a thing that is in esse, but of things not in esse, that he did not grant, is the most natural issue, for a thing not in esse, non potest transire.

XXII. 19 Eliz. In the King's Bench.

Trover and Conversion.

In an action upon the case upon a trover and conversion to his own use per venditionem quibusdam hominibus ignotis, the defendant pleaded, that the goods were bailed to him, to bail over to J. S. to whom he had delivered them, absque hoc, that he did convert them to his own use, per venditionem hominibus ignotis. It was moved by Egerton, that that matter is not traversable, quod Wray concessit, for **[14]** the conversion to his own use, is the cause and ground of the action, and not the selling of the goods, &c.

XXIII. Mich. 19 and 20 Eliz. In the Common Pleas.

Outlawry.

A man was outlawed in the Court of Hustings of London; and the Hustings in which the judgment of outlawry was given, was holden two weeks next after the

last Hustings; so as there was but two weeks betwixt the two Hustings, whereas commonly the Hustings is holden but every three weeks, and now the Sheriffs of London were in doubt, if they might safely retorn the outlawry, without danger of an action upon the case brought against them by the party outlawed; it was holden by Dyer and the whole Court, that they ought and might safely retorn the said outlawry: for the Lord Dyer said, that there is a record in the time of R. 2. whereby it appeareth, that in London they might hold their Hustings every week, if they pleased, and afterwards he commanded Mosley and Christopher, secondaries, to retorn the outlawry, which was done accordingly.

19 ELIZ. IN THE COMMON PLEAS.

XXIV. LOVELESSE'S CASE.

Debt upon Recognizance.

Lovelesse, Serjeant, brought a scire facias upon a recognizance, and had judgment upon default, quod habeat executionem, and afterwards he brought an action of debt upon the said judgment, and exception was taken to the action: for that he ought to proceed upon the judgment given upon the scire facias, and ought to sue execution according to the said judgment by elegit, or scire facias, but not by capias; but the exception was not allowed; for the recognizance is a judgment in it self, and an action of debt will lie upon it; without any judgment in the scire facias; and debt lieth as well upon the judgment, as upon the recognizance it self; and so was the opinion of the whole Court.

1 Cro. 608. 817.

XXV. ELIZ. IN THE COMMON PLEAS.

BRENT'S CASE.

See Bacon's Reading upon this Stat.

The case was, that Robert Brent being seised of lands in fee, made a feoffment thereof unto the use of himself and Dorothy his wife, for their lives; and if he do survive his said wife, then to the use of him the said Robert and such a woman as he should after marry, for the jointure of such wife; the remainder over to a stranger in fee: and afterward (with the privity and assent of the feoffor) he in the remainder and the feoffees join in a feoffment to divers persons, (note, both feoffments were after the Statute of 27 H. 8.) and afterwards Robert Brent, the husband, levyed a fine to the same uses, and took a second wife, and died: the second wife, by the assent and commandment of the first feoffees, after the five years past after the fine, entered to raise the uses mentioned in the first feoffment limited to the second wife.

This case was argued by all the justices of the Court of Common-Pleas: and Mounson, Justice, conceived that the entry of the wife was lawfull, and that without the assent or commandment of the feoffees. An use may be limited to one who is in esse, or in posse; and the second wife here was in esse when the use was limited, and she was also in posse; **[15]** for by possibility the first wife might die, and also by possibility the feoffor might take to wife this woman. A gift to one who is not in esse or in posse, is void. A gift to J. S. & primogenito filio suo, if he have a son alive at the time of the gift, he shall take jointly with his father; but if not, yet after his death he shall take by way of remainder. A use is nothing else but a trust and confidence, and was not any inheritance by the course of the common law; for no mention is made of uses in our ancient books, when the common law greatly flourished, as in the time of E. 1. and E. 3. and also uses are not subject to the grounds of law: and although divers statutes have been made for the avoiding of divers policies for the gaining of lands in mortmain, yet the makers of the said statutes could not find out any such conveyances to uses. See the Statute of

Religiosis, 7 E. 1. and see 29 H. 8. tr. Mortmain 39. There is a glance at uses 44 E. 3. 25. b. the words are, En foy demist, &c. and the feoffees sued livery. And the first mention of uses in our books is 30 H. 6. Br. Title to Uses 49. and the same case Devise Fitz. 22. In the time of E. 4. uses were more frequent; for 5 E. 4. 8. divers cases concerning uses are there put, &c. and afterwards 1 R. 3. a new statute was made for the benefit of cestuy que use; and afterwards the statute of 4 H. 7. for the wardship of cestuy que use: and afterwards the statute of 27 H. 8. which made an end of uses. These uses at the first were of no value, but afterwards by continuance communis error fecit jus, so as they were taken and esteemed as inheritances: and they cannot be more fitly resembled to any thing, as to copyholds, which at beginning were but tenures at will, and were not known at the common law, but now they are in the same reputation in law as inheritances; and they are not guided by the rules of the common law, but by the intent of the parties: which appeareth in this case at bar to be, that she who should be the second wife of Robert Brent, the feoffor, should have the lands ut supra: and therefore this use shall rise, and the statute of 27 H. 8. shall draw the possession after it.

Manwood, Justice; As to the commencement of use, it hath been as long as mankind hath been guided by reason: and although no mention is made of uses in our ancient books, yet that is no argument that uses have been but of late times. Uses were not common, therefore were not at all, is a non sequitur. As long as wills have been, trust and confidence hath been; and also as long as marriage hath been. See the writ of causa matrimonii prolocuti: and see the Statute of Marlbridg, cap. 6. there is mention of falsa feoffamenta; and note, by other words of the said statute there was a trust, but it was a false trust to deceive another; and therefore such a mis-shapen trust is not called a trust by the said statute, but a collusion. And Mr. Littleton saith, that cestuy que use shall be sworn upon enquests, which was not enacted by any statute, but practised and put in ure by reason of common law. And I have seen divers ancient deeds of uses: and in ancient time, you shall not find that any would purchase lands to himself alone, but had two or three joint feoffees with him; and he who was first named in the charter of feoffment, was cestuy que use, although that no use was declared unto him upon the livery, and so it was known by the occupation of the lands. And the reason why no mention is made in our ancient Books of Uses, is, because men were then of better consciences than now they are, so as the feoffees did not give occasion to their feoffors to bring subpœna's to compell them to perform the trusts reposed in them.

As to that which hath been said, that uses have taken their beginning after the statute of West. 3. For before the said statute, if a man had made a feoffment in fee without declaring any use, it should be to the use of the feoffee, because there is a sufficient consideration betwixt **[16]** the feoffor and feoffee to raise the use, i. the seignory created by the law betwixt them; but now by the said statute such consideration is taken away; and then upon such feoffment, without consideration or declaration of use, it is to the use of the feoffor himself; the same is no reason against them: for although that an use implied was not before the said statute of West. 3. yet a use expressed was; and if before the said statute the feoffor had declared an use; the same had been good: as at this day, a gift in tail, or a lease for life, is made to another use, yet notwithstanding that the law doth create a tenure upon the lease or gift, yet the use expressed shall be good. And although uses are of such antiquity, yet they are not directed by the rules of the common law, but by the will of the owner of the lands: for the use is in his hands as clay is in the hands of the potter which he in whose hands it is may put into what form he pleaseth: and notwithstanding that now the possession be executed to the use, yet the property and quality, as abstracted from the possession, shall not be drowned in the possession: and so for as much as uses were by permission of law guided at the wills of the parties, so also shall be the possessions: and so because, that an use, as abstracted from the possession, might have been well limited to the wife which should be, notwithstanding that at the time of such limitation such a one was not in esse, in the same manner it shall be now, when the possession is presently executed to the use: and so in this case, the second wife shall be capable of this use, according to the will and direction of the owner. If a feoffment in fee be made to the use of B. for life, and if A. before such

a day shall pay 10l. to the feoffor, then to the use of the said A. for life, the same is a good use to begin upon the said condition; and yet if it had been limited in possession, it had been otherwise: and that an use may begin upon a contingency, see the case 27 H. 8. 5. A covenant is made by indenture betwixt A. and B. that the son of A. shall marry the daughter of B. upon which B. pays 100l. to A. and the said A. doth covenant, that if the said marriage doth not take effect, that then the feoffees of the said A. shall suffer the said B. his executors and assigns, to have the issues and profits of certain lands, until B. his executors and assigns, shall be contented and satisfied of the sum aforesaid by the said A. his executors or assigns, there, if the marriage doth not take effect, upon such contingent, the use shall rise to B. And see 30 H. 8. Br. Feoffs to Uses 50. A. covenants with B. that then B. shall enfeoff A. of the manor of D. then B. and his heirs shall be seised of the manor of D. to the use of the said A. and his heirs: now if A. enfeoffeth B. ut supra, then, &c. vide librum. And here in our case, the second wife doth not hold joyntly with her husband, for their estates do not begin together, for the husband is in of his ancient estate which he had during the first marriage, notwithstanding the words of limitation to the said husband and his second wife, but she shall take by way of remainder.

Harper, Justice, Uses began about 18 E. 2. after which time there was such a general liking of them, that they were anew used, but they did not come into common practice before the time of King Henry the sixth, when the great contention fell out betwixt the two great houses of York and Lancaster, at which time uses were in great estimation for the safety of inheritances. Afterwards, uses by practices became mischievous, and prejudicial to the publick justice of the realm, and to many particular persons; for some timentes implacitari, conveyed their lands secretly to uses, so as he who had right knew not against whom to bring his action: and for that, divers statutes have been made to enable the subject to implead the pernor of the profits, 4 H. 4. 7. 11 H. 6. 4. 1 H. 7. And as to the making of the statute of 27 H. 8. the truth is, that the King was displeased for the loss of wardships, and other injuries done to him; for which cause he **[17]** complained to the Judges of the defect of the law in that case who therefore shewed unto the King the causes of those injuries and losses to the King; and farther shewed to the King, that if the possession might be joyned to the use, all would go well, and all the injuries, wrong, and loss, which came to the King by reason of such uses, wills, and secret feoffments, would be avoided: for which the King commanded his council to frame a bill to that purpose, and present it to the House of Commons in the 24 year of his reign, but it was then rejected; and the King at that time would have been contented, that the fourth part of the land onely should descend: and from that time the King stayed farther proceedings in the said cause until 27 H. 8. at which time it took effect: and their cure was to pen the statute so precisely, that nothing should be left in the feoffees, but that the whole estate should be executed by the statute, so as the said statute did utterly take out all from the feoffees. Whereas it hath been said, that a use hath been as long as any marriage hath been, and so conceived upon the writ causa matrimonii prolocuti, the same is not any reason; for in that case there is not any confidence or trust: for if the marriage doth not take effect, the woman shall have her writ de causa matrimonii prolocuti. In conveyances we are to respect two things, the form, and the effect of it; and in all cases where the form and the effect cannot stand together, the form shall be rejected, and the effect shall stand. A lease for life is made to a feme sole, she takes husband, the lessor confirms to both of them; the husband cannot take any estate presently according to the words of the confirmation; but because the will of the lessor is, that an estate shall accrue to the husband, he shall have it as the law will, by way of remainder. So lands are given to an abbat and a secular man, the form of the words purport a joynt estate, but that by law cannot be; and therefore they shall take as the law will, rather than not at all. In our case here, the limitation of the use cannot be pursued precisely according to the words, which are, viz. If the husband over-live his said first wife, then to the use of the said husband and his wife which shall be; which in words is a joynt estate: and therefore the words shall be construed, After the death of the first wife, unto the use of the husband until he marrieth, and afterwards to the use of him and his second wife, in which case they shall take joyntly.

Dyer, Chief Justice, As to the beginning of uses, he conceived that the same was immediately after the Statute of Mortmain, at which time all their shifts then in practice were found out: which see, the Statute of Mortmain, 7 E. 1. Stat. de Religiosis: for which cause they were after driven to find out other shifts not provided for by the statute, which were espyed by the making of the statute of 15 R. 2. cap. 5. and in that statute these words, behoof and use are used: which is the first place those words have been used in our law, and yet long time before that statute uses had been in practice, as appeareth in the Exchequer, 34 E. 3. the which in the time of Queen Mary, when the said record was shewed in the Exchequer to the justices, the effect of which record was, that Walter de Chirton, who was customer of the King, became indebted to the King in the sum of 18000l. and with that the King's money had purchased in the name of his friends, to defraud the King, many lands, and took the profits of them; those lands so purchased were extended to the use, and for the King, in payment of his debt, as well as if Walter de Chirton himself had been seised of them, and that by the advice of the Chancellor and the Chief Justices. Now uses by tract of time have grown in credit, so as cestuy que use have been sworn in inquests, and by the law they might justifie the maintaining of their feoffees when they had been impleaded, which they could not have done if they had not more interest in the lands than strangers: **[18]** and they (uses) have been in such reckoning and account since, that an use hath obtained the name of an inheritance, and is now reputed amongst the estates of lands in our law; and therefore we say in speeches, and in penning of statutes, estates in possession, and estates in use: and a use cannot be limited to parishioners, no more than the land it self; so as there is a great affinity betwixt the words, lands and use. It is to be granted, that the statute of 27 H. 8. doth devest all out of the feoffees, yet it doth not devest it before that the use be vested in cestuy que use; for the words of the statute are, that the possession shall be executed in such manner, quality, and degree, as was the use; therefore the vesting of the use ought to precede the execution of the possession to it. And he was of opinion, that this future use in the principal case limited to the second wife did remain in the feoffees at the first, but that they had destroyed it by their feoffment; for the second wife at the time of the feoffment was not known, and therefore it shall now accrue: and he was also of opinion, that this limitation to the second wife was void at the beginning; for the second wife was not a person able to take, when the estate and use limited to the first wife was determined, and therefore she shall not take at all: and if such an estate had been limited in possession, it should not have vested, no more than now.

Mounson, Justice; When the feoffor and the feoffees joyn in a fine of that land, within which the use in future is wrapped, he conceived, that the use being in abeyance and consideration of the law, could not be touched by the fine. It is to be confessed, that an use may be discontinued: see 4 H. 7. 18. A feoffment made to the use of A. for life, and after to the use of B. in tail, &c. A. makes a feoffment in fee, and dieth, the same is a discontinuance of the other uses: and see 27 H. 8. 29. And in our case, the use might arise without any entry of the feoffees; for the use is not discontinued, but the feoffees are barred by the fine: and he was also of opinion, that this use might take effect without any entry, and take effect according to the limitation.

Manwood, This estate which is limited in use to the second wife, because it cannot vest in her because not known, the feoffees are yet content with it, and this use is to grow out of their estates at the seasonable time: then when they joyn in a feoffment, their estate which was the root of the conveyance, and the uses which are the branches, spring not till she dieth; and therefore if the estate of the feoffees, which is the root of the uses, be destroyed by alienation of the land before the uses have their being, as in our case it is, because that then the second was not known, no use can afterwards rise, for by the feoffment they are destroyed, and also every possibility of them. But if the uses had been in esse, so as the persons to whom they are limited are known, then the statute shall execute the possession to such uses. And as to that which hath been objected by my brother Mounson, that the law shall keep and preserve the use, and that notwithstanding any thing done by the feoffees at its due time it shall rise: that cannot be; for the statute of 27 H. 8. doth not speak of such uses as this in our case, but of such uses onely, of which one may say, such a use is limited to such a

person and such to such a person, &c. and such uses are onely executed by the statute. It may be demanded, what estate the feoffees have in the lands until such uses be executed? It may be answered, a fee-simple determinable, as the lord hath when he entereth upon his villein donee in tail: and I conceive, that this use was not in custodia legis; quia de minimis non curat lex: and the use was such a thing of which the law took no knowledge; and in case of an estate in possession, such an use in abeyance should be bound: as a lease for life unto A. the remainder to the right heirs of B. [19] A. suffers a common recovery in the life of B. who afterwards dieth, and afterwards A. dyeth, the heir of B. is bound, for he had not right at the time of the recovery. This fine levied by the manner shall not destroy the uses limited to the second wife; for as to the feoffees, they have nothing to doe with the lands to transfer any estate against the former limitation; for the statute leaves nothing in the feoffees, but vests all in cesty que use, and that which cannot vest in him to whom it is limited, shall return to the feoffor: as if I make a feoffment in fee to the use of my self for life, and after to the use of my second wife, all the fee is now in me, and when I take a second wife, then the feoffees shall be seised to the use of such wife in remainder for her life: but in the case at Bar, the feoffees at the time when this second wife was in esse, had not any thing in the lands, for they had departed with all their interest before by their feoffment and fine.

Note, that by the first feoffment the use was limited to D. the first wife of the feoffor, for term of her life, the remainder in tail to A. Brent, the remainder in fee to one Broughton, and all these uses were executed by the statute; but these persons were not parties to the livery, but onely the feoffees, which had not any thing: then when they make their letter of attorney to make livery of seisin (not being seised of the land) the attorney onely is a disseisor, and so nothing passed from the feoffees, if any right had been in them: and for another reason nothing passed by this last conveyance out of the feoffees, for the parties to the latter conveyance had notice of the use, and so it appeareth by the second indenture, the which makes mention of the first uses, &c.

Dyer, Here in our case, the founders of these uses, i. the feoffor and the feoffees, have an intent to overthrow these uses, for at the common law the feoffees might doe it of themselves; as if the feoffees had made a feoffment in fee in consideration of money to others who had not notice of the uses, now the uses are gone, and the second feoffees in such cases were seised to their own uses. I well know, that by this feoffment all is devested out of the feoffees, which might vest in the person to whom the use is limited; but here this use which was limited to the second wife, could not upon the limitation of it vest in any person; and therefore it shall remain in the feoffees who are put in trust with it, and therefore have interest in the lands until all the trusts be performed: and therefore the second wife was advised by her council to make her entry in name of the surviving feoffee, and the interest which the feoffees have in the interim, untill the execution of all the uses, is a fee-simple determinable; for the whole interest is not devested or driven out of the feoffees untill the whole trust be accomplished, i. untill all the uses limited upon the feoffment are executed, and have their full perfection.

And whereas it hath been alledged on the other side, that upon the second feoffment nothing passed out of the feoffees, for which it shall not be said in law their livery, but that the attorney shall be said the sole disseisor; as to that I conceive, that whatsoever was lost in the feoffees passed by that livery. If he in reversion upon an estate for life makes a charter of a feoffment, and a letter of attorney to make livery of seisin without words ad expellendas omnes, &c. if livery be made by force thereof, the fee-simple shall pass: and he cited a case which was argued before all the justices of England, reported by himself 2 and 3 Ma. 131. Divers leases for years were made of the demeans of an abby, after which the reversion was granted to the Countess of Richmond for life, after which King Edw. 6. granted the reversion in fee to the Earl of Warwick, who made a feoffment of [20] all to certain persons, to the use of his eldest son and his wife for her jointure, with a letter of attorney to make livery and seisin; the attorney made livery accordingly, and by that feoffment and livery it was adjudged, that the fee-simple did pass: so in our case, upon this second feoffment, a disseisin is done to D. the first wife, and yet the right of the feoffees doth

pass thereby; and although it shall not be taken in law their livery, yet it shall be adjudged their confirmation, because they have joined in the deed, and that shall bind their right to establish the same in the new feoffees, as if the disseisee join in a feoffee by deed with the heir of the disseisor: and as to that which hath been objected, that because at the time of the feoffment, the feoffees had not any thing, &c. and therefore nothing shall pass: and they have likened to the case, where the father is disseised, and the son and heir doth release to the disseisor, the same shall not bind the heir after the death of his father: the same is not like our case; for there is a great difference betwixt a release and a feoffment; for if the son disseise the father, and maketh a feoffment in fee in the life of his father, notwithstanding that he had not any right at the time of the feoffment, yet he is bound.

Dyer 340. b. Co. 1 Rep. Shelley's case.

TRIN. 29 ELIZ. IN THE KING'S BENCH. ROT. 342.

XXVI. THURKETTELL AND TEY'S CASE.

In debt by John Thurkettell against Edw. Tey, and Mary his wife, executrix of Robert Thurkettell, the case was, that Agnes Thurkettell, mother of Robert, the testator, devised certain lands to Robert, and afterwards devised 40l. to the plaintiff, John, upon condition, that the said John, cum requisitus esset acquietaret, & retaxaret prædict. Roberto omnes actiones reales & personales, querelas, &c. prædict. 40l. per dict. voluntat. legatis tantummodo exceptis; Agnes died, Robert made two bonds to John, the first was endorsed to pay 20l. parcell of the said legacy, within a year after the death of the said Agnes, so as the plaintiff release according to the will of the said Agnes. The second obligation was with the same condition, to pay 20l. residue of the said legacy, within two years after the death of the said Agnes, upon condition to release, ut supra, and all this matter was pleaded in barr; and farther, that Robert required the said John to make the release, &c. which he refused, and they were at issue upon the request, and it was found for the plaintiff; i. quod dict. Robert. non requisivit, &c. upon which verdict judgment was given for the plaintiff; upon which the defendants brought error, because it appeareth upon the record here, quod billa prædict. prosecuta fuit infra duos annos post mortem dict. Agnet. & sic ante diem solutionis: for the second bond, see 46 E. 3. 28. by Finchden and Persay, and see there, by Persay, that if my writ be brought before the day of payment, and doth depend in suit till after the day of payment, that my writ is made good; for at all times the defendant was my debtor. And afterwards in the principal case the judgment was affirmed in the Exchequer-Chamber: and note, that the day of payment did incurr, pendent the writ.

1 Cro. 110, 111.

[21] 29 ELIZ. IN THE EXCHEQUER.

XXVII. LIGHTFOOT AND BUTLER'S CASE.

It was said in this case by the Solicitor General, that if one holdeth of the Queen, as of her manor, he shall not have the privilege of the Exchequer for that cause; but if the King grants tithes, and thereupon reserveth a rent, nomine decimæ, and a tenure of him, there he shall have the privilege: the principal case was, that one of the parties claimed the lands in question as his freehold, but holden of the Queen, as of such a manor; and the other claimed it as copyhold, holden of the same manor; and the freeholder did suggest in the Exchequer, that the demands of the manor are not indifferent. Clark, Baron, If it be so, this Court shall have jurisdiction. Manwood, If the matter pass against you wrongfully, wherefore may you not have an assise? And the case of Beaumorris was cited (but I remember not to what purpose) i. the Mayor and Commonalty of Beaumorris were patrons of a chantry; and they and the chantry priest made a lease for years by indenture, in the end of which was

this clause, In cujus rei testimonium, tam the priest, quam the mayor and commonalty have put their common seal, and it was moved that there was not any seal for the priest, for he could not have a common seal with the mayor and commonalty. Clark, Twenty men may seal with one seal, and they may also seal with one seal upon one piece of wax onely, and that shall serve for them all, if they all lay their hands upon the seal together. Manwood, They may all seal with one seal, but upon several pieces of wax. Gent, When many are parties to a deed, the words are sigilla omnia; which cannot be aptly said in this case, where all seal upon one piece of wax.

Co. 4. Inst. 118, 119.

29 Eliz. In the Exchequer.

XXVIII. Barns and Smith's Case.

Emanuel Barns, executor of Barns, late Bishop of London, brought debt for arrerages of rent, reserved upon a lease for years, of certain mines demised to Smith, i. mines called Argil, and mines called Greenbourn; and it was against the executors of Smith. The defendant pleaded, as to parcel non detinet, and as to the other parcel of the arrerages, that in the indenture of lease, there is a covenant, that if it shall happen that the said lessee be hindred, quo minus mineriis, præd. gaudere possit; that then so much rent should be deducted anno, to the value of the mine, that he could not enjoy, &c. And he said, that he was hindred, quo minus gaudere potuit mineriis præd. &c. and issue was joined, that the lessee could not enjoy, &c. and it was found for the plaintiff. It was moved by Coke, in arrest of judgment, that here is not any place shewed where these mines were, so as it doth not appear from what place the visne should come; as if in an action (as here) the plaintiff declares of a lease made of lands, called R. in such a county, the same is not good. The issue here is, non potuit fodere in præd. minera de Greenbourn, for the space of seven years and a half, from whence shall the visne come for trial of it? Not from Durham where the lease was made; for no affinity or nearness is betwixt the place where the lease was made and this issue. But if the issue had been, that the lessor had not any thing in the mines at the time of the lease, that might be tried where the lease was made: another **[22]** exception was, because that the plea is; quod non potuit fodere, in 3, 4, 5, 6, 7, 8. dimidio, 10, & 11. and that appears to be seven years and a half, and the jury find that he could not digg, per spatium septem annorum tantum, without speaking of the half year, and so they have not given a full verdict: and as to the first exception, it was said, if a thing be alledged in pleading which is issuable, and there is not laid down any place of it, although that no issue be joined upon it, yet because he hath prevented the other of his plea to it, judgment given in such case shall be reversed: and so it was rated, betwixt Matthew and Stansham: so upon the Statute of Usury, the informer charged the defendant, that by way of corrupt bargain he hath received so much, and doth not shew the place, although no issue was joined upon it, but they were at issue upon another point, yet if judgment in such case be given, it shall be reversed. And in all actions upon the case, where request is necessary, and the plaintiff ought to alledge it; the place of the request must be shewed: and he said, that such issue was to be tried where the mines leased are; and here no place is alledged, where the mines are, but onely in the county of Durham; and yet a visne of the City of Durham hath tried the issue, which ought not to have been, but the visne ought to have come, de corpore comitatus. Clark, Baron, If the issue be joined upon taking of the profits, it shall be tried where the land is, but non debet or detinet, where the lease is made. Coke, The issue is, non potuit fodere, and that is local; therefore it shall be tried where the mines are. Manwood, Non potuit fodere, non potuit gaudere, are not local; but non fodit, non gavisus fuit, is local, and shall be tried where the mines are: and here it is not shewed how he was hindred to dig, &c. and the issue is to be de postatia, non de actu. Tanfield, As to that which Coke hath said, that the visne in this case shall come, de corpore comitatus, the same is not so, for such a visne shall never be, but where the issue is upon nul tiel vill hamlet, or place known: in another case the trial shall be, de corpore

comitatus, as in a false imprisonment the defendant justifies, that the common voice and fame was, that the plaintiff committed such a felony, &c. The plaintiff traverseth the common voice and fame, there the visne shall be, de corpore comitatus, 11 E. 4. 4, and 5. and see also 25 Eliz. the case of Gynne and Constantine reported now in Coke, 6. part Dowdale's case, 48. As to the defect in the verdict for the half year, the record is not so; for the record is, dimidio anni decimi, & undecimi, and so two half years make a whole year, and so there is but seven years in which the disturbance is supposed to be done. See as to the visne, de corpore comitatus, 22 E. 4. 4. Visne 27. Another exception was taken, because that the declaration is, that the lease was made at Durham, in comitatu Dunelm. and doth not say also in Selberg, for such is the name of the County Palatine; but to that it was said, that every writ of execution which goes into the County Palatine, is directed Episcopo Dunelmensi, & cancellario suo, quod det in mandatis vice-com. suo, &c. And Durham was called Selberg in ancient times, and the name of the County Palatine there, is commonly Dunelm. & Selberg. and their pleas there entred; placita coram justiciariis de Dunelm. & Selberg. but the same is amongst themselves onely, and all directions from hence to them are Episcop. Dunelm. without mention of Selberg, and a precedent was shewed to the Court to that purpose and intent. Manwood, Levied by distress, and issint rein arere shall be tried where the lease was made: Clark, That is true, for by the (issint) the plea before is waved: and see 8 H. 5. 10. Where an issue is to be tried in Lincoln, or such a town, which is a franchise, the ven. fac. shall be of Lincoln, &c. and not de vicineto de Lincoln; for then the jury shall be as well of the county adjacent, as of Lincoln itself, which the Sheriff of Lincoln cannot doe: but a venire facias de suburbiis of Bristow was awarded good: **[23]** and if in the case at bar, the defendant had pleaded, that the defendant had entred into part of the mines, and so suspended his rent, upon which they are at issue; that, by Manwood, shall be tried by a jury, de corpore comitatus. The issue here is, if the defendant might enjoy those mines, secundum veram intentionem dimissionis prædict. and that is referred to the devise which was made at Durham, and there it is well triable. And afterwards, at another day it was holden, that all the issues are jeofailes; but as to the want of place, the same was holden to be a material exception. See the case of Mynes, Plowd. 337. Exception was taken to the information, because it is not laid down there in what town or hamlet Newlands lay; and it was holden, the same had been a material exception, if the defendant had demurred upon the information, in which case there is no trial by jury, &c. and he said, misnosmer shall be tried where the writ is brought, &c. So ne unque administer as executor, &c. Manwood, Here the lease is said to be made at Durham, in a place certain; if now there be not any other local thing said which might draw the trial elsewhere, it shall be tried at Durham where the lease is made: an infant makes a lease for years, rendring rent, and afterwards re-enters, and avoids his lease by reason of his nonage, and title is made against him by the lease, upon which he pretended nonage, it shall be tried where the lease was made, and afterwards judgment was given for the plaintiff.

3 Len. 171.

PASCH. 30 ELIZ. IN THE KING'S BENCH.

XXIX. ROSS AND MORRICE'S CASE.

Edward Ross was plaintiff in a replevin against Edward Morrice, and George Manly defendants, who made conusance, as bailiffs to Jerom Weston. The plaintiff declares, of the taking of two geldings, 20 Decemb. 29 Eliz. at Nayland, in the county of Suffolk, in a certain place called Nayland-Court-Meadow. And the conusance is that the place where was a freehold of the said Jer. Weston, &c. The plaintiff in bar of the conusance shewed, that long time before, Sir Christopher Danby was seised of 30 acres of meadow in Nayland, whereof the place where, &c. and leased the same by indenture to Thomas Calton, 19 Maii, 31 H. 8. Habendum from the Feast of the Annunciation, 1553. for the term of 45 years; who, 1 E. 6. assigned his interest to Edw. Ross, the plaintiff's father, who, 1 Maii, the said 1553. entred, and 11 Eliz.

granted his interest to Bamford and Mascal, who entred and were possessed. Sir Christopher Danby died seised of the reversion, 13 Eliz. and the same descended to Thomas Danby his son and heir: 14 Eliz. Mascal died, Bamford, 15 Eliz. granted to the plaintiff, habendum from the 17 of March 1583. for three years, which expired 26 Eliz. Bamford entred, and afterwards Thomas Danby granted the reversion to Edw. Rockwood in fee, to which the said Bamford attorned; and the plaintiff by force of the said lease, put in his cattel, &c. The plaintiff replicando said; that long time before that Danby had any thing, Jeofry, Lord Scroop, had issue of his body, Henry, Lord Scroop, and died; and that one John Guntwarby was seised of the said manor of Nayland, whereof, &c. in fee, by his charter, 25 E. 3. gave to the said Henry, Lord Scroop, the same, et hæredibus corpore suo exeuntibus, who had issue Stephen, who entred, and died seised, having issue John, who entred, and died seised, having issue Thomas, who entred, and 3 H. 7. suffered a common recovery to the use of himself and his heirs, the recoveries enfeoffed, Thomas seised also of many other lands, and had issue, Ralph, Jeofry, Alice, Elizabeth and Margery, and afterwards died seised. Ralph Lord Scroop entred, and thereof did enfeoffee divers persons **[24]** unto the use of himself, and Eleanor his wife, for their lives, and the heirs males of the said Ralph; and afterwards, the said Ralph being possessed of the said charter of entail made, ut supra, by Guntwardy, 7 H. 8. devised that the feoffees should be seised of the said manor of Nayland to the use of himself, and Eleanor his wife, for their lives; and if they died without issue of the body of the said Ralph, the said Jeofry then living, that then the feoffees should be seised to the use of the said Jeofry, (being his uncle) for his life, and after his decease, ad usum rectorum hæredum in perpetuum secundum antiquam evidentiam inde ante factam; with an averment, that the said Ralph, at the time of the said devise, and of his death, was possessed of the charter of entail made by the said Guntwardy: and that the said charter was the most ancient evidence of the said, concerning the said manor. Ralph died without issue possessed of the said charter by which the feoffees were seised of the said manor of Nayland to his use for life, and after to the use of the said Jeofry for life, and after his decease, of the right heirs of the body of Henry, Lord Scroop, lawfully begotten, by reason of the said devise, and the said charter, and of the residue of the manors, to the use of the said Jeofry and his heirs; Eleanor died, after whose decease, the feoffees were seised of the said manor of Nayland, to the use of the said Jeoffry, right heir of the said Henry, Lord Scroop, of his body begotten, and of the other lands to the use of the said Jeofry in fee: Jeofry died without issue, by which the feoffees were seised to the use of the said Alice, Elizabeth and Margery, cosins and heirs of the body of the said Henry Scroop, &c. And of the heirs of the bodies of the said Alice, Elizabeth and Margery, lawfully begotten, by reason of the said devise and charter, as to the said manor of Nayland, and of the other manors to their use in fee: and afterwards the said Alice took to husband, James Strangways, who had issue, Thomas: Elizabeth took to husband, Fitz Randolph, who had issue, Elizabeth, Dorothy, Agnes, Alice: Margery took to husband, Danby, who had issue, Sir Christopher Danby, named in the bar, and afterwards all the said husbands and their wives died, by force of which the said feoffees were seised of one part of the said manor of Nayland in three parts to be divided, to the use of the said Thomas Strangways; and of another part, to the use of the four daughters of the said Elizabeth, and her husband Fitz Randolph, and of another such part to the use of the said Christopher Danby, and of their heirs in tail; and of the other lands to the use of them in fee, in degree of coparcinary; Elizabeth, the eldest daughter of Fitz Randolph, took to husband Shirley; Dorothy her sister took to husband, Eshe: Agnes took to husband, Maynel, and Alice took to husband Draufield. Thomas Strangways had issue, James and died. And afterwards partition was made, by which, to James Strangways were allotted lands in Kent, and agreed that the feoffees should be seised of the said lands to the use of the said James and his heirs, and to no other use. To Sherley, and Elizabeth his wife, lands in Essex were allotted and agreed upon the partition, that the feoffees should be seised to the use of them, &c. in fee &c. And to Danby the said manor of Nayland, in tail, by reason of the devise and charter, aforesaid, as to the said manor of Nayland, and of other lands in fee. And afterwards, 23 E. 8. notice was given to the feoffees of the said partition, and averred that the partition was equal, &c. and that the feoffees were seised to the

use of the said partition, untill 27 H. 8. and confessed the lease made by Danby to Calton, and all the assignments set forth in the bar to the avowry, and farther shewed, that Thomas Danby entred upon Ross the plaintiff, and enfeoffed Rockwood, who enfeoffed Weston.

Coke, for the plaintiff, The case is no more; but where a man hath issue, a son and a daughter by several women, and deviseth his lands to his son, and the heirs of the body of the father lawfully begotten, in **[25]** which case, if the son dieth without issue, tail is extinct, and the daughter shall never have the land, for she doth not take by way of reversion or remainder, and she doth not take in possession, because the possession was in Jeofry who was the heir of Henry, &c. And these cases were vouched; 1 Roberge's case, 2 E. 3. 1. to tail: John Mandevile took to wife Roberge, and Mandevile gave land to Roberge, & hæredibus ipsius Johannis quos ipse de corpore prædict. Robergiæ procreaverit; there the book is, that the formedon was, Quæ M. dedit Robergiæ & hæredibus dict. Johannis quos ipsæ de corpore dictæ Robergiæ procreaverit; et quæ post mortem præfat. Robergiæ, & R. filii & hæredis dict. Johannis Mandevile, & hæredis ipsius Johannis de corpore dicto Robergiæ per dict. Johannem procreat. &c. and the same writ awarded good, which Coke denyed to be law. And he cited the case of Dyer, 4 and 5 P. and Ma. 156. A. gives lands to one for life, the remainder thereof rectis hæredibus masculis de corpore dict. A. legitime procreat. remanere inde rectis hæredibus dict. A. who hath issue two sons, and dieth; A. dieth, the eldest son hath issue a daughter, and dieth without issue male: and he conceived first, that in this case the limitation of the remainder in tail to the right heirs of the body of the donor is void, for the donor cannot make his own right heir a purchasor, without departing with the fee-simple of his person: but admitting the limitation is good, he said we are to consider, if this entail to the son, once vested and commenced in the possession of the son, when he dieth without issue male, the estate be spent, or that the same shall go to the younger son? and he said, that it was the opinion of Dyer in that case, that the younger son was inheritable to the said estate tail: as in the case of Littleton 82. where the condition is, that the feoffee shall give the lands to the son and heir of the husband and wife, and to the heirs of the body of the father and mother lawfully begotten: and the husband and wife before any such gift die, having issue, and afterwards the feoffee gives the land to the son and heir of the husband and wife, and to the heirs of the body of the father and mother begotten, the condition is well performed: and if the eldest son, to whom the gift is made, dieth without issue, the youngest son shall inherit: and in a formedon in the reverter, upon such a gift the writ shall be, et quæ post mortem of the eldest son, ad ipsum reverti debet; because the husband and wife obierunt sine hærede de corpor. suis inter eos exeunt. And such was also the opinion of Saunders. But Brook, Brown and Catlin were clear contrary; and he said, that Bendloes Serjeant, who reporteth that case, doth affirm, that judgment was given in that case, that the estate-tail was spent, and that the daughter should have the lands, and not the second son: and so he said, that in the case at the bar, the estate-tail was spent: but he said, that he conceived that in the principal case at bar there is not any estate-tail at all, because the words (upon which the estate-tail is conceived) are incertain and too general, viz. [secundum antiquam evidentiam], for there might be many ancient evidences, for the words may extend to evidences which cut off the estate tail, as well as to the entail of Guntwardy. He also argued, that the partition was void; and then the lessee had a good interest for certain parts of the lands, for partition cannot be made of an use: and he said, that he agreed, that partition betwixt husband and wives of lands, if it be equal, should bind the makers, because they are compellable to make partition of them; but contrary of an use, for that they are not compellable to do: also, in the principal case, the land entailed is allotted to one of the coparcenors, which is not good but during the coverture, and afterwards void; and then the lease is void but in part, and so the conusance is not good.

[26] Atkinson contrary; and he said, I conceive, that by words of relation a fee may pass without the word heirs. See 39 Ass. 12. The father seised of lands in fee, doth enfeoff his younger son in fee, and the father continues the possession of the lands, claiming to hold them at the will of the son; and the son coming into the town where the lands do lie, in the hearing of his neighbours saith to his father, You have given to me these lands, naming them; as fully as you have given them to me, I give

them back to you again: and the same was holden to be a good gift to the father: 43 E. 3. 22. The King seised of a manor, to which an advowson is appendant by escheat or conveyance, gives the said manor as entirely as such a one held the said manor before the escheat or conveyance, the advowson shall pass without special mentioning of it: and so here in our case at bar; this will hath reference to the ancient evidence, and it shall be as strong as if he had set down the special words of entail; and to ancient evidence before the entail it cannot extend, for then a fee should pass, and then the devise should be void, because to his heir; and the word antiqua evidentia shall have reference to the charter which was made by Guntwardy, for that was an ancient evidence made two hundred years past: and he cited the case of 40 E. 3. 8. the Provost of Beverley's case, and conceived that the estate was not spent, for that the estate-tail was in Jeofry, as the fee was in him. Lands are given to the father for life, the remainder to the son in tail, the remainder to the right heirs of the father; the father dieth, the tail and the fee are in the son; but yet after the death of the son without issue, the lands shall be in the brother's son by descent, and not as purchasor. And in our case, Jeofry was in in the tail, as right heir of Henry; and if Jeofry dieth without issue, his brother of the half bloud shall have the lands, as in the case before cited of 40 E. 3. but that shall be in tail by force of the devise. And he said, that in this case here, the partition was made good enough, although it were of lands in use, for a man might contract for an use without deed: 11 H. 4. Partition 156. Partition of an advowson without deed: and that is by reason of the privity betwixt them, and because they are compellable to make partition: and in our case they are compellable by subpœna in Chancery to make partition; and notwithstanding that the lands entailed be allotted to one coparcenor onely, and the fee to the other three, yet thereby the partition is not void, but voidable: as an exchange by tenant in tail is not void, but if the issue in tail accept of it, it shall bind him during his life: so here; and also by the death of the husbands the partition is not void, but voidable onely.

Clench, Justice; How shall the heir be said seised of the lands entailed, which was allotted to his father and mother after acceptance and agreement?

Atkinson, Of certain part as issue in tail, and of other parts by force of the partition and acceptance, quære of that: for if it be not of the whole as issue in tail, then the lease is not void, but for so much whereof he was seised in tail, and then the lessee is tenant in common with Weston, and then the conusance is not good.

Cooper, Serjeant elect; Here wants certainty, for the words of reference are too general, and therefore void, ad usum rectorum hæredum, without shewing of the donor or of the donee; and they are not helped by the subsequent words, secundum antiquam evidentiam ante hac factam, for that also is incertain; for it appeareth upon the record, that there are divers evidences of the said lands, as the charter of gift, the recovery, and the conveyances made 4 H. 7. and which of them is intended by the devise, non constat: and the said defect is not helped by any of the averments; i. that the devisor was possessed of **[27]** the said charter of entail at the time of his death; and it is also not to the purpose, for it may also be, that he was possessed of other evidences as ancient as the said charter of entail: it is said, that there is no other ancient evidence of the Lord Scroop, but it is not averred that there was not other ancient evidences of the said lands. But admit that the limitation be good by that reference, yet there was not any estate-tail, for every estate-tail ought to be limited in certainty, which see in the statute of West. 2. secundum formam in charta doni manifesto expressam, &c. and here it doth not appear upon the words of the charter, if the estate-tail be limited to the heirs of the donor, or unto the heirs of the donee? and he said, Admit that the same is an estate-tail, then the question is, if Jeofry be a purchasor? and if he be, then by his death without issue the estate-tail is spent: and he said that the estate for life in Jeofry is drowned by the estate-tail limited to him, for they are united together.

Egerton, Solicitor-General; Reasonable and favourable construction ought to be made of this devise according to the intent of the devisor: as 35 Ass. 14. lands are given to B. and his heirs, if he hath issue of his body; and if he die without issue of his body, that the lands shall revert to the donor and his heirs, the same is a good entail; and upon the death of the donee without issue, the donor shall re-enter: and

so here, although that [rectorum hæredum] be incertain words, yet the same is supplied by the subsequent words, viz. secundum antiquam evidentiam. As, where the King grants to a mayor and commonalty such liberties as London hath, the same is a good grant: 2 H. 7. 13. And he conceived, that this estate-tail shall be said to begin in Henry, although he was dead before, and that all his issues should inherit it, and that it should not be determined by the death of Jeofry without issue; and in proof thereof he vouched the case before cited, Littl. 81, 82. for in that case the condition could not be holden to be performed, if the heir to whom the gift was made in facto should be in by purchase, and so the estate-tail spent by his death without issue: and also he vouched the case of one Shelley, that although the heir took that which was not ever in his ancestors, yet he did not take it as a purchasor, but as in course of a descent; and he also cited Robridge's case. And afterwards, the same term, by award of the Court, judgment was entred for the plaintiff, for the incertainty of these words [secundum antiquam evidentiam] to what evidence it should refer; and also [rectorum hæredum] without shewing whose heirs, i. of the donor, or of the donee. And Wray, Chief Justice, said, It shall be intended upon this will, that the meaning of the testator was, that the lands should go unto his heirs according to the law, according to all his evidences which he had of his lands, and that is a fee simple; and it shall not be intended, that the testator had such a special remembrance of one deed made two hundred years before, viz. 25 E. 3.

1 Cro. 108, 109. 1 Leo. 245.

MICH. 30 ELIZ. IN THE KING'S BENCH. ROT. 482.

XXX. PERRY AND SOME'S CASE.

Some, parson of the church of Sherring in Essex, libelled in the Spiritual Court against Perry, for the tithes of green tares, eaten before they were ripe, and for the tithes of the herbage of dry cattel, and for tithes of sheep bought and sold, and for churchings and burials; Perry prayed a prohibition, and in his surmise; as to the green tares, he said, that they had used, time out of mind, &c. in the same parish, in consideration that they had not sufficient meadow and pasture for their milch kine, and draught cattel to pay for **[28]** the tithes of the ripe tares, the tenth shock; but for their green tares which are eaten up before they are ripe, in consideration that they gave them to their cattel, they had used to be discharged of any tithes thereof; and the truth was, that 400 acres of lands within the said town had used to be plowed and sowed every year by the labour of draught cattel, and industry of the inhabitants, in consideration of which, and that in the said parish there was not sufficient meadow nor pasture for their draught cattel, they had used to be discharged of the tithes of green tares eaten before they were ripe: it was holden by the Court, that the same was a good custome and consideration, for the parson hath benefit thereby, for otherwise the said 400 acres could not be plowed; for without such shift to eat with their draught cattel the green tares, they could not maintain their plough cattel, and so the parson should lose his tithes thereof; and for the tithes of the green tares, he hath the tithes of 400 acres. There was a case lately betwixt the Lord Howard and Nichols, where the suit in the Spiritual Court was for the tithes of rakings, and a surmise to have a prohibition was made, that the inhabitants had used to till and sowe their lands, &c. and they had used to be discharged of their tithes of rakings after that the shocks were carried away. And Coke, who was of council with the parson, durst not demurr upon it, but traversed the prescription. Wray, Chief Justice, The want of meadow and pasture in the parish, is the great matter here, and there is not any mischief here, as if they had surmised, that for want of meadow and pasture, they had eaten their meadows with their cattel; and it was held by the whole Court, that it was a good prescription.

1 Cro. 139.

TRIN 30 ELIZ. IN THE KING'S BENCH.

XXXI. THE QUEEN AND PARTRIDGE'S CASE.

In a quo warranto, brought against Partridge, it was holden by all the justices; that a man might prescribe to hold a leet oftner than twice in a year, and at other days than are set forth in the Statute of Magna Charta, cap. 35. because the said statute is in the affirmative: but Popham, Attorney General said, that one cannot prescribe against a statute. And it was moved by him; If a general pardon be granted with general exception in it, he which will have advantage of it, ought to plead it, and shew that he is not any person excepted, for otherwise the Judges cannot allow him the benefit of it, because they do not know if he be a person excepted or not; but if there be special persons excepted by name, and no others excepted, but so many persons, there he need not to plead it; for the Court may discern J. D. from J. S. 8 E. 4. 7. vide 26 H. 8. 7. If a man commits felony, and also treason, and afterwards comes a general pardon for felony, but treason is excepted, and the party is arraigned for felony: by Coke he shall have the benefit of the pardon; Popham, contrary, for he is disabled by the treason: see Coke's case, 18 Eliz. Plowd. 401. he pleaded to the felony, the general pardon by Act of Parliament, and added, that neither himself, nor the said offence was excepted: and it was agreed by the whole Court, that in a quo warranto, it is not sufficient for the defendant to say, that such a subject hath lawful interest to hold leets without making title to himself; for the writ is, quo warranto he claims them. And afterwards judgment was given for the Queen.
1 Cro. 125.

[29] TRIN. 30 ELIZ. IN THE KING'S BENCH.

XXXII. WOODWARD AND BUGG'S CASE.

Woodward libelled in the Spiritual Court against Bugg and Nelson for tithes of certain lands, called Christian-Hill; the defendant sued a prohibition, and surmised, that one Prettiman was seised of the said land, and in consideration of 5l. by him paid to the said parson, it was agreed betwixt them, that the said Prettiman and his assigns should be discharged of the tithes of the said lands during his life, and afterwards the said Prettiman leased the same to the defendants, upon which a prohibition was granted; and it was holden that the party need not to make proof thereof within six months, for it is not within the statute, because a composition with the parson: but now a consultation was granted in the same cause, because the agreement is shewed, but no need of it, the which cannot be any discharge; but if it had been for a time, i. unica vice, it had been good, but contrary, being for life: also there is not any express grant of tithes, but onely a covenant, and agreement that he should be discharged, upon which he may have an action, but no prohibition: it was said on the other side, that although without deed tithes cannot pass in point of interest, yet by way of discharge they well may. Coke, It was holden betwixt Pendleton and Green, that upon such words of covenant and agreement, the party should hold the lands discharged of tithes, which was denied: for if the grantee of a rent-charge will grant it to the lands without deed, it is not good; and there was of late a case betwixt Westbed and Pepper, where it was agreed betwixt the parson and one of his parish, that for twenty shillings rent per ann. the parishioner should be discharged of tithes for twenty years, if he lived so long; and it was holden that no prohibition did lie thereupon, a fortiori where the estate is for life: Gawdy, In a case of grant of tithes for life, a deed is requisite, but here it is but a covenant for money: see 21 H. 6. 43. Wray, If it had been for years, it had been good, but here it is not any contract, but onely a discharge for life, which cannot be during his life, without deed; and afterwards the record was read, which was concordatum & agreatum fuit between the two parties, pro omnibus decimis, during the time that one should be parson, and the other occupier of the said lands, that in consideration of 5l. the said Prettiman and his assigns should

hold the said lands discharged of tithes; Wray, The same is not a contract, but promise; for he doth not grant any tithes, &c.

1 Cro. 188. Owen Rep. 103. 2 Roll. 63. 3 Len. 257.

PASCH. 32 ELIZ. IN THE KING'S BENCH.

XXXIII. DEVERED AND RATCLIFF'S CASE.

In debt, the plaintiff declared, that he himself had brought an action in London against one A. and had judgment to recover, and a capias was awarded and issued forth, to take the said A. in execution upon which, non est inventus was returned; upon which one of the sureties of A. being in prison in London, under the custody of the defendant, upon a plaint against him, was detained in prison for the said debt so recovered against A. Secundum consuetudinem civitatis prædict. prout per record. ejusdem curiæ apparet, and after the defendant suffered the surety to escape; upon which there was a demurr; the matter was, if the said surety was a prisoner in law for the **[30]** said debt, as surety of A. for in the declaration it is not expresly laid, that there was such a custom in London, ut supra, but onely, secundum consuetudinem, &c. And secondly, there were two sureties of A. and the one of them onely is detained in execution: also the custome, as it is here laid, is not reasonable; for a scire facias ought to issue out against the sureties, and they ought not to be taken or detained in execution presently; for the condition of the recognizance of sureties is, that they bring in the defendant, if he be condemned, or to pay the debt; and now by this custome, the party who is surety being taken, cannot plead the release of the plaintiff, or the death of the defendant in his discharge, as he might upon a scire facias, which was agreed per curiam; and adjudged accordingly.

1 Cro. 185.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

XXXIV. CLARK AND GREEN'S CASE.

An action upon the case was brought for these words: He liveth by charming, sorcery and witchcraft; it was moved, that the words were not actionable; for the words might be construed, as if the life of the party were preserved by that means. And it was holden, 30 Eliz. in the case betwixt Smith and Morrice, that the word witch is not actionable; and therefore, if a man be sued in the Spiritual Court for defamation, for calling one witch, a prohibition doth not lie. It hath been holden, that upon these words, He went to destroy a child in a woman's belly, were actionable, and yet it is not felony, but a great discredit; and these words, Thou usest witchcraft, are not actionable. And afterwards, in the principal case, judgment was given, quod nihil capiat per billam. And by Gawdy, It might be that the plaintiff had the forfeiture of those who are convicted of offences, and so liveth thereby.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

XXXV. HARFORD AND GARDINER'S CASE.

In an action upon the case, the plaintiff declared, that the defendant in consideration that the father of the plaintiff had imployed his service about the business of the testator of the defendant, to the great profit of the testator; and in consideration of love and affection that the testator bore to the plaintiff, promised to give unto him 100l. Curia, Love is not a consideration, upon which an action can be grounded; the like of friendship: Wray, If the plaintiff declares, that the defendant in consideration that he was indebted unto the plaintiff in divers summs of money, and promised to pay him 100l. it is not good for the incertainty: also the consideration here, was past

and executed before the promise made, and nothing is done by the son. And afterwards judgment was given against the plaintiff.

3 Cro. 756. 1 Len. 94.

MICH. 31 ELIZ. IN THE EXCHEQUER.

XXXVI. CLARK'S CASE.

Bridget Clark was indebted to Archdell by obligation, and afterwards she delivered to one Andrews certain hogsheads of wine to satisfie the said Archdell de debito prædicto: afterwards the obligation of **[31]** Clark was assigned to the Queen for the debt of Archdel: and if the property of the said hogsheads of wine were altered by the delivery of them to Andrews before the assignment: was the question.

Egerton, Solicitor General; The property is not altred; for the bailor might have an action of account against Andrews before he hath delivered them over according to the bailment; but if he hath delivered them over, the same is a good bar in account: but if one be accountable to me upon a bailment, and afterwards I require him to bail the goods over to A. the same is not in bar of the account, but is a good plea in discharge of account before auditors, for that is matter after the bailment, not upon the bailment. If goods be bailed to bail over upon a consideration precedent on the part of him to whom they ought to be bailed, the bailor cannot countermand it, otherwise it is where it is voluntary and without consideration, but where it is in consideration of a debt not countermandable; contrary, if to satisfie the debt of another.

Manwood, Chief Baron: Where the debtor of the King is sufficient, there a debt due to him ought not to be assigned to the King, but onely where the debt is doubtfull, and that was the ancient course: but now at this day many seem and are accounted to be rich who are not, and therefore omnis ratio tentanda est to recover the debts of the King. But as to the case before us, Briget is executrix to her husband, who was indebted to Archdel, and she delivered the goods to Andrews to satisfie Archdel, and all that before the assignment. And I conceive that the property of the said goods is altered; for, as the case is here, Andrews was surety for Clark, and had a counter-bond of Clark to save him harmless. If I borrow money, and deliver plate for the security of it, the general property is in me, yet the bailee hath a special interest in it, till the money is paid. If goods be delivered to A. to pay to B. A. may sell them. An executor hath goods of the testator, and he with his own monies pays the debts of the testator, he shall retain the goods, and the property is altered. And here in our case, Andrews might by virtue of the bailment sell the goods, and with the money pay the said Archdel. And afterwards judgment was given, that the property of the goods was altered.

Post. 89.

31 ELIZ. IN THE EXCHEQUER.

XXXVII. NORRIS CASE.

In an information upon intrusion against Norris and others concerning Folly John Park, the defendants pleaded in bar a descent: it was holden clearly by the Court, that against the Queen a descent is no plea, nor any title against the Queen, because nullum tempus occurrit regi: neither shall lachess be imputed to her: for the possessions of the Queen are large, and it is not reason that she should be bound or tyed to look to her affairs concerning her possessions, or to incur any damage in default thereof; for she is to intend and manage the publick affairs of the kingdom and State. It was also held by the Court, that in pleading of a lease for life, or feoffment, the party needs not to shew the place where the lease or feoffment was made.

Popham, the Queens Attorny, took exception to the bar to the information, that

whereas in the information title is made to the Queen, and concludes, prout patet per plurima recorda & memoranda Scaccarii; the defendants have not traversed it by saying, absque hoc quod habetur aliquod tale recordum, to which it was said by Harris and Savil, Serjeants, that if a special record had been alledged in cer-[32]-tainty, then we ought to have taken such traverse; but here it being in the generalty, we ought not to traverse at all. Manwood, Because the information is general, i. ut patet per plurima recorda, so the traverse ought to be also.

Another exception was taken to the bar, because in the information the title of the Queen is set forth: and the defendants plead, that long before the intrusion A. was seised in fee, and enfeoffed B. who died seised, &c. where it might be that the title of A. was mean betwixt the title of the Queen and the intrusion: whereas by Manwood and Popham they ought to have said, diu antequam the Queen was seised, A. was seised, &c. Savil and Harris, If he should so plead, we should confess that the Queen once had a title, and that is not true, which Manwood denied, for by such plea nothing is confessed. And it was said by some, that where in the bar the title of the Queen is confessed and avoided, there the defendant shall say, diu antequam the Queen had anything, &c. otherwise not. And it was holden by all, that in such case, a feoffment might be an induction unto a traverse, but not a descent. And by Manwood, it is a general rule, as well in the case of a subject, as in the case of the Queen, that nothing can be an inducement to a traverse, but such a thing as is traversable; and here the descent induceth the traverse, being not traversable in this case. Also it was holden, that the place where the party dieth seised needs not to be shewed in pleading a descent. And afterwards Manwood at another day, mutata opinione, conceived, that as to plurima recorda, there needed no traverse, although there were many presidents to the contrary: diu ante transgressionem fieri sup. is a good plea in trespass in case of a common person, not in the King's case, diu ante intrusionem, &c.

31 Eliz. In the Exchequer Chamber.

XXXVIII. Robinson and Robinson's Case.

In the case betwixt Robinson and Robinson in the Exchequer Chamber by English bill concerning the manor of Draiton Basset; the defendant pleaded in bar a special plea, to which the plaintiff replyed; and afterwards the defendant, when he should have rejoyned, would have relinquished his special plea, and pleaded the general issue.

Manwood, in the Common Pleas, and King's Bench, and in the Court of Common Pleas in the Exchequer, before the issue joyned, the defendant might relinquish his special plea, and plead the general issue, for the pleadings there are in paper until issue be joyned, and therefore at any time before issue joyned, the plea might be withdrawn: but in the Chancery, Court of Requests, and here, all pleas put in are in parchment, and filed; and therefore it cannot be so done: and therefore here, if the plea be once ingrossed into parchment and filed, the defendant cannot relinquish his plea, and plead the general issue; contrary, where the plea is yet in paper.

Gent, Baron, That if upon the plea in paper an issue be offered with an absque hoc, &c. the other party cannot relinquish it, although it be but in paper. But afterwards the Barons asked the clarks, what was their course in such cases: who answered, that if the plea be in parchment, and upon the file, it shall never afterwards be taken from off the file, but with the consent of the parties, and order of the Court. And afterwards Manwood, with the assent of the rest of the Barons, gave a rule, that the defendant should rejoyn to the replication, or otherwise a nihil dicit to be entred.

[33] 31 Eliz. In the Exchequer.

XXXIX. The Lord Cromwel's Case.

In the case of the Lord Cromwel upon the statute of 33 H. 8. for levying of the King's debts: a debt came to the Queen by attainder of the creditor, upon which an

extent issued against one of the ter-tenants liable to the debt, and not against all: it was moved, that upon a branch of the said statute, all the ter-tenants ought to be charged: but it was the opinion of divers, that such a debt which cometh to the King by attainder, is not within the said statute; for although the attainder is by a judgment, yet debt by judgment it cannot properly be said, but where a debt is recovered by judgment. And that was the case of the Lord Norris, for a debt due to Heron by the Lord Williams, which Heron was attainted.

HILL. 29 ELIZ. ROT. 631. IN THE COMMON PLEAS.

XL. MACHEL AND DUNTON'S CASE.

In ejectione firmæ the case was, that one Machel, alderman of London, was seised and leased for years, with clause of re-entry for non payment of rent; and in the indenture of lease there were divers covenants on the parts of the lessee: and afterwards the said Machel by his will willed, that the lessee should retain the land demised for thirty one years, reckoning the years of the first term not expired as parcel of the said term of thirty one years, yielding like rent, and under such covenants as the lessee held the former lease; and by the same will devised the inheritance over to a stranger. It was first moved, if here the lessee for years had a new interest accrued to him by the will? If it shall vest in him as an interest by itself, or that both estates, as well the former lease, as the estate for years devised by the will, should be united by way of surrender? Another matter was because that the devise is yielding such rent, and under such covenants, &c. Now because the meaning of the devisor was, that the devisee should hold over the land for the term encreased as he held before; if here the law shall give construction to this devise as near the intention of the devisor as it may be? and so construe the words of the will to amount to a condition. But by the opinion of the whole Court, the words of the devise cannot make a condition; for a condition is a thing odious in law, which shall not be created without sufficient words. Another matter was moved, if the fee-simple should pass by this devise in point of reversion, or remainder? And by the better opinion of the Court, it shall pass in point of reversion; for if it should be a remainder, then the rent which is reserved upon the lease by the will, shall not be incident to such remainder, and therefore the law shall qualifie it into a fee-simple. Another matter was moved; admitting that the words of the devise, ut supra, are condition, if here in this case there be a grantee of the reversion intended within the statute of 32 H. 8. As A. seised of lands in fee, deviseth them to B. for years, rendering rent, with clause of re-entry; and by the same will deviseth the reversion to another: if because that it was never in the devisor a reversion or a condition? If **[34]** the devisee be within the said statute to take advantage of it? And the opinion of the whole Court was, that the devisee of the fee-simple should take advantage of this condition.

1 Cro. 288. Owen 54, 92. Poph. 8.

XLI. TRIN. 29 ELIZ. IN THE COMMON PLEAS. POSTEA 210.

A justicies issued forth to the Sheriff of H. for the debt of 40l. and the same plea was held and determined before the under-sheriff in the absence of the sheriff: it was moved by Puckering, Serjeant, if a writ of error or a false judgment lieth in this case? And it was resolved by the justices, that the sheriff himself in his person ought to hold plea of a justicies; and if he make a precept or deputation to another, it is meerly void: 34 H. 6. 48. See the case there abridged, Fitz. Bar. 161. And a justicies is not an original writ, but a commission to the sheriff to hold plea above 40s. And upon a judgment given upon a justicies, a writ of false judgment lieth, and not a writ of error. See 7 E. 4, 23. And it was the opinion of the Lord Anderson, that the judgment given in the principal case was utterly void, & coram non judice.

TRIN. 29 ELIZ. IN THE EXCHEQUER.

XLII. THE QUEEN AND JORDAN'S CASE.

An information was exhibited in the Exchequer for the Queen against the executors of William Jordan, surveyor of the ordinance, &c. and the executors of John Bowland, deputy of Ambrose Earl of Warwick, master of the ordinance, &c. in which was set forth for the Queen, that certain powder, pellets, and other furniture of war, came unto the hands of the said Jordan and Bowland, in respect of their said offices, to the value of £400,000, and shewed how much came to each of them, and the special charge incertain, per quod onerabiles & computabiles dominæ Reginæ devenerunt, nec tamen computum unquam inde reddiderunt, nec reddere voluerant, sed bona & catalla prædicta ad uses suos proprios converterunt, in deceptionem dictæ dominæ Reginæ, &c. The defendants pleaded not guilty, upon which the Queen's attorny did demur in law, because the defendants have answered onely to the conversion: in which case although they have not converted, yet if the said goods have come to the hands of their testator, it is sufficient for the Queen, and the defendants are chargeable to the Queen for the same: and the opinion of all the Barons was clear, that the defendants ought to answer to the charge, &c.

11 Co. 89, 90, &c.

PASC. 29 ELIZ. IN THE COMMON PLEAS.

XLIII. COLLET AND THE BAILIFFS OF SHREWSBURY'S CASE.

In a false imprisonment, the defendants justified by prescription, scil. that they have used, if any person within their town contemptuose se gesserit against the bailiffs of the said town, or any warden of any trade there, to commit such a person to prison for the space of a day or more at the least, at their discretions: and shewed farther. That the plaintiff did mis-behave himself, tam factis quam verbis, against the wardens of such a mystery in the said **[35]** town, &c. And when the bailiffs, super querimoniam eis inde factam, sent for the plaintiff, he would not come to them, but mis-behaved himself against them, tam dictis quam factis; for which they did commit him to prison, &c. upon which there was a demurrer. And afterwards judgment was given for the plaintiff, because their prescription is not good; for it is too large to imprison subjects at their discretion: also they have set forth the offence of the plaintiff generally; i. misbehaviour, tam factis quam dictis, without alledging any special misdemeanor in certain.

XLIV. PASCH. 29 ELIZ. IN THE COMMON PLEAS. 3 LEN. 79.

It was holden by the whole Court, that where a man makes his will in this manner, I will and bequeath my land to A. and the name of the devisor is not in the whole will, yet the devise is good, by averment of the name of the devisor, and by proof that it was his will. And if one lying sick in extremis, having an intent to devise his land, by word makes such a devise, but doth not command the same to be put in writing, but another without his knowledge or command puts the same in writing in the life of the devisor, it is a good devise, for it is sufficient if the devise be reduced in writing during the life of the devisor.

1 Cro. 100. 1 Leo. 113.

TRIN. 27 ELIZ. IN THE COMMON PLEAS.

XLV. LEONARD LOVELACE'S CASE.

In waste, the case was, that lands were devised to the father of the defendant, and to his eldest issue male, de corpore suo exeunti: and upon demurrer it was adjudged, that by this devise no estate passed but an estate for life unto the father of the defendant, the remainder to his eldest son for life, so as no estate of inheritance passed thereby; and therefore punishable for waste.

1 Anders. 132. More Rep. 371. Savile Rep. 75. 1 Cro. 40.

HILL. 33 ELIZ. IN THE COMMON PLEAS.

XLVI. COBB AND PRIOR'S CASE. POSTEA 48.

The case was, A man deviseth his lands to his wife during the minority of his son, upon condition that she shall not doe waste during the minority of her said son, and dieth: the wife takes a husband, and dieth; the husband commits waste: it was holden by the whole Court, that the same is not any breach of the condition.

[36] MICH. 30 AND 31 ELIZ. IN THE COMMON PLEAS.

XLV. SALWAY AND LUSON'S CASE.

Matthew Salway brought a writ of right against Luson, and the writ was, messuagium, & 200 acr. jampnor. & brueræ, and exception was taken to the writ because that jampnor. & brueræ, were coupled together where they ought to be distinctly severed; and so many acr. jampnor. and so many acr. brueræ: although it was objected on the part of the demandant in maintenance of the writ, that in the Register, fol. 2. the writ of right is, redditu unius libræ Mac. & Obed. i. mace and cloves together without distinction or severance. And it was said in a writ of right, we ought to follow the register, and therefore a writ of right was abated, because the word pomarium was put in the writ, for in the register, there is no such writ, and the word gardinum comprehends it, but in other writs as writs of entry, &c. it is otherwise: see the case of the Lord Zouch, 11 Eliz. 353. In a writ of entry, sur disseisin mille acr. jampnor. & brueræ. But the exception was not allowed; for it may be, that jampnorum & brueræ lie so promiscuously, that they cannot be divided: and see 16 H. 7. 8. and 9. The respect which the justices there had to the register, so as they changed their opinions, conformable to the register; another exception was taken to the writ, because the demandant demands duas partes custodiæ de hay in the forest of C. and the opinion of the whole Court was, that the writ ought to be officium custodiæ duarum partium de hay, and not duas partes custodiæ, as advocatio duarum partium ecclesiæ. not duas partes advocationis: another exception was, because the writ was, duas partes, &c. in three to be divided, whereas it should be divisus, & non dividend. for dividendum is not in any writ but a writ of partition. And by Windham, the parts of this office are divided in right, quod curia concessit, another exception was taken, because in the writ, it is not set down in what town the forest of C. is, so as the Court doth not know from whence the visne should come; for no venire shall be de vicineto forestæ as de vicineto hundredii & manerii; and that was holden to be a material exception: another exception was taken, because a writ of right doth not lie of an office; for at the common law, an office did not lie of it, but now it doth by the statute of West. 2. For it was not liberum tenementum, but the party grieved was put to his quod permittat. And of this opinion was the whole Court.

1 Leon. 169.

HILLAR. 31 ELIZ. IN THE COMMON PLEAS.

XLVIII. JOHNSON AND BELLAMY'S CASE.

In ejectione firmæ, it was found by special verdict, that Mr. Graunt was seised of the lands, &c. and by his will devised the same to Joan his wife, for life; and farther he willed, that when Richard his brother shall come to the age of 25 years, he should have the lands to him and the heirs of his body lawfully begotten. Mr. Graunt died, having issue of his body, who is his heir, Richard, before he had attained the age of 25 years, levied a fine of the said lands, with proclamations in the life, and during the seisin of Joan, to A. Sic ut partes ad finem nihil habuerunt: and if this fine should bind the estate-tail was the question; and the justices cited the case of the Lord Zouch, which was adjudged, M. 29 and 30 Eliz. Tenant in tail discontinues to E. and af-**[37]**-terwards levieth a fine to B. although the partes ad finem nihil habuerunt, yet the fine shall bind the entail: but the serjeants at Bar argued, that there is a great difference betwixt the case cited, and the case at Bar; for in that case, the said fine was pleaded in bar, but here the fine is not pleaded, but found by special verdict; to which it was said by the Court, that the same was not any difference; for the fine by the statute is not any matter of estoppel, or conclusion; but by the statute doth bind and extinguish the estate-tail, and the right of it: and fines are as effectual to bind the right of the entail when they are found by especial verdict, as when they are pleaded in bar: and by Periam, collateral warranty found by verdict, is of as great force, as if it were pleaded in bar, and afterwards judgment was given, that the estate-tail by the fine, was utterly destroyed and extinct.

Postea 82, 83.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

XLIX. JAY'S CASE.

Jay brought an action of debt before the Mayor of Shrewsbury, &c. and declared upon an obligation which was upon condition to pay money at London, and issue was there joined upon the payment. And it was moved how this issue should be tried, viz. if it may be removed by certiorare into the Chancery, and thence by mittimus into the Common Pleas, and from thence sent to London to be tried, and when it is tried, to be remanded back to Shrewsbury to have judgment: see 21 H. 7. 33. Upon voucher in the County Palatine of Lancaster, the law is such in matters real; for real actions cannot be sued but in the said County Palatine, but in personal matters it is otherwise, for such actions may be sued elsewhere, at the pleasure of the party; and thereunto agreed the whole Court: and although such matters have been removed before, yet the same were without motion to the Court, or opposition of the other party, and so not to be accounted precedents: see 3 H. 4. 46. abridg'd by Brook, Cause de remover Plea. 41. Where he saith, that a foreign plea pleaded in London in debt, goes to the jurisdiction; but upon a foreign voucher in a plea real, the plea shall be removed in bank by the statute to try the warranty, and afterwards shall be remanded.

4 Inst. 205.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

L. SANDS AND SCAGNARD'S CASE.

In an action upon the case, the plaintiff declared, that he was possessed of certain chattels which came to the defendant by trover. The defendant pleaded that heretofore the plaintiff brought debt against the now defendant, and demanded certain moneys, and declared, that the defendant bought of him the same goods, (whereof the action is now brought) for the summ then in demand, to which the then defendant waged his law and had his law; by which nihil capiat per breve, &c. was entred.

And demanded judgment, if, &c. And by Windham and Rodes, Justices, the same is no bar in this action, for the waging of the law, and the doing of it, utterly disproves the contract supposed by the declaration in the said action of debt, and then the plaintiff is not bound by the supposal of it, but it is at large to bring this action; and so judgment was given for the plaintiff.

[38] TRIN. 29 ELIZ. IN THE COMMON PLEAS.

LI. SPITTLE AND DAVIE'S CASE.

In a replevin, the case was, that one Turk was seised of certain lands in fee, and by his will devised parcell of his said lands, to his eldest son in tail, and the residue of his lands to his younger son in fee, provided, that neither of my said sons shall sell or make leases of the lands given or bequeathed unto them by this my will, or doe any act with any of the said lands, to the hindrance of their children or mine, by any devise or means, before they come to the age of 30 years, and if any of my sons doe so, then my other son shall have the portion of my lands so devised to his brother, the eldest son before his age of 30 years leased the lands to him devised, ut supra, for years, against the intent of the said proviso. The younger son entred, and he leased the same land for years before his age of 30 years, upon which the eldest son did re-enter, and the opinion of the Court was, that here is a limitation, and not a condition: and here the re-entry of the eldest son was holden unlawfull; for this proviso did not extend but to the immediate estate devised, expressly to them, and not to any new estate, which did arise upon the limitation; and when the younger son enters upon the eldest son by the said limitation, he shall hold his estate, discharged of the proviso, or any limitation contained in it.

Owen Rep. 8, 55. 2 Cro. 398.

TRIN. 30 ELIZ. IN THE EXCHEQUER.

LII. MARTIN VAN HENBECK'S CASE.

An information was exhibited in the Exchequer, against Martin Van Henbeck, merchant-stranger, upon the statute of 18 H. 6. cap. 17. concerning the gaging of vessels of wine, and shewed, that the defendant had sold to such a one, so many pipes of wine, and that none of them did contain as they ought, 126. gallons; and although they were so defective, yet the defendant had not defalked the price, &c. according to the want of measure, for which he had forfeited to the Queen, all the value of all the wine so defective. Exception was taken to the information, because there is not set down how much in every pipe was wanting, as one or two gallons, &c. so as a ratable defalcation might be made according to the proportion of the want of measure; but if the informer had set forth in his information, that no defalcation was at all, such general allegation of want of measure, without other certainty, had been good. And the case was cited, 32 E. 4. 40. Lysle's case, where the plea wants certainty; or where he pleads that he was ready to shew to the council of the plaintiff his discharge of an annuity, &c. and doth not shew what manner of discharge, as release, &c. So 2 H. 7. 6. in dower, against the heir, who pleads in bar, detainment of charters, without shewing what charters in certain: also there is time enough of defalcation, when the time of payment comes, and not upon the contract; and it is not shewed, that the vendee had paid for the wine. Egerton, Solicitor, contrary, When the thing demanded is to be recorded, there it ought to be certainly shewed, but contrary, where it goeth onely to the point of conveyance of the office; and here, the thing to be abated is not in question; for be it more or less, the defendant is to lose the value of all the wine, and that which is to be defalked, is but [39] an induction, or conveyance tending to the payment of the forfeiture: as in Partridge's case, 7 E. 6. Plow. 85. Whereupon the statute of 32 H. 8. maintenance, the plaintiff charges the defendant with a lease for years, made to a stranger, without shewing for what term

certain, and yet it was there holden well enough, notwithstanding that the lease was not to be forfeited, but was a conveyance to the point of forfeiture; i. the value of the lands 38 Ass. 12. A steward of a leet was presented, for that he had suffered many brewers and bakers to bake and brew, contrary to the assise, pro redemptione inde capiend. without shewing in certain, what bakers, or of whom he had taken redemption; but notwithstanding that, the defendant took issue upon the matter, &c. And it is impossible for the informer, to know the quantity of the full measure of every pipe of wine, which doth not belong to him but to another, and if the law should compel him to this impossibility, the statute should be of none effect. 3 E. 3. 363. In nusance for drowning of his lands, exception was taken, because it was not set forth what quantity of land, but it was not allowed; for it is impossible to know, to what depth the land was drowned, and how much of the land was drowned: so here the informer cannot know every spoonfull, &c. And he said, that the defalcation ought to be at the time of the contract, or within convenient time after. Coke, contrary, Here is a great incertainty, which is not tolerable in an information, for the quantity of the want is uncertain, and so likewise the quantity of the defalcation, for the want must be fourty, twenty, ten, five, or one gallon, pottle, quart, or pint, and in such information upon penal laws, the matter of it ought to be certainly shewed. Oportet ut res certa deducatur in judicium, so as the Court may judge thereof: as where an information is exhibited upon the Statute of Usury, that statute is, that if any take above 10l. for the loan of 100l. for one year, he shall forfeit the whole value of the principal, here there ought to be an usurious contract for above 10l. in the hundred; and also there ought to be a taking; and it is impossible to discover the subtilty of an usurer: but if information be exhibited here against an usurer, and chargeth that he took more then 10l. in the hundred, without shewing how much, such information is utterly insufficient; for the informer ought to set forth the quantity of the interest received, and yet the same is not to be recovered: also if the informer setteth for an usurious contract, cum quodam homine ignoto, it is insufficient, 5 H. 7. 17, 18. If an information be exhibited upon the Statute of Liveries, as well the giver as the taker, ought to be certainly shewed, &c. Another exception was taken, because the words of the information are, quæ quidem dolia, vel eorum aliquod, &c. did lack, &c. But by Manwood, the same is well enough, wherefore Coke did not speak to it; and he said, that the time of the defalcation of the price is upon the payment, and not before. If J. S. lend to one 100l. for a year, and upon the loan, contract with me, to give me 20l. for the loan of the same for one year, if now when I pay him he taketh but 10l. he shall not be punished for the contract, but perhaps the bond shall be void. And upon the statute of 5 E. 6. of ingressors, if the information be, that the defendant hath bought corn, &c. it is not sufficient; for the words of the statute are, get into his hands, &c. Owen Serjeant to the same purpose: He hath not alledged, quantum, vel in quanto defecit, if there had been but a pint, it had been sufficient; the information goes farther, non defalcavit tantum de pretio, quantum defecit, and so tantum, & quantum, is incertainly laid; 22 H. 6. If A. be bound to B. to make him a sufficient estate in such lands, in an action brought upon such an obligation, it is no plea to say, that he hath made unto him a sufficient estate, &c. but he ought to shew what estate, so 7 E. 4. If one be bound to repair such a house, it is not sufficient to say, that he hath repaired it, but **[40]** he ought to shew, in hoc, vel inillo: Egerton, The abatement shall be upon the contract. And afterwards judgment was given against the informer, because it is not shewed in the information in how many vessels there was want; but if he had alledged but the want of one pint, it had been good for the value of all the wine: and by Manwood that might have been well enough known by the gauging how much every vessel wanted.

MICH. 30 ELIZ. IN THE EXCHEQUER.

LIII. GREEN AND EVERARD'S CASE.

In ejectione firmæ against Everard by Green, the parties were at issue, and the said Green challenged one of the jurors, and assigned for cause, because the said juror

held land under the same title as the defendant did: to prove which one Lancelot Chandler was produced as a witness for the said Green, who deposed upon the said challenge the same, for which the juror challenged was drawn, and so there was no inquest: and so the plaintiff was delayed of his trial: whereupon he sued the said Lancelot, tam pro domina Regina quam pro seipso: and it was found for the plaintiff. And now exception in arrest of judgment was put into the Court engrossed in parchment; viz. Ad judicium pro domina Regina, & præsat. querente, curia procedere non debet, quia manifeste apparet, per informat. dict. querent. quod ipse non fuit pars gravata, quod per calumniam in dicta informatione specificat. ac per jurament. dict. Lancelot super inde fact. dictus querens, non fuit damnificat. sed in calumnia prædict. & jurament. prædict. super inde factum tendebat in commodum ipsius Everardi, propter quod ipse idem Everardus tempore calumniæ prædict. existens tenens tenementorum prædictor. per dict. declarat. specificator. eadem tenementa ratione calumniæ prædict. ac prædict. jurament. tenebat & proficua inde provenientia diutius quam aliter si præsens triatio habita fuisset sine aliqua calumnia tenere potuisset. See the statute of 5 Eliz. against perjury, the words are, grieved, letted, or molested, &c.

MICH. 30 ELIZ. IN THE KING'S BENCH.

LIV. GEORGE AP RICE'S CASE.

George ap Rice, tenant in tail after possibility of issue extinct, assigned his estate to one A. against whom he in the reversion brought a quid juris clamat, and it was adjudged that he should attorn; for although tenant in tail after possibility of issue extinct, himself is not compellable to attorn, yet his assignee shall attorn; for the privilege is knit to the person who is in truth tenant in tail after possibility of issue, which cannot be the assignee, for by the assignment the privity and the privilege are destroyed. And where the defendant, in a quid juris clamat, is adjudged to attorn, distress infinite shall issue forth against him, to compell him to attorn; and if he, when he appears, doth refuse to attorn, he shall be imprisoned until he doth attorn: and this judgment, that the assignee of tenant in tail after possibility should attorn, being given in a court in Wales, was afterwards affirmed in a writ of error brought upon it in the King's Bench.

1 Len. 290. 291.

[41] 30 ELIZ. IN THE COMMON PLEAS.

LV. LUCAS AND PICROFT'S CASE.

The case was, that an assise of novel disseisin was brought in the county of Northumberland of two acres of land; and as to one acre, the defendant pleaded a plea tryable in a foreign county, upon which the issue was adjourned into the Common Pleas, and from thence into the foreign county, where by nisi prius it was found for the plaintiff: and now Snag, Serjeant, prayed judgment for the plaintiff, and cited the book of 16 H. 7. 12. where assise is adjourned in bank for difficulty of the verdict, they there may give judgment but the whole Court is of contrary opinion; for here is another acre, the title of which is to be tryed before the justices of the assise, before the tryal of which no judgment shall be given for the acre for which the title is found: and the assise is properly depending before the justices of the assise, before whom the plaintiff may discontinue his assise: and it is not like unto the case of 6 Ass. 4. 8 Ass. 15. where in an assise, a release dated in a foreign county is pleaded, which was denyed, for which cause the assise was adjourned in bank, and there found by inquest not the deed of the plaintiff: now the plaintiff, if he will release his damages, shall have judgment of the freehold presently: but in our case, parcel of the lands put in view doth remain not tryed, which the plaintiff cannot release as he may the damages: and therefore the Court awarded that the verdict should be sent back to the justices of the assise.

3 Len. 137. Postea. 199. 14. H. 7. part 118.

MICH. 30 ELIZ. IN COMMUNI BANCO.

LVI. POVYE'S CASE.

Povy, an Attorny of the King's Bench, brought an action of trespass there against the Warden of the Fleet, who came into the Common Pleas and demanded the advice of the Court, because he is an officer of this Court, and therefore ought not to be impleaded elsewhere: but it was said by the Court, that because that the plaintiff hath also his privilege in the King's Bench, as well as the defendant hath here, this equality of privilege shall render the parties at liberty; and he shall have the benefit of the privilege who first begins suit: and so the Warden of the Fleet was advised to answer.

3 Cro. 180.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

LVII. INCHLEY AND ROBINSON'S CASE.

In an ejectione firmæ, it was found by special verdict, that King E. 6. was seised of the manor and hundred of Fremmington, and by his letters patents granted the same to Barnard in fee, rendering 130l. per annum, and also to hold by homage and fealty; and afterwards Queen Mary reciting the said grant by E. 6. and the reservation upon it granted to Gartrude, Marchioness of Exeter, the manor of Fremmington, and the said rents and services; and also the manor of Camfield, and other lands and tenements, to be holden by the twentieth part of a knight's fee: Gertrude so seised, devised to **[42]** the Lord Montjoy the manor of Fremmington, the manor of Camfield, &c. and also bequeathed divers sums of money to be levied of the premisses: and they farther found, that the said rent of 230l. was the full third part of the yearly value of all the lands and tenements of the devisor. The question was, if by those words of the devise, of the manor of Fremmington, the rent and services of the manor did pass? i. the rent and the homage and the fealty reserved, the grant of King E. 6. of the manor and hundred of Fremmington? and if the said rent and services are issuing out of the manor? for if the rent doth not pass, then the same is descended to the heir of the marchioness; and then being found the full and third part of the value, the King and the heir is fully answered and satisfied, and then the inheritance of the residue discharged, and settled in the devisee: and if the rent doth not pass, then is the heir of the marchioness entitled by the statutes to a third part of the whole.

Shuttleworth, Serjeant, If the marquess had devised by express words the said rent and services, they could not have passed: for as to the services, they are entire things, as homage and fealty, and they cannot pass by devise in case where partition is to follow, for such things cannot receive any partition or division, therefore they are not divisible; for the statute doth enable the proprietor or owner to devise two parts of his inheritances, in three parts to be divided; i. as catalla felonum cannot be devised for the reason aforesaid; which was granted by the whole Court. And as to the devise, he argued much upon the grounds of devises, and put a ground put by Fineax, 15 H. 7. 12. where every will ought to be construed and taken according as the words do import, or as it may be intended or implyed by the words, what the meaning of the testator was out of the words of the will. See thereof a good case 19 H. 8. 8. and 9. and he relied much upon the case of Bret and Rigden, Plow. 342. So he said in this case, because the intent of the devisor doth not appear upon the words of the will, that this rent should pass; it shall not pass, for there is not any mention made of any rent in all the will.

Fenner contrary, and he argued much upon the favorable construction which the law gives to wills, 14 H. 3. Reversion for remainder, & è contr. 17 E. 3. 8. A man may make a feoffment of a manor by the name of a knights fee, à fortiori in case of the devise: and in our case the marquiss conceived, that the rent and services reserved out of the manor of Fremmington was the manor of Fremmington; and the law shall give strength to that intention.

Walmsly conceived, that the rent did not pass by the name of manor, &c. for this rent, nec in rei veritate, nor in reputation, was ever taken for a manor: also the words, Of the manor and hundred of Fremmington, are put amongst others which are manors in truth; by which it seemeth, that the devisor did not intend to pass but one manor, and no other hereditaments, by that manor of Fremmington. It is a rule in law, that in the construction of a will a thing implyed shall not controul a thing expressed: but here, if by implication the rent shall pass, then the manor of Camfield shall not pass, which it was the intent of the devisor to pass, and that by express words, see 16 Elizab. Dyer 330. Clatche's case: and see 16 Eliz. Dyer 333. Chapman's case. But in our case here, there are not any sufficient words to warrant any implication; for neither in truth nor in reputation was it taken to be a manor: 22 H. 6. 2. Green Acre might pass by the name of a manor, although it were but one acre of land, because known by the name of a manor. See accordingly 22 H. 6 39. And see, where, before the Statute of Uses, a man had recoverors to his use, and he wills by his will, that his trustees should sell his lands, they may sell. And he said, that if a man seised of a **[43]** manor parcell in demesne, and parcell in service, and he grants the demesnes to one and his heirs, and afterwards deviseth his manor, peradventure the services shall pass; but this rent hath no resemblance to a manor.

Gawdy, This rent shall pass by the name aforesaid. Favourable construction is to be always given to wills, according to the intent of the devisor, and no part of a will shall be holden void, if by any means it may take effect; then here it appeareth, that his meaning was, that upon these words every thing should pass to the devisee concerning the said manor of Fremmington; for otherwise, the words of the manor of Fremmington should be void and frivolous, which shall not be in a will, if any reasonable construction can be; for it is found expresly by the jury, that neither at the time of the will made, nor at the time of the death of the devisor, the said devisor had any thing in the said manor of Fremmington, but onely the said rent of one hundred and thirty pounds. And it may well be taken that the devisor being ignorant what thing a manor is, thought that the rent was a manor, because that he had rents and services out of the manor. For in construction of wills, the words shall serve the intent of the party; and therefore if a man deviseth, that his lands shall be sold for the payment of his debts, his executors shall sell them, for the intent of the testator naming the vendors, is sufficient: and see Plowden, 20 Eliz. 5. 24. L. after the statute of 27 H. 8. deviseth that his executors shall be seised to the use of A. and his heirs in fee, whereas then there was no feoffees to his use; the same was holden a good devise of the lands of A. and the Judges conceived, that the devisor was ignorant of the operation of the statute in such case, and therefore his ignorance was supplied: see Br. Devises, 44. 29 H. 8. A. had feoffees to his use, and afterwards, after the statute of 27 H. 8. willed that his feoffees should make an estate to B. and his heirs, it was holden by Baldwin, Shelley and Mountague, Justices, that it was a good devise: see 26 H. 6. Feoff. 12. A carve of lands may pass by the name of a manor, ergo, à multo fortiori, rent, for rents and services have more nearness, and do more resemble a manor than a carve of lands; and it cannot be intended, that the meaning of the testator was to grant the manor it self, in which she had nothing, especially by her will; for covin, collusion, or indirect dealing, shall not be presumed in a will: also the marchioness, for four years together before her death, had the rent and services of the said manor, and she well knew, that she had not any other thing in the said manor, but the said rent and services; and therefore it shall be intended, that that was her manor of Fremmington, A. seised of a capital messuage, and great demesnes lying to it, leaseth the same for years, rendring rent, and afterward deviseth to another all his farm, lying in such a place, it was ruled in that case, that by that devise, the rent and the reversion should pass: see the case betwixt Worselie and Adams, Plowd. 1 Eliz. 195. by Anthony Brown and Dyer. Periam, Justice, was of opinion, that this rent might be divided well enough; but by Anderson, It is but rent-seck; but Periam said, it was a rent distrainable of common right, but all of them agreed, that the rent might be divided, but there should not be two tenures. And the Lord Montjoy being advised that this rent did not pass by the grant, but descended to the heir, being the full part of the whole, entred into all the residue of the lands, and made a lease of the manor of Camfield unto the plaintiff, upon which

entry, the ejectione firmæ was brought, and afterwards the plaintiff seeing the opinion of the Court to be against him, and for the devisee of the rent by the name aforesaid, did afterward discontinue his suit, &c.

Owen Rep. 88. 3 Len. 165.

[44] TRIN. 30 ELIZ. INTRAT. T. 28 ELIZ. ROT. 507. IN THE COMMON PLEAS.

LVIII. COSTARD AND WINGFIELD'S CASE.

In a replevin, the defendant did avow for damage-feasant, by the commandment of his master, the L. Cromwel; the plaintiff by way of replication did justifie the putting in of his cattel into the land, where, &c. by reason that the town of N. is an ancient town, and that it had been used time out of mind, &c. that every inhabitant of the said town, had had common for all manner of cattel levant and couchant within the said town, and so justified. The defendant said, that the house in which the plaintiff did inhabit in the said town, and by reason of residency in which house he claimed common, was a new house erected within 30 years; and that before that time, there had not been any house there, upon which the plaintiff did demurr: Shuttleworth, Serjeant, argued for the plaintiff, that he should have common there by reason of resiancy in the said new house; and he said, that the resiancy is the cause, and not the land, nor the person thereof; and thereupon he put the case of 15 E. 4. 29. And he agreed the case, that if the lord doth improve part of the common, that he shall not have common in the residue of the land, for the lands improved, because, that he cannot prescribe for that which is improved, as the book is, in 5 Ass. But here in the principal case he doth not prescribe in any person certain, or in, or for any new thing; but he sets forth that the use of the town hath always been, that the inhabitants should have common there, and this common is not common appendent, or appertinent, but common in gross, see Needham, 37 H. 6. 34. b. And he said, that if the house of a freeholder, which hath used to have such common, doth fall down, and he erecteth a new house in another place of the land, that he shall have common to that new erected house as he had before? And he took a difference betwixt the case of estovers, where a new chimney is erected, and this case, and he stood much upon the manner of the prescription. Gawdy, Serjeant, contrary, And he took exception to the prescription; for he said, that it is said therein; that it is antiqua villa, but he doth not say, that it hath been so time out of mind, &c. and so it ought to be said, as the book is in 15 E. 4. 29. a. And then, if it be not an ancient town time out of mind, the parties cannot prescribe as inhabitants of the said town, to have common time out of mind, &c. And he said, that if such a prescription as is said in this case be good in law, viz. that every one who erected a new house within the said town, should have common to his said new house, the same should be prejudicial to the ancient town, and to the utter overthrow and manifest impairing of the common there; and it might so happen, that one who had but little lands in the said town, might erect twenty new houses there, and so an infinite number of houses might be newly erected there; and there should be common allowed to every inhabitant within the said new erected houses, which should be inconvenient and unreasonable. Anderson, Chief Justice, He who erects a new house, cannot prescribe in the common, for then a prescription might begin at this day, which cannot be; and he insisted much upon the general loss which should happen to the ancient tenants, if such a prescription for new erections should be good. Periam, If it should be law, that he should have common in this case, that all the benefit which the statute gives to the lord for improvement, should be taken away by such new edifications and erection of new houses, which were not reasonable; and such was the opinion of the other justices, and **[45]** therefore they all agreed, that in the principal case, the plaintiff should not have common to this new erected house; but the entry of the judgment was respited until the Court had seen the record, and after they had seen and considered upon the record, Anderson and Periam were of opinion as before: but Windham did encline to the contrary; but they all agreed, that he who set up again a new chimney where an old one was before, should have estovers to the said new chimney; and so if he build a new house

upon the foundation of an old house, that he should have common to his said house new erected: so if a house falleth down, and the tenant or inhabitant sets up a new house in the same place: also if a man hath a mill, and a watercourse to it time out of mind, which he hath used time out of mind to cleanse, if the mill falleth, and he erecteth a new mill there, he shall have the watercourse, and liberty to cleanse it, as it had before, and afterwards the same term, judgment was given for the defendant to which Windham, Justice, agreed.

6 Co. 60.

HILL. 29 ELIZ. IN THE KING'S BENCH.

LIX. ROUS AND ARTOIS CASE.

The case was large, but the points in this case were but two: the first was, if tenant per auter vye, after the death of cestuy que vye holdeth over. If he be a disseisor or not: the second point was, if tenant at will, or at sufferance, be such a tenant of the manor as he may grant copyhold estates to copyholders: for the first point; it was agreed by Godfrey, and he held, that the principal case was, that if tenant pur auter vye holdeth over the life of cestuy que vye, that he thereby gaineth the fee; but he granted the cases, that where a man holdeth at the will of another, that after the estate determined, if he holdeth over, he hath not thereby gained fee, for he is tenant at sufferance; and as Littleton saith in his chapter of Releases, 108. Tenant at sufferance, is where a man of his own head occupieth the lands and tenements at the will of him who hath the freehold; and such an occupier claims nothing but at will; but he said, that in the principal case, he otherwise claimed than at the will of the lessor; for that it appeareth, that he hath granted copy: and he said, that this difference doth give answer to the case which is, t. H. 8. br. t. per Copy 18. where it is said for law, that none is tenant at sufferance, but he who first enters by authority of law: as if a man makes a lease for years, or for the life of another, and he holdeth the lands after his term expired, or after the death of cestuy que vye; if he claim nothing but at the will of him who hath the freehold; he is a tenant at sufferance. But if he holdeth in the lands against the will of his lessor, then he is a disseisor; and so if he do act after such continuance of possession, contrary to the will of his lessor, he is a disseisor, 10 E. 4. If an infant maketh a lease at will, and the lessor dieth, and the lessee continueth in possession, and claims fee, the heir shall have mort-dancester, 18 E. 4. If cestuy que vye dieth, and the tenant hold in, and was impleaded, the lessor shall not be received, and he conceived the reason of the case to be, because that the reversion was not in him; but that the fee was gained and rested in the other, 22 E. 4. 39. g. by Hussey. If a termor holdeth over his term, there an estate in fee is confessed to be in him, because he holdeth the possession of the lands by wrong; but there is a quære made of it, if he be a disseisor or not, but I conceive that he is, for trespass doth not lie against him, before the lessor hath made his entry; and therefore, if the lessee doth continue in the possession of the lands by reason of the first entry; that is the **[46]** reason, as I conceive, that the writ of entre ad terminum qui præteriit, lieth against such a termor, who holds so over his term; and that writ is a præcipe quod reddat, which doth not lie but against a tenant of the freehold. And such is the opinion of Tilney, 7 H. 4. 43. That if the guardian holds in the lands at the full age of the heir; or if the tenant for years after the term expired, holdeth over the lands, their estates shall be adjudged a fee. And in our case here, he doth not claim to hold in at the will of the lessor; for he hath done an act contrary to the will of the lessor; for he being lord of the manor, in manner as aforesaid, hath granted estates by copy; and it is holden, 12 E. 4. 12. by all the justices, that if tenant at will, or tenant at sufferance at will, makes a lease for years, that the same is a disseisin to the lessor, and the tenant at will thereby gains the freehold: and the reason of the book seems to be, because he claims to hold a greater estate than of right belongs unto him. The second point was, if tenant at sufferance might grant copies, and he said, that he might, and such grant should be good, because he is in by lawfull means, and an assise doth not lie against him, as in the book of 22 E. 4. 38. before, and he is dominus pro tempore. And this case is not like to the cases,

where copies are made by abators or disseisors; for the law doth adjudge, that copies made or granted by them are void, and his act here as a tenant at sufferance of making and granting of the copies stands with the custome of the manor which warrants them; as in the case of Grisbrook and Fox, if an administrator made by the ordinary sells the goods of the intestate; and with the money thereof arising, payeth the debts of the intestate, and afterwards he who was made executor proves the will, he shall not avoid such sale of the goods, because he hath made it according to law, and hath done no more than an executor is compelled to doe: so 12 H. 7. 25. b. If a baily cut down trees to repair an ancient pail, the same is good: so 4 H. 7. 14. b. If he payeth a quit rent, it is good. And note, 4 Mariæ Br. Tenant by Copy, 27. That the lessee of a manor, in which there are copyholds, after the death of the copyholder, may admit the heir of the copyholder to the land; and so he may doe, who hath but an estate in the manor durante bene placito: and yet it seems by the book, that such a tenant of the manor, cannot reserve and lessen rent, but he ought to reserve the ancient rent, or more. Coke contrary; And first he said, that he who holdeth over the life of the cestuy que use, doth not gain any fee where he comes in first by right, for that he is but tenant at sufferance, 35 H. 8. Dyer 57. in the case of the Lord Zouch, cestuy que use for life, the remainder over in tail makes lease for life of the lessee, he dieth, the lessee continueth his estate, and the opinion of the Justices of the Common-Pleas, and of others was, that he is but a tenant at sufferance, for the lease was not any discontinuance of the remainder, because he had authority by the statute of Rich. 3. to make a lease, and that is intended of such estate which he might lawfully doe; and this is our case, and so it is adjudged already. As to the second point, I grant, that tenant for years, or at will, or at sufferance is dominus pro tempore, but there is a difference as unto granting of copies by them: for it was adjudged 25 Eliz. that they might grant copies which are to be granted upon surrenders, made by copyholders: as if a copyholder doth surrender to the use of another, they may accept of such a surrender, and grant the lands by copy to him to whose use the surrender is made; but if a copyholder dieth, they cannot grant voluntary copies de novo. And he said that Popham, who argued the said case in 25 Eliz. that this difference was agreed, and so adjudged in one Sleer's case. And so 17 El. in the case of one Stowley, where the case was, that a manor was devised to one, and the devisee entred and granted copies, and afterwards it was found that the devise was void, and it was there holden **[47]** that copies made by such devisee upon surrenders, were good, and were not to be avoided; but contrary of copies made after the death of tenants upon voluntary grants. I grant, that when cestuy que use dieth, the estate for life is utterly void and gone; and therefore he is in by wrong, but he cannot thereby gain so great an estate as a disseisor, because he came in at the first by right. Atkinson put a difference betwixt tenant at will, and tenant at sufferance; for tenant at will shall have aid, but contrary, of tenant at sufferance, as the book is, 11 H. 4. a release to tenant at will is good, contrary to tenant at sufferance; when after the death of cestuy que use he holdeth over, he hath some interest, scil. to this purpose, that he shall not be a wrong doer, for he is neither abator nor disseisor, therefore not a wrong doer, and then if he be in by a right, or rightfully, he is then dominus pro tempore, and then the grants made by him by copy are good. 7 H. 7. 3. Tenant at sufferance, was to justifie the distraining the cattel of another damage feasant. Coke, True, it is, the beasts of a stranger, but not of the tenant of the freehold: Gawdy Justice, The lessor cannot have trespass against him before entry; not because he is not a wrong doer, but because it is his folly that he doth not enter: all the justices did hold with the plaintiff against the copy granted: and that he which granted it was but tenant at sufferance, and not a disseisor, nor had gained the fee, because he came in first by right: and therefore they awarded, that if the defendant did not shew better cause, that judgment should be entered for the plaintiff.

Owen Rep. 27. 4 Co. 24. 3 Cro. 302.

LX. TRIN. 29 ELIZ. IN THE EXCHEQUER.

In the Exchequer Chamber, there was this case: An indenture tripartite, was betwixt three, A. was one of them, and he covenanted with them, et quolibet eorum. And the covenant was, that the land which he had aliened to one of them, was discharged of all incumbrances; and he to whom the limitation of the lands was, a writ of covenant sole. Buckley argued, that it was well brought, and cited the case of 6 E. 2. Br. Covenant 49. where one covenanted with twenty, to repair the sea-banks, and he did not repair against two of them, and they two brought a writ of covenant solement, and the writ holden maintainable, because they onely were damnified, and so he said in this case: but notwithstanding this, it was afterwards, viz. M. 30 Eliz. adjudged by the whole Court, that the covenant did not lie by one of them onely, but ought to be brought by them both.

5 Co. 18.

MICH. 33 ELIZ. IN THE COMMON PLEAS.

LXI. CARTER'S CASE.

A. being seised of the manor of Staple in Odiham, and of divers other lands in Odiham, suffered a common recovery of the whole, and by indenture expressed the uses in this manner, viz. of all his lands and tenements, in Odiham, to the use of his wife for life, the remainder over, &c. And of the manor of Staple, to the use of his youngest son in tail; but by the clear opinion of the whole Court, although the manor of Staple was in Odiham, yet the wife shall have nothing therein; for the intent of the party was, that the son should have the same, and his wife the residue; and accordingly judgment was given.

1 Cro. 208. Owen Rep. 84. 8 Co. 119.

[48] MICH. 33 ELIZ. IN THE COMMON PLEAS.

LXII. COBB AND PRIOR'S CASE.

The case betwixt Cobb and Prior was this; A man seised of lands in fee, devised the same to his wife during the minority of his son, upon condition, that she should not do waste during the minority of the said son, and died; the wife married a husband, and died; the husband committed waste: it was holden by all the justices, that the same was not any breach of the condition; and judgment was entred accordingly.

TRIN. 33 ELIZ. IN THE COMMON PLEAS.

LXIII. TAYLOR AND BROUNSAL'S CASE.

In an information upon the statute of 32 H. 8. by Taylor against Brounsal, the case was, that John Brounsal was seised, and gave the lands to T. B. and the heirs of his body, &c. the remainder to R. B. and the heirs male of his body, the remainder to the right heirs of J. B. T. B. died, having issue a daughter; and R. B. made a lease for years of the lands: and it was holden by the Court to be no maintenance within the said statute, for he in the remainder might make a lease for years: then it was given in evidence, that a common recovery was had against the husband and wife with a single voucher, and so the remainder limited to R. B. destroyed, and that after that recovery R. B. made the lease: to which it was said by the other side, that the said recovery was never executed, and no discontinuance of the remainder, and then the lease made by R. B. was good: and the truth of the case was that such a recovery was bad, and an habere facias seisinam awarded and returned, but no execution was in truth had upon it, nor the recoveror never

entred: and if R. B. who is a stranger to the said recovery shall be admitted against the recovery to say, that no execution was thereof, was the question? and therefore all the matter was found by special verdict. It was also given in evidence, that the land was given to T. B. and the heirs males of his body; and then when the daughter, which is not in truth inheritable, entereth, if that entry, she being privy in bloud to R. her uncle, shall be a disseisin, or abatement, &c. as in the case of Littleton, where the youngest brother entreth after the death of the father; for in such case, the youngest son doth not get any freehold, but is but a tenant at sufferance. Anderson, When the daughter enters, and takes a husband, who leaseth for years, and the lessee entreth, the same is a disseisin. Periam doubted it, for he said, when the younger son entred, the freehold was in him, which Anderson doubted.

Trin. 33 Eliz. In the Common Pleas.

LXIV. Maunsel and Vernon's Case.

In debt by Maunsel against Hen. Vernon Esquire, who came in by capias, i. compulsary process, and pleaded, that he was Hen. Vernon Lord Powis, and so a Baron of the Parliament, and demanded judg-**[49]**-ment of the writ. (Note, some said, that if the defendant had come in by issue joyned, or gratis, and not by compulsary process, he could not have pleaded this plea, or any other misnomer.) The plaintiff replyed, that the defendant is an esquire, absque hoc, that he is Lord Powis, and a Baron of the Parliament; and as the jury was ready at the Bar to try this issue, this matter was objected. And Anderson conceived, that this plea to the writ was not good, for the name of the lord is not any degree, as knight, duke, earl; nor is it parcel of the name nor parcel of addition; and therefore it is no plea in abatement of a writ; and all the writs of Parliament, directed to Barons to summon them to Parliament, shall have their names, sirnames and additions; as if they be knights, knights, and if esquires, they shall be named esquires; and if a bond be made by J. S. Lord R. the writ shall not be so, for the King by his writ doth not name any one lord; but otherwise it is of duke, earl, &c. for these are offices of dignity, and parcel of their names, and not onely additions. Windham and Periam contrary; and they conceived that there was no difference in this point betwixt a lord and an earl; for which cause the Court being in doubt, although that the exception was entered of record, would have saved the same to the party, and taken the jury de bene esse: but afterwards, because it appeared it was joyned in the prejudice of Sir Edward Herbert, who was a stranger thereunto, and whose title was concerned therein, and there was none on his part to inform the jury; the jury was at last dismissed by the Court.

Trin. 28 Eliz. In the Kings Bench.

LXV. Penruddock and Newman's Case.

In an ejectione firmæ by Penruddock against Newman, the plaintiff declared of a lease made by the Lord Morley, and upon not-guilty pleaded, the jury found this special matter, (scil.) that W. Lord Mounteagle seised of the manor of D. whereof, &c. became bound in a statute in such a sum of money to A. who died; the executors of A. sued execution against the said lord, (scil.) extendi facias, a liberate issued, upon which the said manor was delivered to the executors, but the said liberate was not retorned: and it was farther found, that the executors being so possessed of the manor, the lord commanded a court baron to be holden there, which was done by sufferance and permission of the executors, and in their presence: at which time the executors said to the lord the conusor, We have nothing to do with this manor. And upon this verdict several matters were moved.

1. If the execution were well done, because the writ of liberate was not retorned?

and as to that, divers books were cited, 21 H. 6. 8. 18 E. 3. 25. And there is a difference betwixt a liberate, and a capias ad satisfaciend. and fieri facias, these writs are conditional, ita quod habeas corpus, &c. Ita quod habeas denarios hic in curia, 32 H. 8. ca. 28. 16 H. 7. 14. but contrary in a writ of habere facias seisinam, or in a liberate, for in these writs there are not such words; and therefore although they be not retorned, execution done by virtue of them is good enough: see 11 H. 4. 212. If the sheriff by force of an elegit doth deliver the moyety of the land, and doth not retorn the writ; if the plaintiff will plead a new action of debt, the defendant may plead in bar the execution aforesaid, although the writ be not retorned, nor doth remain upon record: and it is not like unto the case of partition made by the sheriff, for that must be retorned, because that after the retorn of it, a secondary judgment is to be given, (scil.) quod partitio prædict. firma & stabilis remaneat in perpetuum, firma & stabilis in [50] perpetuum tenetur, says the Book of Entries 114. And Egerton, the Solicitor-General, cited a case to be lately adjudged betwixt the Earl of Leicester and the Lady Tanfield, that such an execution was well enough, although the liberate was not retorned.

The second point was, admitting that it be a good execution, if the executors being in possession of the manor, and suffering the conusor to hold a Court there, and saying the words aforesaid in the presence of the lord who is conusor; if the same do amount unto a surrender, or not? and it was the opinion of Wray Chief Justice; that it was not a surrender, for that here the words are not addressed to the conusor, who was capable of a surrender, but to other persons: and it is not like unto the case of 40 E. 3. 23, 24. Chamberlains Assise, where tenant for life saith to him in the reversion, that his will is, that he enter upon the land; the same is a good surrender, because here is a person certain who may take the land: but in our case, it is but a general speech, and therefore it shall not be a surrender.

1 Leon. 279.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

LXVI. BASKERVILE AND BISHOP OF HEREFORD'S CASE.

In a quare impedit brought by Walter Baskervile against the Bishop of Hereford, and others; the plaintiff counted, that Sir Nicholas Arnold, knight, was seised of the advowson in gross, and granted the same to the said Baskervile and others, to the use of himself for life, and afterwards to the use of Richard Arnold his son in tail: proviso, that if the said Nicholas died, his heir being within the age of twenty three years, that then the grantees and their heirs should be seised to themselves and their heirs, until the said Richard had accomplished the said age. Sir Nicholas died, Richard being but of the age of fourteen years; by force whereof the grantees were possessed of the said advowson, &c. and afterwards the church became void, and so it appertained to them to present.

Exception was taken to the count by Serjeant Gawdy, because the plaintiff had not averred the life of Richard, upon whose life the interest of the plaintiff did depend: and he compared the same to the case of the parson, which had been adjudged, where the lessee of a parson brought an ejectione firmæ, and it was found for him; and in arrest of judgment exception was taken to the declaration, because the life of the parson was not averred; and for that cause the judgment was stayed.

Anderson, Upon the dying of Sir Nicholas, Richard being but of the age of fourteen years, an absolute interest for nine years vested in the grantees, not determinable upon the death of Richard; or rather, they are seised of a fee determinable upon the coming of Richard to the age of 23 years.

Rhodes and Windham Justices, contrary; and that here is an interest in the grantees determinable upon the death of Richard within the term; for if Richard dieth without issue within the term, the remainder is limited over to a stranger.

And as to the exception to the count, it was argued by Puckering Serjeant, that the count was good enough; for although the life of Richard be not expresly added, yet such an averment is strongly implied, and so supplyed: for the count is, quod dictus Nich. obiit, dicto Richardo being of the age of fourteen years, & non amplius,

by force of which the plaintiff was possessed of the said advowson, quo quidem Nich. sic possessionato existente, the church voided: and possessed he could **[51]** not be, if not that the said Richard had then been alive; and that is as strong as an averment: see 10 E. 4. 18. In trespass for breaking of his close, the defendant pleaded, that A. was seised and did enfeoff him, to which the plaintiff said, that long time before A. had anything, B. was seised, and leased to the said A. at will, who enfeoffed the defendant, upon whom B. re-entred, and leased to the plaintiff at will, by force whereof he was possessed untill the defendant did the trespass; and that was allowed to be a good replication without averring the life of B. who leased to the plaintiff at will, for that is supplied by the words, scil. virtute cujus, the plaintiff was possessed untill the defendant did the trespass: see also, 10 H. 7. 12. In an assise of common, the defendant made title, that he was seised of a house and a carve of land, to which he and all those whose estate he hath, &c. had common appendant, and doth not say, that he is now seised of the house; but the exception was disallowed; for seisin shall be intended to continue untill the contrary be shewed.

TRIN. 29 ELIZ. IN THE KING'S BENCH.

LXVII. MORGAN AND CHANDLER'S CASE.

In debt for arrerages of rent, by Morgan against Chandler, it was found by special verdict, that the land out of which, &c. was assured by an Act of Parliament to the Marchioness of Northampton for the term of her life, the remainder to the Lady Bourcher, her daughter, and the heirs males of her body, the remainder to King H. 8. in fee; and it was ordained by the same Act, quod omnes concessiones & dimissiones, anglice, grants and leases, factæ vel in posterum fiendæ, by the said marchioness, of the lands aforesaid, per script. indentat. dict. marchio. bonæ & validæ in lege erunt, durante termino, &c. The marchioness made a lease for 21 years to Kenelm Throgmorton rendring 10l. rent, who assigned the same to the defendant. The Lady Bourcher died without issue, the marchioness died; and if the lease should now bind the Queen, was the question: and it was moved by Clark of Lincoln's-Inn, that it should, for the King was party to the Act of Parliament; and those estates for life in tail, and in fee, are all as one estate, and derived out of one estate, and the estate of the King is bound with the lease; and it was moved by Broughton, that the lease should not bind the Queen, and so by consequence not her patentee; and he cited a case, adjudged upon a like Act, scil. the statute of 35 H. 8. by which it was enacted, that the Lady Katharine, wife of the said king, should be as a feme sole, and that she might make leases, &c. In that case, the leases should not bind the King or his successours; for the said Act did not extend to make the leases good, but onely against coverture. And it was observed by Clench, Justice, that in the Act of Parliament now in question, it is expresly provided, that the rent reserved by the marchioness, should go to the Lady Bourcher, but no provision made, that it should go to the King, and therefore it is not reason that the King should be bounden: but another matter arising upon the pleading, the point did not fall in judgment.

TRIN. 29 ELIZ. IN THE KING'S BENCH.

LXVIII. BACKHOUSE AND SPENCER'S CASE.

Samuel Backhouse brought a writ of annuity against Alderman Spencer of London, and declared upon a grant of an annuity for term of years, and depending the action, the term expired. And it was the **[52]** clear opinion of the whole Court, that the plaintiff could not have judgment, for the judgment in this writ, is, quod querens recuperet annuitatem prædictam, and now there is not any annuity in being, see 34 H. 6. 20.

1 Roll. 228. 6 Co. Higgin's case. 1 Inst. 285. a. 14 H. 7. 31. 19 H. 7. 16.

LXIX. MICH. 29. ELIZ. IN THE COMMON PLEAS.

In a writ of partitione facienda, the defendant prayeth aid; and the plaintiff counterpleads the aid, upon which counterplea, they are at issue, and it is found for the plaintiff: it was adjudged, that same is peremptory to the defendant; and the judgment shall be, non quod respondeat, sed quod partitio fiat, &c.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

LXX. ROLSTON AND CHAMBER'S CASE. 1 LEON. PA. 282.

Rolston brought an action of trespass upon the statute of 8 H. 6. of forcible entry, against Chambers, and upon issue joined, it was found for the plaintiff, and damages assessed by the jury, and costs of suit also, and costs also de incremento adjudged, and all were trebled in the judgment, with this perclose quæ quidem damna in toto se attingunt ad, &c. and all by the name of damages; and it was objected against this judgment, that where damages are trebled, no costs shall be given, as in wast, &c. But afterwards it was clearly agreed, that not onely the costs assessed by the jury, but that which was also de incremento adjudged, should be trebled, and so were all the presidents, as it was affirmed by all the prothonotaries; and so are many books, scil. 19 H. 6. 32. 14 H. 6. 13. 22 H. 6. 57. 12 E. 4, 1. Book of Entries, 334. and judgment was given accordingly: it was also agreed, that the party so convicted of the force at the suit of the party should be fined, notwithstanding that he was fined before upon an indictment for the same.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

LXXI. WREN AND BULMAN'S CASE.

Wren brought an action upon the statute of 1 and 2 of Phil. & Ma. for unlawfull impounding of distresses against Bulman, and was nonsuit, and it was moved by Shuttleworth, Serjeant, If the defendant should have costs upon the statute of 23 H. 8. and it was adjudged, that he should not; and that appears clearly by the words of the statute, &c. For this action is not conceived upon any such matter which is comprised within the statute: and also the statute upon which this action is conceived, was made after the said statute of 23 H. 8. which gives costs, and therefore the statute of 23 H. 8. and the remedy thereof cannot extend to any action given by 1 and 2 Phil. & Ma. And so Rhodes, Justice, said it was adjudged 8 Elizabeth.

1 Len. 282. Rolston and Chambers.

[53] MICH. 29 ELIZ. IN THE COMMON PLEAS.

LXXII. MERY AND LEWES'S CASE.

Mery brought an action upon the case against W. Lewes, executor of David Lewes, late master of St. Katharine, juxta London, and declared, that the said David in consideration, that quædam pars domus fratrum & sororum sanctæ Katharin. fuit vitiosa & in decasu, the said Mery ad requisitionem dicti Davidis repararet eandem, assumed to pay to the said Mery all such moneys that the said Mery expenderet in such reparations; and farther declared, that eandem partem domus prædict. reparavit, &c. and upon non assumpsit, it was found for the plaintiff; in arrest of judgment it was objected, that the count was too general, quædam pars domus: for the plaintiff ought to have shewed specially, what part of the house in certain, as hall, chamber, or other rooms, but the same was not allowed: another objection was, because it is

set forth in the consideration, that the plaintiff, ad requisitionem dict. Davidis repararet; and the plaintiff declared, quod reparavit, generally, without saying, ad requisitionem dict. Davidis reparavit, and that is not the reparation intended in the declaration, scil. reparatio ad requisitionem, but a reparation of his own head, and at his pleasure, and for that case judgment was reversed.

3 Len. 91. 2 Cro. 404.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

LXXIII. BRASIER'S CASE.

Note, it was agreed in the case by all the justices, and by the prothonotaries, that if the disseisor levy a fine, and the disseisee in the preservation of his right against the said fine, enter his claim in the record of the foot of the fine, that the same is not any such claim as shall avoid the statute of 4 H. 7. See for this case of the Lord Zouch, in Plowden's Commentaries.

TRIN. 29 ELIZ. IN THE KING'S BENCH.

LXXIV. RALPH MORRIS'S CASE.

Ralph Morris and his wife, libelled in the Spiritual Court, for that the defendant called the wife of one of the plaintiffs, veneficam, sortilegam, & incantatricem dæmoniorum; and now came the defendant into this Court, and surmised, that the matter of the libell is determinable by the common law, and thereupon prayed a prohibition and it was holden by the Court, that although the offence of witchery be in some cases triable by law, yet the same doth not take away the jurisdiction of the Spiritual Court; and therefore, to call one a witch, generally an action will not lie at law, as it hath been adjudged; but to say, that he hath bewitched such a one, an action will lie at law. Wray, Such witchcraft as is made felony by any statute, is not punishable in the Ecclesiastical Court, but in case of slander of such witchcraft, upon such slanderous words of witchcraft which is not felony, the Ecclesiastical Court shall punish the same, and afterwards in the principal case, a consultation was awarded.

[54] TRIN. 29 ELIZ. IN THE COMMON PLEAS.

LXXV. BARDENS AND WITHINGTON'S CASE.

A. is bound in a statute to B. and sows the land. B. extends the lands, which are delivered unto him in execution; it was adjudged in this case, that the conusee should have the corn sowed; the same law in case of a recognizance.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

LXXVI. SMALMAN AND LANE'S CASE.

The case was, a capias upon an original process, was delivered to the new Sheriff of Warwick against Lane, at the suit of Smalman. And the sheriff informed the Court, that before that the process was directed to him, that the said Lane was taken in execution by the old sheriff, upon a judgment given against him in the King's Bench; and that the said old sheriff had imprisoned the said Lane, by force of the execution in his own house, and there he remained, and prayed the advice of the Court, what return he should make upon that matter, because the said Lane was never in his possession; for all the other prisoners which were in the gaol, and in the ordinary prisons, were delivered to him, and the old sheriff would not bring Lane to the place

where the other prisoners were delivered. And it was the opinion of all the justices, that by the law, the old sheriff ought to deliver the body of him who is in his custody by view, to the new sheriff; and such prisoners ought to be brought unto him to view, and from that time, the law shall adjudge such prisoners to be in the possession of the new sheriff, and not before; for he is not bound to go to them, not being in the ordinary prison of the county. Anderson, The new sheriff may return, that the said Lane is in execution in custodia sua, and so charge himself; for although the office of the old sheriff be determined, yet it is not an escape, so long as the party be in custodia and not at large. Periam contrary, It is an escape in the old sheriff as soon as his authority is determined, the prisoner not delivered: see now C. 3. part 71, Wesby's case.

MICH. 29 ELIZ. IN THE KING'S BENCH.

LXXVII. MEGOT AND BROUGHTON AND DAVIE'S CASE.

In an action upon the case upon assumpsit, it was found by nisi prius for the plaintiff, and afterwards before the day in bank, one of the defendants died, and after judgment given, the other defendant brought a writ of error in the same Court, where the judgment was given, and assigned an error in fact: scil. the death of one of the defendants pendant the writ, vide 2 E. 3. 21. It was said, that the case is not like the case of an action of trespass, for every trespass done by many, is several by each of them, but every assumpsit is joint, and not several. Another point was moved, if the Court could reverse their own judgment? quære.

1 Cro. 105. Roll 798. b. 3 Len. 96.

[55] TRIN. 29 ELIZ. IN THE EXCHEQUER.

LXXVIII. FARRINGTON AND FLEETWOOD'S CASE.

The case upon the statute of 31 H. 8. of Monasteries, was this, The abbat and convent of A. &c. 29 H. 8. made a lease of certain lands for three lives, to begin after the death of one F. if they so long live: and afterwards, 30 H. 8, within a year before the dissolution, they make another lease to Fleetwood: if the first lease in the life of the said F. be such an estate and interest, as by virtue of the said statute shall make the second lease void? was the question; for it was not in esse, but a future interest.

Manwood, All the reason that hath been made for the second lease, is, because the first lease is but a possibility; for F. by possibility may survive all the said three, and so it shall never take effect: but notwithstanding, be it a possibility or otherwise, it is such a thing which may be granted or forfeited, and that during the life of F. And note the words of the statute; If any abbat, &c. within one year next before the first day of this present Parliament, hath made, or hereafter shall make, any lease or grant for years, life or lives, of any manors, &c. whereof and in which any estate or interest for life or years, at the time of the making of any such lease or grant, then had his being or continuance, and hereafter shall have his being or continuance, and then was not determined, &c. shall be void, &c. And here is an interest, and that not determined at the time of the making of the lease to Fleetwood. And of such opinion were all the Barons, and divers other justices; and therefore a decree was made against the lease, &c.

3 Len. 164, 165. ante 333. Plus.

TRIN. 29 ELIZ. IN THE EXCHEQUER.

LXXIX. BEAUMONT'S CASE.

Note, it was holden by all the Barons in the Exchequer, that a duty which is not naturally a debt, but by circumstances onely, as debt upon a bond for performance of

covenants, or to save harmless, may be assigned over to the Queen for a debt; but in such case, a present extent shall not issue, but a scire facias shall issue forth, to know if the party hath any thing to plead against such assignment.

Owen Rep. 46.

TRIN. 29 ELIZ. IN THE EXCHEQUER.

LXXX. GODDARD'S CASE.

It was moved in the case of Goddard concerning the manor of Staple in Hampshire, if the tenant of the King of lands holden in capite be disseised, and the disseisor aliens the lands, and afterwards the disseisee doth re-enter? Manwood said, that the land shall not be charged with a fine for alienation without licence, because the title of the alienee grew under the wrong of the disseisor; but the person of the disseisor shall be charged with such fine. Tenant of the King in capite makes a lease for life, the lessee for life makes a feoffment in fee without licence, the lessor re-entreth, neither his person nor the land shall be charged: but if my feoffee upon condition maketh a feoffment without [56] license, and I re-enter for the condition broken, now my land shall be charged with the fine upon alienation, for the feoffee was in by me by good and lawfull title, because he had power to make a feoffment over, although subject to the condition. So if tenant in tail, or the husband seised in the right of his wife, make a feoffment in fee, and afterwards the land is recontinued, the fine accruing for alienation without licence shall bind the land: and if tenant for life loseth issues, and dieth, the lands shall be charged with the same.

11 Leon. 8.

TRIN. 29 ELIZ. IN THE EXCHEQUER.

LXXXI. THE LORD OF NORTHAMPTON AND LORD ST. JOHN'S CASE.

The Lord of Northampton had by ancient letters patents bona & catalla felonum & fugitivorum within the Isle of Ely; and one dwelling within the island was attainted of felony, to whom another was indebted by obligation, and the money by the condition of the bond was to be paid at a manor of the Lord St. John's, who within his manor had also bona & catalla felonum & fugitivorum; and at the payment the Lord St. John claimed the money: but all the Barons of the Exchequer were clear of opinion, that the Lord St. John could not have the money, for the place of payment nihil operatur, but the obligation is the substance which came to the Lord of Northampton within the Isle of Ely. Popham, the Queens Attorny, claimed the money for the Queen, for the Lord of Northampton cannot have it; for by the general words of bona & catalla felonum things in action do not pass, but by express words they well pass, otherwise not: and therefore day was given to the Lord of Northampton to shew his letters patents.

2 Roll. 195. Co. 12. 1, 2. Co. 4. 95. Dyer 262.

MICH. 30 ELIZ. ROT. 2737. IN THE COMMON PLEAS.

LXXXII. ARDS AND SMITH'S CASE.

Edward Ards brought a replevin against Smith and Reading; the defendants made conusance as bailiffs to Robert Chamberlain, and shewed, that one A. was seised of the manor of Keney in fee, whereof the place where is parcel, and so seised, gave the said manor to Richard Chamberlain and Sibil Fowler, and to the heirs males of the said Richard: Richard and Sibil intermarry, and have issue Edward; Richard dieth, Sibil dyeth, Edward hath issue Leonard, and dieth; Leonard hath issue Francis, and dieth; Francis hath issue Robert, in whose right the conusance is made, and dieth; Robert entreth: the plaintiff in bar of the conusance sheweth, that one B. was thereof seised, and thereof enfeoffed one Cottesford, then master of Lincoln

College, and the fellows thereof: after which the said Leonard, son and heir male of the said Edward, 25 H. 8. did release to the said master and fellows with warranty, the said Robert, in whose right the said conusance is made, being heir male of the said Robert, and demanded judgment, if against that warranty, &c. The defendants confess the gift before to the said Richard and Sibil, and that they had issue the said Edward; but farther shewed, that after the death of the said Richard, Sibil and Edward her son leased the said manor for years to one Mascal, who entred, and was possessed: Edward suffered a common recovery unto the use of the recoverers, who entred and ousted the lessee and enfeoffed the said B. who [57] enfeoffed the said master and fellows; the lessee re-entred, Sibil died, Leonard, son and heir apparent of Edward, released to the said master and fellows with warranty; Edward died, Leonard died, and thereupon a demurrer was by the parties: and the matter was, if this recovery being suffered by him in the remainder in tail upon an estate for life, the recoverors entring upon the lessee for years of the lessee for life, and putting him out, and afterwards the lessee for years re-entring: if now any estate did remain in the college, after the re-entry, which might work a release?

Snag, Serjeant, argued, that a sufficient estate did remain in the college, upon which a release might enure; i.e. an estate to begin after the death of Sibil, and the expiration of the term for years: and although rei veritate, Edward was not tenant of the freehold at the time of the recovery, yet such an exception doth not lie for the issue; and to that purpose he cited the opinion of Fairfax, 12 E. 4. 14.

Shuttleworth, Serjeant, contrary; This recovery works nothing but by way of estoppel and conclusion, and therefore the issue in tail may well disclose the matter, and avoid such recovery; and the better opinion in the case cited before, 12 E. 4. is that such a recovery against such a person is utterly void, which see there by Littleton, Choke and Brian. 14 E. 4. 2. and also 28 Ass. 17. and Dyer 8 Eliz. 252, 253. Land conveyed to the husband for life, the remainder to the wife in tail, the remainder to the right heirs of the husband and wife; the husband and wife suffer a common recovery, the husband hath issue and dieth, and afterwards the wife dieth, the issue shall avoid the lease and recovery. See also the case betwixt Hare and Snow, Plow. 20 Eliz. 514. where a common recovery was had against tenant in tail, and his wife, whereas in truth the wife had nothing in the land whereof the recovery was suffered: it was holden, that the issue in tail, or any other person, might shew the truth of the matter; for he shall not be bound by any estoppel which his father hath admitted, by joyning in voucher with his wife, for he is not subject to the estoppel; and therefore it was holden, that if the wife in such case might sue execution to have in value, yet the son in tail might oust him of it. So 8 H. 4. 122. a præcipe is brought against tenant in tail, who prays in aid of a stranger as tenant for life, who enters into the aid, and bars the demandant, and afterwards the tenant in tail dieth; his issue is at large to claim the estate-tail, although the mouth of his father was estopped as to it. So tenant in tail brought a quod ei deforceat, and counted upon an especial tail, whereas in truth it was a general tail, and recovereth, and dieth; the said recovery shall not conclude the issue. See 33 H. 6. 18. And in our case, when the recoverors enter by force of the recovery, the same is a wrong to the lessee for years, and also to the tenant for life; for the one is ejected, and the other disseised; and therefore the re-entry of the lessee doth defeat all the estate which was in the college under that recovery: and here the entry of the lessee for years shall avoid all the estate which was conveyed to the college by the recoverors. See 44 E. 3. 30, 31. Bassingborn's Assise: Land is given to A. for life, the remainder to B. for life, the remainder to C. in fee: A. aliens in fee, the ancestor collateral of him who hath the fee doth release to the alienee with warranty: B. enters, here the whole warranty is lost, and all the first estate is recontinued: so in our case, by this entry of the lessee, the whole estate of the college under the recovery is defeated, so as nothing remains in the college, upon which the release can enure, and then there is no warranty in the case: and as the case is here, Edward, who suffered the recovery, dieth before the descent of the warranty by the death of Leonard, by whom the release with warranty was [58] made; by the death of which Edward the interest which the college had in the said manor by the said recovery, and the estoppel of it, was determined and utterly gone, and then the warranty descending afterwards cannot

attach upon the possession which was at the time of the warranty made, which was by the conclusion, which by the death of Edward is determined and removed by an eign title, i. the entail. As if tenant in tail doth discontinue, the discontinue is disseised, tenant in tail releaseth with warranty to the disseisor, the disseisee entereth in the life of tenant in tail, who afterwards dieth; the warranty works nothing for the cause aforesaid. And also he put this case, Tenant in tail of land grants a rent-charge in fee, and an ancestor collateral releaseth to the grantee with warranty, and dieth, the tenant in tail dieth, now the issue is bound: but if tenant in tail dieth before him who maketh the release, now the rent is determined by the death of tenant in tail, and then the warranty cannot attach upon it. At another day the case was moved, and conceived in these words, (scil.) tenant for life, the remainder in tail, tenant for life leaseth for years, a recovery is had against him in the remainder in tail, living tenant for life, the recoverors enter, and oust the lessee for years, the son and heir of him in the remainder in tail releaseth with warranty to him to whom the recoverors have assured the lands, the lessee enters, he against whom the recovery was had dieth, the releasor dieth, &c. It was holden, that the entry of the lessee, before that the warranty had attached upon the possession which passed, had avoided the warranty. And the Lord Anderson conceived, that the recovery should not prejudice the issue in tail, but that the issue shall fauxifie the same: and if tenant in tail be disseised, and so disseised suffereth a common recovery, his issue shall not be barred, quod fuit concessum per omnes: and afterwards another matter was moved, (scil.) that the release is pleaded to be made to Lincoln College by the name of Custodi Sociis & Scholaribus Lincolniensis Collegii in Oxonia, where the true name of the college, as is confessed by the record in the plea pleaded is, Custos sive Rector, Socii & Scholares Lincolniensis Collegii in Oxonia, &c. It was adjourned. See this case reported, (3 part, Lincoln College case.)

3 Co. 8.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

LXXXIII. HALL AND THE BISHOP OF BATH'S CASE.

Hall brought a quare impedit against the Bishop of Bath, and others; the incumbent pleaded, quod ipse nihil habet, nec habere clamat, &c. nisi de præsentatione Georgii Sidenham militis, not named in the writ, and demanded judgment of the writ, upon which the plaintiff did demur in law: and it was argued by Drew, serjeant for the plaintiff, that the writ was well brought without naming the patron: for if a quare impedit be brought against the patron and incumbent, and the patron dieth, pendant the writ, the writ shall not abate: 9 H. 6. 30. It might be, that the plaintiff did not know, nor could tell, who presented the said incumbent, but he findeth the incumbent a disturber by his incumbency: and if of necessity such patron ought to be named, then if such a usurper should die before the writ brought, he which hath cause of action should be remediless. And by Anderson and Periam, the writ is good enough for the reason aforesaid: and Anderson put this case; If A. wrongfully by usurpation doth present, and his clark is received; and afterwards A. having gained the patronage, grants it over to B. against whom shall the quare impedit be brought? Walmsley, against B. which Anderson doubted.

1 Leon. 45.

[59] MICH. 32 ELIZ. IN THE COMMON PLEAS.

LXXXIV. HUGHE'S CASE.

In a formedon, the writ was, that A. Dedit Aliciæ filiæ suæ, and to J. S. and to the heirs of their two bodies begotten, and it was shewed in abatement of the writ, that the name of the wife is put before the name of the husband, to which it was said by the Court, that if such a writ be brought against the husband

and wife, and the name of the wife be put before the name of the husband, the writ shall abate; and if in the case at bar it had appeared, that the donees at the time of the gift, were husband and wife, upon such a matter disclosed the writ should abate; but that doth not appear plainly to the Court.

LXXXV. MICH. 32 ELIZ. IN THE COMMON PLEAS.

Note, it was holden by the Court, that if a writ of dower be brought against an infant, who loseth by default at the Grand Cape; that he may reverse the same by a writ of error; but where an infant appeareth by guardian, and afterwards loseth by default, there he shall never avoid it: for if any default be in the guardian, the infant shall recover against him in a writ of deceit. And afterwards, the judgment in the first case was reversed.

1 Cro. 567. 3 Cro. 224. Post. 189.

LXXXVI. MICH. 32 ELIZ. IN THE EXCHEQUER CHAMBER.

Note, in the Exchequer Chamber, before the Lord Chancellour, the two Chief Justices, and the Chief Baron; a writ of error was cast upon a judgment given in the Court of Exchequer; and it was agreed, quod propter absentiam dom. Thesaurarii Angliæ, they ought not, nor could receive the said writ; and the statute of 31 Eliz. doth not help the matter, for that extends but to discontinuances, which before the statute many times hapned for the not coming of the Chancellour or Treasurer, and not to give conusance in a writ of error in the absence of the Treasurer, &c.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

LXXXVII. LACY AND FISHER'S CASE.

In a replevin by Lacy against Fisher, the defendant pleaded, that the place where, &c. is called Spicold, and holden of the manor of Easthall by certain rent, and made conusance as bailiff of the lord of the said manor; and issue being joined hereupon, it was tried by the jury of the visne of Spicold, and it was moved in arrest of judgment, that the issue was mis-tried; for the visne ought to have been of Spicold and Easthall also: and a case was cited to have been adjudged accordingly betwixt Webb and Richmond. M. 31 Eliz. in the same Court.

[60] MICH. 32 ELIZ. IN THE COMMON PLEAS.

LXXXVIII. CORBET'S CASE.

The case was, that an action of debt was brought by original writ against an administrator in another county than where the administrator was dwelling, and before notice of that suit, he paid divers other debts of the intestate, due by specialties; so as he had not assets to pay the debt in demand, having assets, at the day of the teste of the original, and now the defendant appearing, pleads the same special matter, and concluded, and so nothing remained in his hands. And it was holden per curiam to be a good plea: see 2 H. 4. 21, 22.

PASCH. 31 ELIZ. IN THE EXCHEQUER.

LXXXIX. SIR WILLIAM PELHAM'S CASE.

The case, short put, was this: A. tenant for life of a messuage, &c. the remainder in tail to B. with divers remainders over: A. by deed indented and enrolled, bargained and sold the messuage, &c. so conveyed to Sir William Pelham in fee, who afterwards suffered a common recovery thereof, in which A. is vouched; and so a common recovery is had and executed, and all this was before the statute of 14 Eliz. And if the said recovery should bind B. who was in the remainder in tail; or if it be a forfeiture, was the question. Altham of Gray's-Inn argued, that here is a forfeiture: first, it is to see, if a common recovery suffered by tenant for life (who is also bargainor in this case) be a forfeiture or not by the common law, if no execution be sued upon the same recovery. Secondly, if the recovery be executed, if he in the remainder may enter for the forfeiture. When tenant for life bargaineth and selleth the messuage, &c. although upon it an estate in fee be limited, yet nothing passeth from him, but that which he may lawfully pass, and that was the estate for the life of the bargainor, for such estate onely might lawfully pass; and here the bargainee is but tenant for the life of another, and when with his own consent he suffers a common recovery and that without right, the same is a forfeiture. By matter in fact, a particular tenant may commit a forfeiture, as well as by matter of record: by matter in fact he cannot commit a forfeiture, if the reversion be not thereby pulled out of him in the reversion: as if lessee for ten years maketh a lease for 1000 years, the same is no forfeiture, for by that the reversion is not touched; but if he in matter of record doe any thing which sounds to the disinheriting of him in the reversion, although in truth it doth not touch the inheritance, yet it is a forfeiture; which see 39 E. 3. 16. If tenant for life plead any thing against the right of him in the reversion, it is a forfeiture. And by Finchden and Belknap, he cannot plead to the right. 5 Ass. 3. Tenant for life is impleaded in a præcipe by a stranger, and confesseth the action upon which the demandant hath judgment; the lessor enters, against whom the demandant sueth execution, and the lessor brought an issue, and had judgment to recover, for it is a forfeiture, because the tenant for life hath admitted the reversion in another, because it is an alienation to the disinheritance of the plaintiff, i. the lessor. 19 E. 3. t. Receit 14. where tenant for life pleads in chief, or doth not gainsay the action of the demandant, or makes default by covin, he shall forfeit his estate; but if a rent be demanded against **[61]** tenant for life, and he render the same, it is no forfeiture: 22 Ass. 31. Tenant for life is impleaded by covin betwixt him and the demandant, and pleads in chief without aid prayer, upon which judgment is given, he in the reversion may enter: in a quid juris clamat, against tenant for life, who pleaded faulty, traversing the point of the action, he in the reversion shall not be received, for inasmuch as the tenant hath traversed the action, he is not within the statute of West. 2. of default, reddition; but he in the reversion may enter by the common law: 22 E. 3. 2. In a scire facias, to execute a fine against tenant for life, who pleaded to the enquest, whereas in truth, the land in demand was not comprised within the fine, and judgment is given for the demandant in the scire facias, that he in the reversion may enter: in the principal case here, there is apparent and manifest covin; for the tenant for life is vouched without cause, and this recovery is by assent, and is to the use of the bargainee, who is tenant for the life of another, and therefore by the common law, he in the reversion may enter before the execution be sued. And it is well known, that these common recoveries are used to dock a remainder in tail; and that was the scope of this recovery: and as to the case of 5 E. 4. 2. tenant for life is impleaded in a præcipe quod reddat, who voucheth a stranger, the demandant counterpleads the vouchee, and it is found for him; he in the reversion hath no remedy, but a writ of right, and if such vouchee enters into the warranty, and loseth by action tried, or by default, &c. that book is to be intended of a recovery executed; for there in such a case, he in the reversion may not enter, but is put to his writ of entry by the common law, vide Br. Tit. Forfeit 87. 24 H. 8. Tenant for life is impleaded and prayes in aid of a stranger, he in the

reversion may enter, but if he doth not enter untill the other hath recovered, then he cannot enter, but he is put to his writ of entry, ad terminum qui præteriit, vel de ingress. ad com. legem, and therein shall falsifie the recovery. And there by Brook, Voucher of a stranger is not a cause of forfeiture; for he doth not disaffirm the reversion to be in the lessor. And he vouched, 24 E. 3. 68. where tenant for life pleaded in the right without aid prayer; and so he argued, that before execution, he in the remainder might enter, but after execution, he is put to his action; but in our case, although execution, be sued, yet he in the remainder may enter, for it is found by verdict, that at the time of the recovery he was within age, and then no laches of entry shall be imputed unto him, and then he shall not be driven to his action: as if tenant by the curtesie maketh a feoffment with warranty, and dieth, and the same descendeth to his heir within age, yet he shall enter, although that he had not avoided the warranty in the life of his ancestor; and he also conceived that the statute of 23 H. 8. cap. 31. did extend to this case: for Sir William Pelham, the bargainee, was but tenant for life, and although that he be but tenant for the life of another, yet he is tenant for life as fully as if he were tenant for his own life: the words of the statute are, or otherwise for the term of life or lives quo ad non. As upon the statute of 20. E. 1. which gives receit, i. de defensione juris; the words are, Cum quis aliquod breve dom. Regis impetret versus renentem per legem Angliæ, vel feodum talliatum, vel sub nomine dotis, vel alio modo ad terminum vitæ, &c. Also, although that he who entreth at the time of the recovery was not next in the remainder to the particular estate, yet he is within the statute of 32 H. 8. for he was in the remainder at the time of the recovery, and at the time of the entry, he in the immediate remainder was dead, and then he next in remainder: see 15 E. 4. 9. by Littleton, If I grant my services to one for life, and he in a præcipe brought against him, plead in the right; or granteth unto another the said services in fee, the same is not any forfeiture, because it is not any discontinuance. It will be objected, that **[62]** the words of the statute of 32 H. 8. are, that such recoveries shall be utterly void; and if so, then he in the reversion cannot be damnified, and then no cause of forfeiture; to that it was easily to be answered, that where tenant for life doth any thing which sounds to the disinheriting of him in the reversion by matter of record, although it doth not devest or otherwise prejudice the inheritance, yet it is a forfeiture. Coke contrary; Here in our case there is not any covin: Sir William Pelham, the bargainee, he was deceived by the bargainor, for he did not know but that the bargainor was seised in tail at the time of the bargain, and it was lawfull for him to doe other act in the farther assurance of his bargain; and it was also lawfull for him to vouch his bargainor; and although the bargainor vouched a stranger, yet it is not a forfeiture, 39 E. 3. 16. Aid prayer of a stranger is a forfeiture, and the reason thereof is, because he acknowledgeth the reversion to be in a stranger, and that is the cause of the forfeiture. See Book of Entries 254. Where upon aid prayer, the party to have aid sheweth special matter; but in our case, Sir William Pelham hath vouched his bargainor, and that not without cause, for he hath a warranty from him; and the demandant could not counterplead it, for he had seisin, by force whereof he might make a feoffment: as unto the case of 14 E. 3. Tit. Receit 135. Lessee for life in a præcipe against him without aid prayer pleaded to the enquest at the first day, in that case it is said, that he in the reverson may enter. It is true, that he may enter in the receit, but not into the land for forfeiture, for then Fitz. would have abridged the case in title of entry congeable, and not in the title of receit: and the book of 5 E. 3. is good law, for there the tenant doth confess the reversion to be in another; but in our case the tenant voucheth, which is a lawfull act done, and according to the covenants of his purchase: and although the recovery be by agreement, yet it is not therefore a forfeiture; for if the tenant for life voucheth truly, it is no forfeiture. Before the statute of West. 2 cap. 3. which gave receit to the wife, and to those in the reversion where the particular tenant is impleaded, and maketh default, vel reddere noluerit, there was no remedy in such cases, but by writ of right, but no entry, and that was for the reason of the credit which the law gave to recoveries, for if they might enter; wherefore is receit given? but that was in two cases onely: but afterwards, because it was found, that many particular tenants being impleaded would plead faintly, the statute of 13 R. 2. gave receit in such cases. And upon what reasons were these acts and statutes made, if in such cases the entry was congeable?

but after these two statutes, another practice was devised, for such particular tenants would suffer recoveries secretly, in such sort, that those in the reversion could not have notice thereof, so as they could not before judgment pray to be received, to remedy which mischief, the statute of 32 H. 8. was made, by which all recoveries had against tenant by the curtesie, or otherwise for life or lives, by agreement of the parties of any lands whereof such particular tenant is seised shall be void, as tenant by the curtesie, &c. should be void against him in the reversion; and yet there was an evasion to creep out of that statute; for such particular tenants, would make a feoffment with warranty, and then the feoffee should be impleaded in a writ of entry, and he vouch the tenant for life, who would aver, and such recovery was holden to be out of the statute of 32 H. 8. for the recovery was not against such particular tenants, &c. for the remedy of which mischief, the statute of 14 Eliz. was made, by which it is provided, that such recoveries had where such particular tenants are vouched shall be void, if such recovery be by covin betwixt them: and he conceived, that the forfeiture is not in respect of the recovery it self, but of the plea pleaded by the tenant: and here in our case, there is not any covin **[63]** found, or that Sir William Pelham knew that he was but tenant for life; but it is found, that this recovery was with their assent, and that was lawfull as the case is; for they might agree to have such a recovery for farther assurance: and so Sir William Pelham hath not vouched any but his bargainor, and that accordiug to their covenants; and this bargainor was not a bare tenant for life, but he had also a remainder in tail, although not immediately depending upon the estate for life, which he had cut off; there it was not meerly a feigned recovery: see 5 E. 4. 2. and 24 H. 8. br. Forfeit. 87. where tenant for life being impleaded in a præcipe, voucheth a stranger, the same is no forfeiture, for the same doth not disaffirm the reversion: but contrary of aid prayer, for a stranger may release with warranty to tenant for life, upon which he may vouch: and he reported in his argument, that Bromley, Chancellor of England, sent him to both the Chief Justices, to know their opinions upon this point; and they were of opinion that the voucher of a stranger was not any forfeiture, and also that after the recovery was executed, he in the remainder could not enter; but they conceived, that the right of him in the remainder was not bound: and he said, that after the recovery was executed, that he in the remainder could not enter: see 24 H. 8. Br. Forfeit 87. for if entry in such cases should be lawfull, infinite suits would follow thereupon, which would be much to the discredit of common recoveries, which are now the common assurances of the land. As to the objection of the enfancy, the same will not help the matter. Br. Sav. Default 50. 6 H. 8. A recovery had against an infant, in which he voucheth and loseth, is not erroneous; contrary of a recovery upon a default: and if an infant, tenant in tail, suffer a common recovery, the same is a discontinuance, for in such recoveries infancy is not respected: and in a scire facias upon a judgment had against the father, the heir shall not have his age: and he cited a case out of Bendloe's Reports, 5 Eliz. Tenant for life, the remainder over to a stranger in fee, tenant for life is disseised by covin; in a præcipe quod reddat against the disseisor, he voucheth the tenant for life, who enters into warranty generally, and voucheth over the common vouchee: it was adjudged, that the recovery was out of the statute of 32 H. 8. for the recovery was not had against the particular tenant, for he was but tenant in law, because vouchee; and also that the recovery was a good bar to him in the remainder, notwithstanding that he was within age at the time of the recovery.

And afterwards at another day the case was argued by the barons; and Clark Baron conceived, that the entry of him in the remainder was congeable: it hath been said, that Sir William Pelham did not know that the bargainor had an estate but for his life, or that any other person had any remainder therein; the same is not to any purpose to excuse him: for 42 E. 3. every purchasor ought at his own peril take notice of the estates and charges which are upon the lands of which he is purchasor; and the law presumes that none will purchase lands without advice of councel, and without knowing the titles to the lands. And although divers statutes have been made to provide against the practices of particular tenants, yet it is no argument, that no other remedy was before. And by Littleton, If tenant for life joyneth the mise upon the mere right, it is a forfeiture. And he held strongly, that the judgment did not take away the entry, cause of forfeiture being given before the judgment: see

5 Ass. 3. and 22 Ass. 31. to that purpose: for where tenant for life is impleaded, he ought to attend upon him in the reversion, and to expect instructions from him in defence of his title, &c. And therefore if he maketh default, or confesseth action, the same is a forfeiture: and as to the supposed recompence, the same shall not help this case, for this is a common **[64]** recovery, and nothing else but an assurance: and recoverors they are but assignees, and they shall take advantage of conditions by 32 H. 8. and a recovery shall be seised to the use of him who suffereth the recovery, if no other use be expressed. And he also held, that when tenant for life bargains, and sells his lands by deed enrolled, although no fee passeth, yet it is a forfeiture, and that by reason of the enrolment, which is matter of record. And he said that if an infant, tenant for life, be disseised, and the disseisor dieth, and afterwards the infant dieth, that he in the remainder might enter.

Gent, Baron, argued to the same intent; and he said, that if tenant for life suffereth a recovery, the same is not simply a forfeiture, for he may have a warranty upon a release or confirmation made to him. Attornment doth not give a right, but is onely a consent, yet if he who hath not any thing in the reversion will levy a fine thereof unto another, and afterwards the conusee brings a quod juris clamat against the tenant of the land, and he attorn, it is a forfeiture.

Manwood, Baron, to the same intent; This is a new case, and I have not seen nor read the case in any book, nor seen any presidents; and it is a great case, and a general case, and worthy to be argued; and I conceive clearly, that here is a direct and express forfeiture: the dignity of judgments in reputation of law hath been urged, which ought to stand in force until they be reversed by error or attaint: and also Littleton 481. hath been urged, where upon the statute of West. 3. he saith, that before the statute aforesaid, if a lease had been made to one for life, the remainder to a stranger, and afterwards a stranger by faint action hath recovered against tenant for life by default, and afterwards the tenant for life died, he in the remainder had not any remedy: but there Littleton doth not report the same as his own opinion, but as an opinion conceived by a reader upon the said statute; and in truth it is but a meer conceit. And as to the main point, he took this difference; such recoveries in which the title of the demandant stands indifferent to the Court, and non constat, if it be good, or not being suffered by tenant for life by default or confession, without aid-prayer of him in the reversion, do not make any forfeiture, although that the tenant for life hath not dealt with him in the reversion, not having prayed in aid of him: and in such case, if a lease be made for life, the remainder over in fee, upon such recovery he in the remainder shall have a formedon in the remainder, or a writ of right, and shall not put out him who recovered, without any action, and that by the common law. Then came the statute of West. 2. c. 3. which gave unto the wife a cui in vita, upon a recovery had against the husband by default, where before she had not any remedy, but onely writ of right: and notwithstanding, si ulterius quæratur, si necesse habet ostendere jus suum, secundum formam brevis quod prius impetraverat: and if his right be not better than the right of him in the reversion, he shall lose it, notwithstanding the judgment given before for him: and that statute gave receipt, or writ of entry, ad terminum qui præteriit; and that statute is to be intended of such recoveries where a good title or indifferent is, so as non constat Curiæ, if it be good, or not: after that tenant for life was driven unto a new shift, and would not make default, or lose for not pleading, but he would plead, but that faintly; for the remedy of which mischief, the statute of 13 R. 2. which gave receipt in such case; the particular tenant being restrained by this statute, he jugled yet, and practised to suffer a recovery secretly, without notice of him in the reversion: for the remedying of which mischief, the statute of 32 H. 8. was made, and that makes such recovery had against such a particular tenant void against him the reversion.

[65] It hath been objected, that the said statute of 32 H. 8. did not give any forfeiture in this case, but makes the recovery void; and therefore he in the reversion ought to stay until after the death of the particular tenant: to that I shall speak after. But here our case is of a common recovery, and it doth appear to the Court, that the demandant hath not right, for the tenant might have barred him: also this recovery is not to the use of the recoveror, but to the use of him who was tenant in it; and in truth it is nothing else but an assurance: and in these feigned recoveries

the recoveror comes in under the title of the tenant to it, and not paramount, as in case of a recovery upon a good title. A lease for years made by him who after suffers a recovery is good, and shall not be defeated by the recovery; otherwise it is where the recovery is upon a good title. See statute of Glocest. cap. 11. where upon default of the tenant, receipt is given for lessee for years; yet if the tenant vouch, upon default of the vouchee the lessee for years shall be received: and now receipt of lessee for years is out of the book, for by the statute of 21 H. 8. cap. 15. he may falsifie the recovery: but no receipt lieth in the case of a common recovery, for that he who recovers cannot put out the termor. As to that which my brother Clark hath said, that the bargain and sale in this case is not any forfeiture, but when the bargain and sale is enrolled, then it is a forfeiture; I am not of such opinion: for although that the enrolment be of record, yet the deed is not of record; for against a deed enrolled, a man may plead infancy, although none can plead non est factum. Also he held, that although by the bargain and sale, and the enrolment of it, the bargainee had not a fee, for by such act the reversion is not removed; yet by the recovery, and the execution of it, the bargainee hath gained a fee out of the lessor, for the recovery is to the use of the bargainee, against whom it was had. It hath been objected, that here is onely a voucher, which paradventure was lawfull in this case, by reason of a warranty paramount; or of a release or confirmation with warranty: and two cases have been vouched to that purpose, viz. 5 E. 4. 2. Tenant for life being impleaded in a præcipe, voucheth a stranger, the demandant counterpleads the voucher, which is found for him, he in the reversion hath no remedy but a writ of right; so if the vouchee had entred into the warranty, and lost, &c. As to that book, we ought not to conceive, that every case reported in our books is law; but let us observe, of what authority that case is; truly it is the conceit of the reporter himself, for he puts the case, and resolves the case, but no judge or serjeant is named in the case, &c. The other case is 5 E. 4. 2. b. Note by Heydon clearly. If my tenant for life voucheth a stranger, who entreth into the warranty generally, and doth not know how to bar the demandant, the tenant shall recover in value, and the reversion of that which he hath in value shall be in me in lieu of my former reversion; as a release to the tenant for term of life shall enure to him in the reversion: but that is but the opinion of one serjeant, &c. But I answer to these books, if the demandant in such recovery hath a good title, so as the tenant or the vouchee, as Heydon saith, do not know how to bar the demandant, there such voucher of a stranger is no forfeiture, nor such recovery suffered upon it, for against his will, volens nolens, he suffered it: but if the tenant hath good matter to bar the demandant, and no good cause of voucher, nor any warranty, as the matter is in the case of a common recovery, there the voucher of a stranger, or suffering of a recovery, is a forfeiture of his estate. And here in our case if the demandant hath not any title, the tenant or vouchee hath not any warranty; but the tenant might have barred the demandant if he would: and he said, that the voucher onely doth not make the forfeiture, but rather the recovery; for when judgment **[66]** is given, and execution is had, then the fee is plucked out of the reversioner: vide 6. R. 2. If tenant for life claimeth a fee, the same is a forfeiture: but here Sir William Pelham hath done more, for he hath gained fee by the judgment, therefore à fortiori it shall be a forfeiture. But let us see a little what meddlings or attempts by the particular tenants are causes of forfeiture, and what not: 5 Assis. 3. A. brought a writ of entry against tenant for life by collusion to oust B. of his reversion, supposing that the tenant for life held of his lease; the tenant confessed the action, upon which judgment is given, B. enters, and his entry adjudged lawfull, for this recovery is adjudged in law but an alienation to the disinheritance of him in the reversion: and there it appeareth, that such recovery by covin is but an alienation, and without any strength of a recovery. And he cited many other cases cited before by Altham: 14 E. 3. Recept 135. where tenant for life pleads in chief, and prays in aid of a stranger, where he might bar the demandant, and would not, the same is a forfeiture: also 22 E. 3. 2. and 27 E. 3. where tenant for life, in a quid juris clamat, attorned to the conusee upon a fine levyed by him that had not any thing in the land, the same was a forfeiture; and yet the attornment doth not devest the reversion out of the lessor: 50 E. 3. 7. and 8. Land was given by fine in tail, the remainder over to a stranger in fee, the donee took a wife and died without issue, the wife

accepted dower assigned by a stranger, he in the remainder brought a scire facias against the wife; she is tenant in dower of the assignment of a stranger, and pleads to the title; the demandant recovereth, she hath lost her dower, for she hath not pleaded as she ought, being a particular tenant, &c. H. 4. Tenant for life loseth his land in a recovery against him against his will, and thereupon brings quod ei deforceat, and declares upon an estate-tail, and recovers, the same is a forfeiture, because he hath challenged a higher estate than he had, 5 H. 5. Tenant for life joyns the wife upon the meer right: 2 H. 6. Lessee for years being ousted, brings an assise, and recovers: 1 H. 7. Accepts a fine of a stranger upon condition, come ceo, &c. all these are forfeitures. In the principal case here, the tenant who suffers his recovery doth not plead at all to defend the right: but whereas he might have barred the demandant, he giveth strength to his pretended title, and makes it a perfect title; and by suffering this recovery and judgment to pass upon it, he hath taken the reversion out of the lessor to whom he owed fealty, and therefore he shall forfeit his estate. And without any doubt it is apparent to the Court, that the demandant in this recovery hath not any title, but the recoverors in such cases are but as assignees or purchasors, which appears by the statute of 7 H. 8. ca. 2. which gives distress and avowry to recoverors, &c. As to the inventing of recoveries, it was a necessary device, for it was to take away estate-tails, which were the causes of great mischiefs and inconveniencies in this realm: and there was great reason for it; for tenant in tail might by the common law alien his lands post prolem suscitatam, and now he hath an inheritance, and may do waste, but he was so restrained by the statute of West. 2. that all the realm, and the subjects in it, were inveigled thereby; joyntures of wives, leases of fermors, mortgages to creditors, statutes, and other assurances, were defeated by the deaths of tenants in tail, which was both against the common law, and also against all conscience. These matters coming to the knowledge of the justices, and the mischiefs thereupon following being very frequent, and it appearing that the tenant in tail was a dangerous fellow, and that there was no safe dealing with him, they took consideration of them: and considering also with themselves, that lineal warranty and assets, and collateral warranty without assets, did bar the **[67]** entail, upon this consideration they grounded the practice and usage of common recoveries. So as by that means tenant in tail, hath postestatem alienandi, as he hath at the common law; and by this means, right was done to the common law because its authority was restored; and thereby injury was done to no man: but as for tenant for life, he never had potestatem alienandi. And as to that which hath been said, that the recovery shall stand in force untill after the death of tenant for life; and in our case here, tenant in tail is alive; truly, if the law should be such, great mischiefs would follow: for then great jointresses, the widows of great persons, having assurances to them of great and stately houses, and of lands furnished with timber, of great yearly value, might suffer such recoveries; and so having plucked the fee out of the heirs, might commit waste, and the same should be dispunishable, which would be an intolerable mischief; and so he concluded, that the suffering of a recovery was a forfeiture, and judgment, Trin. 21 Eliz. was given, and entred accordingly.

1 Co. 41. Post. 65. acc. 1 Len. 264. 1 Inst. 251. b. acc. 4 Inst. 330. b.

Trin. 31 Eliz. In the Exchequer.

XC. Noon's Case.

Debt was brought in London, against one as executor, and upon fully administred pleaded, it was found for the plaintiff, who assigned the same to the Queen, whereupon a scire facias issued out of the Exchequer against the defendant, into the county of Dorset. The sheriff retorned nulla bona, &c. which scire facias was upon a constat of goods in another county; it was agreed by all the Barons, that the debt was well assigned to the Queen: and also that the scire facias might issue forth of another Court, than where the record of the judgment remained; and that upon a constat of goods, in another county than where the writ is brought, or where the party is dwelling, he may well have a scire facias in another county. But the retorn was

challenged, because contrary to the verdict: as in a replevin, no such beast, is not a good retorn, but averia elongata; or nullus venit ex parte querentis ad monstrand. averia: and here the sheriff might have retorned, devastavit, which well stands with the verdict, 5 H. 7. 27. But as to that, it was said by the Barons, that it is true, that the sheriff of the county where the writ was brought, is concluded by the verdict, to make any retorn contrary to it; but the sheriff of another county shall not so be; but the sheriff of the county where the writ is brought ought to retorn devastavit, &c. and thereupon the plaintiff shall have process into another county; but the question farther was: If a scire facias upon testatum shall issue into another county, before that the sheriff of the county where the writ is brought, had retorned a devastavit? for some conceived, that a devastavit where the writ was brought, ought first to be retorned, and then upon a testatum, process should issue forth into any county within England; but others were of opinion, that without a devastavit retorned upon a testatum, process might be sued forth immediately into any other county. Williams said, If I recover goods by action brought in Midd. I may upon a testatum, have a capias into any foreign county.

[68] TRIN. 31 ELIZ. IN THE EXCHEQUER.

XCI. WESTERN AND WEILD'S CASE.

In a writ of accompt brought in London, the defendant pleaded, never his receiver, &c., which was found for the plaintiff, and judgment given, that the defendant should accompt; afterwards the defendant brought his writ of privilege: and if the same should be allowed after judgment? was the question: Coke, It shall be allowed, for the defendant hath not surceased his time. This judgment to accompt is not properly a judgment, for no writ of error lieth upon it before the accompt be ended: Manwood, Regularly, after judgment, no privilege shall be allowed, but that is to be intended of a judgment ended; but here, notwithstanding this judgment, the action is depending, and therefore he conceived that the privilege should be allowed in this case. It was objected, that then the plaintiff should be at great mischief, for he should lose the advantage of his trial; for he must begin again, and plead again, and have a new trial. Clark, The plaintiff shall have benefit of his former trial by way of evidence.

TRIN. 27 ELIZ. IN THE COMMON PLEAS. ROT. 1353.

XCII. BRIAN AND CAWSEN'S CASE.

In an action of trespass by Brian and his wife, and others, against Cawsen; that William Gardiner was seised in fee, according to the custome of the manor of C. of certain lands, and surrendred them to the use of his last will; by which he devised them in this manner; i. I bequeath to John Th. my house and land in M. called Larks and Sone: to Step. Th. my house and land, called Stokes and Newmans, and to Roger Th. my house and lands, called Lakins and Brox. Moreover, if the said John, Stephen or Roger, live till they be of lawfull age, and have issue of their bodies, lawfully begotten, then I give the said lands and houses to them and their heirs in manner aforesaid, to give and sell at their pleasure; but if it fortune one of them to die without issue of his body, lawfully begotten, then I will that the other brothers, or brother, have all the said houses and lands in manner aforesaid: and if it fortune the three to die without issue, in like manner, then I will, that all the said houses and lands be sold by my executor, or his assigns, and the money to be given to the poor: the devisor dieth; John, Stephen and Roger are admitted according to the intent of the will, Roger dieth within age, without issue, John and Stephen are admitted to his part, John comes of full age, and hath issue, J. and surrenders all his part of the whole, and his estate therein, to the use of Stephen and his heirs, who is admitted accordingly; Stephen comes of full age, John the father dieth, Stephen dieth without issue, John the son, as cosin and heir of Stephen is admitted, according to the will, and afterwards dieth without issue, the wives of the plaintiffs are heirs to him, and

are admitted to the said lands, called Larks and Sone, and to the moyety of the lands, called Lakins and Brox, parcell of lands where, &c. by force whereof they enter into all the lands where the trespass is done, and it was found, that A. sole executor, died intestate, and that Cawsen the defendant is cosin and heir of the devisor, and that he as heir, entred, and did the trespass. First, it was agreed by all, that by the first words of the will, the three devisees had but for their lives. But [69] Fenner and Walmesley, who argued for the plaintiffs conceived, that by force of the latter words (scil.) if the said John, Stephen and Roger, live till they be of lawfull age, and have issue of their body, lawfully begotten, then I give the said lands and houses to them and their heirs, in manner aforesaid, &c. that they have fee; and the words (in manner aforesaid) are to be referred, not to the estate which was given by the first words, which was but for life, but to make them to hold in severalty, as the first devise would, and not jointly, as the words of the second devise do purport: and Fenner said, It had been resolved by good opinion, that where a fine was levied to the use of the conusee and his wife, and of the heirs of the body of the conusor, with divers remainders over, proviso, that it should be lawfull to the survivor of them, to make leases of the said lands in such manner as tenant in tail might make by the statute of 32 H. 8. Although those lands were never devised before the fine, yet the wife survivor, might demise them by force of the proviso, notwithstanding the words in manner, &c. So if lands be given to A. for life, upon condition, the remainder to B. in manner aforesaid; these words, in manner aforesaid, shall refer unto the estate for life limited to A. and not to the condition, nor to any other collateral matter. The words, If they live untill they be of full age, and have issue, are words of condition, and shall not be construed to such purpose, to give to them by implication an estate tail; for the words subsequent are, that they shall have to them and their heirs, to give and sell at their pleasures, by which it appeareth, that his intent was not to make an estate tail; for tenant in tail cannot alien or dispose of his estate, &c. And as to the latter words, And if it fortune they three to die without issue, &c. these words cannot make an estate tail, and the express limitation of fee in the former part of the will, shall not be controlled by implication, out of the subsequent words: as if lessee for fourty years deviseth his term to his wife for twenty years, and if she die, the remainder of the term to another, although she survive the twenty years, she shall not hold over. And here, the second sale appointed to be made by the executor, shall not take away the power of the first sale allowed unto the devisees after issue. Snagg and Shuttleworth, Serjeants, to the contrary: and they said, that the defendant hath right to two parts, for no inheritance vesteth in the devisees until full age and issue; and because two of the devisees died without issue, they never had an inheritance in their two parts, and so those two parts do descend to the defendant, as heir to the devisor, no sale being made by the executor; these words, If John, Stephen and Roger, are to be taken distributive, viz. If John live, &c. are to be taken distributive (scil.) if John live untill, &c. he shall have inheritance in his part, et sic de reliquis: as if I have right unto lands which A. B. and C. hold in common, and I by deed release unto them all, the same shall inure to them severally, 19 H. 6. And here, these latter words, If they three die without issue, it seems to be but an estate tail: see to that purpose, 35 Ass. 14. 37 Ass. 15. For a man cannot declare his intent at once, but in several parts; all which make but one inheritance, and so it is said by Persay, 37 Ass. 15. we ought to adjudge upon all the deed, and not upon parcell. And see Clatche's case, 16 Eliz. Dyer 330, 331. And it was said, that if I give lands to one and his heirs, as long as J. S. hath heirs of his body, the same is a fee-simple determinable, and not an estate tail, quære of that. Then here the fee-simple is determined by the death of the devisees without issue, and therefore the lands shall revert to the heir of the devisor, especially there being no person in rerum natura, who may sell, for the executor before any sale by him made, died intestate; and if he had made executors, yet the executor of the executor could not sell, which see, 19 H. 8. 9. 10. And afterwards, the justices resolved, that no estate tail is created by the will, but that the fee-simple is settled in them [70] when they came to their lawfull age, and have issue; so as the residue of the devise is void: and judgment was given for the plaintiffs.

3 Len. 115.

XCIII. Hil. 29 Eliz. In the Common Pleas.

The case was this, (viz.) by the civil law the parson ought to have his tythe by the tenth ridg: and in a great field there was corn upon the arable land, and grass upon the head lands; and in a suit for tythe hay, and rakings of the corn, the defendant did prescribe, to pay the tenth shock of corn for all the corn, hay and rakings of the corn; and the prescription was challenged not to be good, for it is upon the matter a prescription of non decimando, for the tenth shock is due of common right, and so nothing is for the hay and rakings: it was holden by all the justices, that for tying of horses upon the head lands, and eating of the grass and corn together, that the prescription was good: but the doubt was, when the grass is made into hay, which is upon the head lands, if it be a good prescription then, and discharge for the hay, because it is another thing than what is growing upon the land? But in the end all the justices agreed, that by the civil law (ut supra) the tenth ridg is due for tythe corn; therefore for the reaping, binding and shocking, it is a reasonable prescription, that the party shall have the hay upon the head lands in recompence of the said other things, and the hay upon the head lands is but of little value.

Roll. 646. 1 Cro. 446. 475.

XCIV. 29 Eliz. Challoners and Bowyer's Case.

In assise of novel disseisin by Challoner against Bowyer, it was given in evidence at the assise, that William Bowyer was seised, and having issue two sons, and two daughters, devised his lands to his younger son in tail, and for want of such issue, to the heirs of the body of his eldest son; and if he die without issue, that then the land shall remain to his two daughters in fee: William Bowyer dieth, the younger son dieth without issue, living the eldest son, having issue him who is tenant in the assise: it was moved, that notwithstanding that by way of grant, the son, living his father, cannot take as heir, i. by limitation, as heir to his father, because that none can be said or held heir to his father as long as the father be alive; yet by way of devise the law shall favour the intention of the party, and the intent of the devisor shall prevail. But all the Court was strongly against it, and held, that as well in case of devise, as of grant, all is one. Whereupon the tenant produced witnesses, who affirmed upon their oaths, that the devisor declared his meaning concerning the said will, that as long as his eldest son had issue of his body, that the daughters should not have the land: but the Court utterly rejected the matter; and judgment was given for the plaintiff.

[71] 29 Eliz. In the Exchequer.

XCV. The Countess of Linnox Case.

In this case it was said by Manwood Chief Baron, that whereas the Cistercians, &c. had a privilege, that they should not pay tithes for their lands, quas propriis manibus excolant, but their fermors should pay tithes: and now by the statute of 31 H. 8. they are dissolved, that the Queen and her fermors should be discharged of such tithes as the spiritual persons were: for the Queen cannot excolere; ergo, her fermors shall be discharged: and so long as the Queen hath the freehold, her fermors shall have such privilege, although she leaseth for years, or at will: but if the Queen granteth over the reversion, then the fermors shall pay tithes.

More Rep. 915.

MICH. 29 ELIZ. IN THE KING'S BENCH.

XCVI. GOLDING'S CASE.

In an action upon the case against Gloding, the case was; a feme sole, being tenant for life by devise of lands, leased the same for years, to begin after her death; and afterwards made another lease, 18 Octob. for twenty one years to the same lessee, to begin at Michaelmas before; and the pleading was, virtute cujus quidem dimissionis: and the lessee entred Crast. Sanct. Mich. which was before the making of the lease: and upon the grant of these two leases, the consideration of assumpsit was grounded in an action of the case thereupon, and six hundred pounds damages given: and now this was moved in arrest of judgment.

Coke for the plaintiff; Where two considerations are laid down in the declaration, although that the one be void, yet if the other be sufficient, the action upon the assumpsit lieth, and damages shall be taken accordingly. And the grant upon the assumpsit was, that both the leases should be assigned to the defendant; and the plaintiff hath declared accordingly, although that one of the leases be void; and the agreement was, that the plaintiff should assign totum statum, titulum, & interesse suum quæ habet in, &c. It appears here in the pleading, that the lease was made the eighteenth of October, and the lessee did enter, and was thereof possessed, Crast. Mich. which was before, and so the lessee then entering was a disseisor, but by Coke, the same is not a disseisin, although that the lessee entreth before the lease made; for there was a communication of a lease, although the lease was not made before the eighteenth of October; and peradventure it was by assent of the lessor, in which case it cannot be a disseisin: but be it a disseisin, yet in as much as he hath assigned all his interest, quod ipse tunc habuit, the consideration is answered; and he hath also delivered both the indentures of demise, and hath granted all that which he might grant; be such grant void or good, it is good consideration enough as to us.

Egerton, solicitor, contrary; In every action upon the case upon a promise, there are three things considerable, consideration, promise and breach of promise; as to the consideration in our case, the grant of the lease, which is to begin after the death of the lessor, is merely void: and as to the second consideration, it appeareth, that the lessor at the time of the making of the **[72]** lease had but a right, for he was disseised; for he who was afterwards the lessee entred before he had any lease made unto him; and so here is not any consideration to ground the assumpsit upon: but admit that there be a consideration, yet the action doth not lie: for 19 Eliz. a difference was taken by the justices, (scil.) when in the declaration in an action upon the case, two or more considerations are laid, and are not collateral, but pursuant: as if I owe you an hundred pounds, and I say, that in consideration that I owe you 100l. and in consideration that you shall give me 10l. I promise to pay unto you the said hundred pounds which I owe you: if you bring an action upon the case against me for the hundred pounds, and lay in your declaration both considerations, although you do not pay me the ten pounds, yet the action lieth: but where the considerations are not pursuant, but meerly collateral, and do not depend the one upon the other, as in consideration that you are of my councel, and you shall ride with me to York, I promise to give to you an hundred pounds; there both considerations ought to be performed, or otherwise the action doth not lie: and so here in the principal case; the considerations being collateral, they both ought to be performed. Afterwards, upon consideration had of the case by the Court, judgment was given for the plaintiff: and it was said by Coke, that there was not any disseisin in the case, but he who entred was tenant at sufferance, by reason of the precedent communication.

1 Len. 296. 1 Cro. 50. Noy 18.

TRIN. 28 ELIZ. IN THE KING'S BENCH.

XCVII. CURTISE AND COTTEL'S CASE.

The case was this, that one Bonham was seised of a manor, within which there were divers customary lands demisable by copy for three lives: the lord of the manor did demise some of those lands to three sisters, habendum to them for their lives successive, for the fine of 100l. by them paid; and they being seised accordingly, the eldest sister, who was tenant in possession, took to husband one Chapman; after which the said lord by indenture leased the same land to the eldest sister, the remainder to the husband, the remainder to the second sister, and no agreement was made thereunto by the second sister by deed, before or after the making of the indenture; but four days after the lease made she agreed to it in the country, and then took to husband Curtise, and they entred, claiming the said land, upon which entry the action was brought: the point was, that when the lease by indenture was made to the eldest sister, at which time no agreement was made by the second sister who was in remainder; yet when after she agreed, if by that agreement her right to the copihold were extinct, or not? so as the interest of the eldest sister being gone by the acceptance of the estate by the indenture, the second sister might come and claim her customary interest, as it were paramount the interest of the eldest sister, which she claimed by the indenture.

Glanvil, The customary interest of the eldest sister is extinct upon this matter, by reason of her agreement to it afterwards. Where an estate is given to one by a lawfull act, it shall be adjudged in the party before agreement, until it be disagreed unto; and if the party do once agree, he cannot afterwards disagree unto it. If an estate be lawfully made to a copyholder but for years, his whole interest in the copyhold is determined: and that a freehold cannot be waived in pais, but onely **[73]** by matter of record: see 13 R. 2. Joynt-tenants 13. A charter of feoffment was made to four, and seisin was delivered to three of them in the name of them all; and afterwards the fourth feoffee came and saw the deed, and said, that she would not have any thing in the lands, but altogether disagree unto it; and it was held, that that disagreement by word in pais did not devest the freehold out of her: but when the party doth disagree in a court of record, there the freehold is out of the party ab initio; and if he once agree, he shall not disagree afterwards. See Littl. Sect. 648. Tenant in tail enfeoffeth his son and heir apparent, and another, and livery and seisin is made to the other, according to the charter of feoffment, in the name of the son also, the son not knowing of it, nor disagreeing to the feoffment; the other feoffee dieth, the son neither occupies the lands nor takes the profits of them during the life of his father; the father dieth, the same is a remitter to the son, because the freehold is cast upon him, and there is no default in him, and therefore he is remitted: but upon an illegal act is otherwise; for if A. disseise B. to the use of C. in such case nothing is in C. before an express agreement, for the disseisin was an unlawfull act. And in this case at bar, it doth not appear that the eldest sister is dead, and therefore the right of the second sister cannot now come in question.

Shute, Justice, If the second sister, at the time of the making of the said indenture, had agreed unto it, then it had been a full extinguishment, but by an agreement afterwards it is not good.

Gawdy, Justice, The remainder is in consideration of the law; and the estate of the first sister is not so determined, that any can take advantage of it; for the lord, against this lease by deed indented, cannot enter, or claim any thing: and the second sister, although she hath not agreed, yet she cannot enter during the life of her elder sister, for her remainder takes effect in possession after the death of her said sister. But if any should take advantage of it, it should be the lord, if his deed indented did not stand against him. And afterwards judgment was given against the younger sister.

Clench, Justice, was of another opinion, viz. that the entry of the younger sister, notwithstanding that her elder sister was alive, was lawfull: quære of that.

TRIN. 28 ELIZ. IN THE KING'S BENCH.

XCVIII. WELLOCK'S CASE.

A parson, in consideration of twelve pence, granted to one of his parishioners, that he should hold his lands discharged of tithes: it was holden by the whole Court, that the same was no good discharge, being without deed, as a lease of his tithes. But it was holden, if the parson afterward sueth the parishioner for tithes against the same grant and promise, the parishioner may have an action upon the case against the parson upon his promise, although he cannot plead the grant as a lease.

[74] TRIN. 28 ELIZ. IN THE COMMON PLEAS.

XCVIII. LAWSON AND HARE'S CASE.

A replevin by Lawson against Hare, who avowed for a leet fee; and shewed how that he, and all those whose estate he hath in the hundred of C. have used to hold a leet, once every year; and that at each time, when such leet hath been holden, the inhabitants within the said leet have used to pay to the lord of the leet 16d. for a leet fee; and that the lords of the said leet have used to distrain for the same: and sheweth farther, that 5 Julii 26 Eliz. he held there a leet, &c. The plaintiff replied, absque hoc, that they had used to distrain; and issue being joyned, it was found for the defendant. It was moved in arrest of judgment, because, that the defendant had entitled himself to a leet, by an estate in the hundred, and did not shew a deed of it, which was said, he ought to have done; as is 11 H. 4. 48. And of such opinion was Anderson and Windham, Justices. Periam and Rhodes Justices, contrary, as this case is, and that the avowant need not shew a deed, but if the hundred it self had been in question, then a deed ought to have been shewed; but here the avowant entitles himself to one thing, (scil.) a leet, and a leet fee, by reason of the hundred, and it is sufficient for him to say, that he is seised of the hundred, &c. although it be by disseisin: for if he hath possession of the hundred, be it jure, vel injuria, he shall have also all things incident thereunto, for the possession of the hundred draws to him the leet, and the leet, the leet fee. But admit in this case a deed ought to be shewed, we are to see if the same be helped by the Statute of Jeofailes, which extends to defaults in form in writs, original or judicial counts, declarations, plaints, bills, &c. 18 Eliz. cap. 14. and such defects are thereby helped. And by Anderson, Although that the avowant be quasi an actor, yet in rei veritate, he is defendant; for although that he is to have retorn of the cattel, if it be found for him, yet he who sueth the replevin is the plaintiff, and if the defendant will justifie the distress, and not avow, he is meerly defendant, and not a plaintiff, or actor, no more than in a præcipe quod reddat, the tenant voucheth and recovereth in value, he cannot be said plaintiff, or defendant, and the avowant cannot be nonsuit, as the plaintiff. But Windham and Periam were of a contrary opinion; for avowry is in lieu of a declaration, and the plea of the plaintiff to the avowry, is not called a replication, but a bar to the avowry. But admit the avowry be within the statute, then if the Statute of Jeofailes there extend to help it; and Anderson conceived that it did: but the plaintiff might have demurred upon the avowry for the not shewing the deed, and judgment should have been given for him; but when he hath traversed, and the issue found against him, now it shall be intended, that avowant hath a deed, although he hath not shewed the same. Another exception was taken, because it is said in the avowry, that the said leet was holden, 5 Julii, and then it was void: for the Statute of Magna Charta, cap. 35. requires, that leets be holden within one month after Michaelmas and Easter; but that exception was not allowed: for by Anderson, Windham and Rhodes, by force of the prescription, the lord might hold his leet what day he pleased, and that his liberty is not restrained by the statute; and such is the common experience: for the same statute provides for it, (scil.) quod quilibet habeat libertates suas quas habuit, & habere consuevit tempore regis H. avi nostri, vel quas postea perquisiret: and by

Rhodes, the said statute doth not extend but to the sheriffs towns, and not to other leets, which see Br. Leets, 23. **[75]** upon the case of 8 H. 7. 1. which was affirmed by him to be good law; contrary by Periam, but he granted, that if a leet hath used to be holden at one day certain, other than that which is limited by the said statute, the same may so continue, notwithstanding the statute, for such liberty is saved by the statute. And by Anderson and Rhodes; If the King grant to one a leet to hold semel quolibet anno, and doth not say, ad libitum of the grantee, yet the grant is good, and the grantee may hold it at what day he will.

3 Len. 178. 1 Cro. 217. 245.

13 Eliz. In the Exchequer Chamber. Error.

C. Goore and others against Dawbeny.

A writ of error was brought in the Exchequer Chamber by Goore and Goore, Swinnerton and Tedcastel, against Dawbeny, of a judgement given against them in the Court of Exchequer, in an action upon the case, in the nature of a conspiracy brought by Dawbeny, &c. who declared, that Goore and Goore, were joint merchants of a stock of many wares, in moyeties transported in Barbary, and Swinnerton and Tedcastel were their factors, and Dawbeny and the Goores were also joint merchants intire of merchandizes transported, &c. And the said Swinnerton and Tedcastel were their factors therein; and that was to merchandize for two years; and shewed farther, that the said plaintiffs did conspire against the said Dawbeny (see the declaration in the number roll, for I could not take it in brief.) Coke of councill with the plaintiff assigned the errors; because Dawbeny in his declaration hath declared, that they were joint merchants (scil.) the now plaintiffs, and have conspired against him, and hath not shewed the place where they were joint merchants, or where they were made joint merchants, and that is issuable, although it be not the principal thing in the declaration; for that is the fraud: as where debt is brought for rent reserved upon a lease for years the principal matter is the debt, and the principal issue is nihil debet; yet the demise is issuable, and non dimisit is a good plea: and here the defendant by the plea of not guilty, hath not lost the advantage of exception aforesaid. And he cited a great case lately adjudged betwixt Stansam and Matthew, in an action upon the case, conceived upon the trover of a bond and the conversion of it to his use; the defendant pleaded, not guilty, and it was found against him; and because in the declaration there was not any place of the conversion, judgment was stayed. Here in the declaration are two things, first, the conspiracy, secondly, the execution of it, for the one without the other will not maintain the action, but here the conspiracy is not pursued, nor executed according to that which is laid to be conspired. The conspiracy is laid, that the factor upon his account demanded 4000l. of Barbary money, per nomen bona & denariorum summas, and the execution is laid, that he demanded in allowance of wares delivered to Isaac Abess; and he took a general rule, that a commander shall never be charged, but where his commandment is strictly and precisely pursued. Barbary money is included in this word bona, for it is not current in England: see as to the pursuing of the commandment; Sanders and Archer's case, Plow. 18 Eliz. 437. And in our case, he not onely puts the thing, but also the person, for the conspiracy is that he demanded allowance for goods delivered to Isaac, and his four sons, for Isaac. In the one case it is pretended, that Isaac and four sons are debtors; and in the other case Isaac onely: also here Dawbeny hath allowed and accepted the accompt of the factors, against which he cannot have this action; for it is **[76]** ignorantia crassa, idque facti, quæ non excusat: also upon such incertain demand as is laid in the declaration, Dawbeny was not holden to make allowance: i. for so much wares upon a certain bargain made with Isaac; and that was not a lawfull demand, and upon such uncertain demand, he was not bound to make allowance; et hoc modo est ignorantia juris quæ non excusat omnino. Also here Swinnerton onely accompts and demands allowances, and

Swinnerton onely was not factor, but also Tedcastle, and therefore Dawbeny was not bounden to allow that accompt to Swinnerton, no more than to a mere stranger: and also Dawbeny alone was not to make allowance, for the two factors were accomptable to him, and to Goores also. And so allowance by one of them to whom they are accomptable, is not good. One executor (where the power is committed to two) sells the land, the sale is void, and two joint attorneys, &c. one onely can doe nothing: and here in this declaration, it is many times alledged, that they were conjunctim mercatores, conjunctim factores; but I confess, that one joint factor, with the express consent of his companion, may accompt alone; and so of the other, one may by express consent take an accompt onely. One factor is no factor where there are many joint factors; and in our case, the two Goores and Dawbeny saw the accompt, but Dawbeny onely allowed of it, and that is not good: as if two arbitrators are, and one onely makes the award, although both hear the matter. 14 E. 3. Fitz. Acc. 72. That the one accomptant cannot accompt without his companion; but there Parn saith, that it had been adjudged, 6 E. 3. that the one might accompt without the other: see 41 E. 3. 3. & 9. Tamworth's case. Tanfield contrary: As to the first error, it is but conveyance and matter of inducement to the fraud and conspiracy, which is the principal point of the action; and therefore needeth not to be so precisely alledged: and also by the general issue, they have passed the advantage of it, and all the special matter of the count is contained in the general issue; for not guilty, goes to all, and includes the whole. Also upon the matter, the jury hath found that they were joint merchants; and although they were joint factors, and the one onely hath accompted, yet the same accompt is good enough, for it was made with the consent of the other, as appeareth by the declaration. Conspiraverunt, & agreaverunt, that Swinnerton in his accompt, peteret allowance, &c. so there was consent to take the accompt, &c. and 6. E. 3. it is adjudged ut supra. And that the one joint factor may accompt without his companion, is the law of merchants; for factors are oftentimes dispersed, so as they cannot be both present at their accompts, and so it hath been heretofore allowed in the King's Bench: and as to that that Dawbeny onely hath given allowance to this accompt, the same is good enough: if I promise to two to doe any act, the one of them may discharge me from it, and that by word, for it is but a personal thing: two joint-tenants of a manor grant the stewardship thereof to one, and 20l. per ann. for the exercise of it; if the one discharge him, it is a good discharge as to the service, but yet he shall have his fee: if the lord of the manor grant the stewardship thereof to another, taking 10l. per ann. of the issues and profits of his court there for his fee: and afterwards the lord dischargeth the steward, the same is void; for it is a disadvantage to the steward, for he cannot have his fee, if no courts be holden; but if the fee be limited to issue out of lands, there such discharge is good; for there the steward shall have his fee although that no courts be holden there, see 18 E. 4. 8. to that purpose. Egerton, solicitor, to the contrary, although (as hath been objected) the matter of joint merchant be but matter of inducement, it is nothwithstanding material, and without it the action will not lie: in debt, upon arbitrament, the plaintiff in his declaration, ought to shew the submission; and although the defendant pleadeth, nihil debet, yet if the **[77]** place of the submission be not shewed in the declaration, all is naught; for although that it be but inducement, yet it is a material inducement; for if no submission, no award, and if no award, no debt, and then no cause of action. The case of 14 E. 3. cited before, there the accomptants by their deed, or jointly, or severally accomptable at the pleasure of him to whom, &c. Also, because it is set forth in the declaration, that they were joint merchants of wares, adventured into Barbary, for the space of two years; the factor in praying of allowance, ought to shew what wares were adventured into Barbary within the said two years. Conspiracy is a thing odious, and ought to be directly proved; and it is not reason, that that which he himself hath once allowed, he himself shall after defeat it, as here he attempts. And he relied much upon the variance between the conspiracy and the execution of it moved before by Coke, where by the conspiracy, Isaac is made the debtor, with his four sons; and in the execution, Isaac is made the onely debtor, and to that point, he vouched the case, 3 & 4 Ph. & Ma. betwixt Brown and Nevil, that an award was to be performed (scil.) an award made between Joh. Brown, for, and in the behalf of John Moore on the one part, and R. Nevil on the other part; and did not shew that Moore made the submission,

and for that cause it was holden naught: for Moore was a principal person in the award, and Brown but a servant, &c. So in our case for Isaac. Popham, Attorney General, in an action upon the case, The plaintiff declares, quod cum the defendant was indebted to the plaintiff in 20l. he promised to pay to the plaintiff 20l. Here it needs not, that the plaintiff shew in his declaration, the place or time in which the defendant became his debtor, for the promise is the principal matter, and the other matter is but inducement: so if A. in consideration that I at his request have married his daughter, promised to pay to me 100l. In an action upon the case brought by me upon this promise, it is not necessary that I shew the place where I married his daughter. In all personal things, where two are chargeable to two, the one may satisfie it, and one may accept of satisfaction, and bind his companion, and yet the one cannot have an action without his companion, nor both onely against one, 18 E. 4. 3. Two joint-tenants of a manor have one bailiff of it, the one of them assigns auditors to the bailiff, who accompts, and is found in arrearages, the same is a good accompt, and it is holden there, that both, &c. may have debt upon the arrearages of the accompt taken by the manner. And if one may assign auditors, he may also take accompt, and discharge the accomptant against his companion. And he conceived, that this allowance of the accompt by Dawbeny, did not exclude him of his actions, but rather gave him cause of action, nam læsus non esset, nisi credidisset; and the bailiff of my husbandry, who bargains and sells for me, if upon his accompt to me, he alledgeth and surmiseth, that he hath sold my cattel to one who is decayed, and upon that surmise I allow his accompt; afterwards, re comperta, I shall have an action of deceit: and in this very case at the bar, it was holden in the King's Bench, that Dawbeny, notwithstanding his allowance of this false accompt, should have his action, &c. Note that afterwards, viz. Trin. 32 Eliz. the judgment given for Dawbeny was reversed.

Trin. 31 Eliz. In the Exchequer.

CI. Sir William Waller's Case.

In this case it was moved by Winter, that if one hath judgment in debt, and upon that, within the year and day, sues a capias ad satisfaciendum, although that he doth not prosecute the same by the space [78] of two or three years, yet when he pleaseth he may proceed thereupon, and he shall not be put to a scire facias; for a writ of execution once sued forth, shall be a continual claim, and the party shall never be put to a scire facias; and of such opinion was Philips.

Manwood, I grant, that if one hath sued forth a writ of execution, and that be continued by vicecomes non misit breve, for two or three years, yet the plaintiff may proceed thereupon, and shall not be put to a scire facias: but if such writ be sued forth, and not continued, but discontinued by a year and a day, he shall be put to a scire facias, for it is negligence of the plaintiff of not continuing of it, which within the year and day he might without order of the Court, but after the year not by any order of the Court, &c.

3 Len. 259. 4 Len. 44. Post 87.

Trin. 31 Eliz. In the Exchequer.

CII. Griffin's Case.

It was holden in this case, that if lessee for years of a messuage grants totum messuagium suum, the grantee hath but at will, but if he grant all his interest and estate in such a messuage, then the whole lease passeth: and so it was said to have been lately adjudged in the case of one Winnibank in the King's Bench.

PASCH. 26 ELIZ. IN THE KING'S BENCH.

CIII. SECKFORD AND WOLVERSTON'S CASE.

The plaintiff being bailiff of the liberty of Esheld, in the county of Suffolk, the sheriff of the said county directed a warrant unto him to arrest the defendant upon a latitat retornable in the King's Bench; by force of which the defendant being arrested, became bound in the obligation upon which the action is brought; the condition of which is, that if the defendant personally appear in the King's Bench at Westminster, and there to answer, &c. It was moved, that the obligation was void by the statute of 23 H. 6. For the form which the said statute prescribes for obligations to be taken by the sheriff, is according to these words, Appear at the day contained in the bill, writ or warrant, and in such place, &c. and that all bonds taken in other form shall be void. As to the words of surplusage [personally] the justices were of opinion, that the obligation was well enough, notwithstanding that because, as the case is, the appearance of the defendant ought to be in person upon a latitat, for the defendant is supposed to be in custodia mariscal. And so it hath been adjudged in the Common Pleas, where the appearance of the party arrested is de jure personal, &c. contrary where personal appearance is not requisite. As to the other matter [and there to answer] Wray put a difference, where the words are [there to answer] that the bond is well enough, for it is no more in effect, but that he shall appear eo animo ut respondeat. But if the words had been [appear and answer] the same is a void condition, for it may be that the plaintiff will never declare against him: but Gawdy and Ayliff, Justices, were of a contrary opinion, and that the bond was void by reason of the words aforesaid: but the Court would not give judgment against the plaintiff, but ex gratia curiæ suffered the plaintiff to discontinue his action.

1 Cro. 672, 776. Owen Rep. 40.

[79] PASC. 26 ELIZ. IN THE KING'S BENCH.

CIV. PARTRIDG AND POOL'S CASE.

In an action of trespass by Partridg against Pool, the plaintiff did suppose the battery at D. in the county of Midd. The defendant justified, by reason of an assault at S. in the county of Glocester, absque hoc that he beat the plaintiff at D. in the county of Midd. upon which traverse the plaintiff did demur in law. It was argued by Popham, Attorny-General, that the traverse of the county is good; and he put the case 21 H. 6. 8, and 9. In trespass of battery at D. in the county of York, the defendant doth justifie by an assault at London, in such a place in such a parish, and the hurt which, &c. absque hoc. that he was guilty de aliqua transgressione in com. ebor. upon which issued a venire facias into Yorkshire, and as the book is, the traverse to the county was taken with great deliberation, &c. prout, &c. See also 22 E. 4. 39. And the traverse de jure ought to be allowed, for the jury of Midd. are not bounden to find the assault in the county of Glocester: see 2 Ma. Br. Jurors 50. In actions upon transitory matters, although they be laid in foreign counties, yet the jurors, if they will, may give their verdict, but they are not bounden to it.

Egerton, Solicitor, contrary; and he put a difference, where the justification is local, and where transitory: as in false imprisonment the defendant justifies, as sheriff, the taking of the plaintiff by virtue of a capias directed to him at D. within the county of G. where the plaintiff declares of an imprisonment in another county, there the traverse of the county is good; for the defendant could not take the plaintiff by force of the said process in any other county, than where he himself is sheriff, and so the justification is local: 11 H. 4. 157. But in our case the matter of the justification is merely transitory. And at last, after many motions, it was adjudged, that in the principal case the county was not traversable; and so judgment was given for the plaintiff; Gawdy, Justice, being of a contrary opinion: but by Wray clearly, the

jurors are bounden, upon pain of attaint, to take notice of such a transitory thing done in another county: which see 2 Ma. Br. Attaint 134. 9 H. 6. 63.
3 Len. 97. 1 Cro. 842.

PASC. 26 ELIZ. IN THE KING'S BENCH.

CV. DAW'S AND MOLLINS'S CASE.

In an attachment upon a prohibition by Daws against Mollins, for that the defendant traxit querent. in curiam Christian. for tithes of great trees, sub nomine sylvæ ceduæ: the defendant pleaded, that the loppings for the tithes of which he sued, were the loppings of trees, called asp, beech and oak, de stipitibus prius succisis crescentes: and also for hornbeams, maples, hazels, &c. The plaintiff, as to the asp, oak, and beech, did demur in law; and as to the residue, he pleaded, that with part he mended the hedges, and the rest being de minimo valore, were bound up with the boughs of the oak, &c. into faggots; upon which the defendant did demur in law. It was argued by Egerton, Solicitor, on the part of the plaintiff; and he held, that a wood of common right ought not to pay tithes, not because the soil in which it groweth yields other tithes of the herbage, but because non renovantur in annum; and therefore at this day no consultation shall be granted for quarry, stone and coals: but after **[80]** came the Statute of Sarum (vide F. N. B. 51. h.) by which it was agreed, coram concilio Regis in Parliamento apud Sarum, quod consultationes fieri debeant de sylva cedua, eo non obstante quod non renovantur per annum: and see to that purpose the Register 49. Et ulterius, super hoc facta fuit quædam consultatio pro abbate de Notley de sylva cedua: which statute was afterwards expounded by the statute of 45 E. 3. cap. 3. not to extend to great wood of the growth viginti annorum, vel amplius, but onely to such wood which is called sylva cedua. And at last, after many motions, it was ruled, that because the defendant had not shewed, that the trees, (scil.) oak, ash, and beech, were not before cut within twenty years before the last succision, of which the tithes are now demanded, tithes shall not thereof now be paid. And as to the other point, that the hornbeams sallows, &c. did grow sparsim amongst the oaks, and the owner felled the whole wood, and caused them to be promiscuously cut into faggots, and bound up in faggots together, and the most part of every faggot was oak, and the residue was of little value, so as the severance of the sallows, &c. from the oak, &c. would not quit the charge; in such case tithe shall not be paid: but of the other part, if the most part of the wood be sallows, &c. and here and there sparsim groweth an oak, &c. and the owner cuts down all the wood, and makes faggots as before, tithes in such case shall be paid of them.

TRIN. 26 ELIZ. IN THE EXCHEQUER.

CVI. THE QUEEN AND LORD LUMLEY'S CASE.

Sand's Case.

Betwixt the Queen and the Lord Lumley, it was moved in the Exchequer; Queen Mary seised of the rectory of D. granted advocationem Ecclesiæ de D. If now by this grant the advowson passeth as now disappendant, or the rectory it self passeth as appropriate; or nothing at all passeth? was the question. And by Manwood, Chief Baron, the advowson doth not pass, but doth remain appropriate; as it was before; for the church, as it was appropriate by a judicial act, so without such an act it cannot be disappropriate: and he said, that by the grant of the advowson, the rectory did not pass; for by the appropriation the advowson is gone, and is not in esse, and so by consequence cannot be granted; and it is not within the statute of 4 and 5 Ph. and Ma. of confirmation of grants of the King; for the said statute doth onely help misrecital, misnaming, mistaking, &c. but here there is no such thing in rerum natura, as the patentee pretendeth to be passed by the patent: and if it were in the case of a subject,

nothing would pass; as it was adjudged in one Sand's case, 11 Eliz. And he said, that at this day a parsonage may be disappropriated, but that ought to be by a judicial act, as by presentment, and not by any other private act of the proprietor: and so he said, a church was disappropriated by the Lord Dyer, by presentment, which of late he made unto it.

Hob. 304. 3 Len. 101. Roll. 240. Tit Appropriat.

TRIN. 26 ELIZ. IN THE KING'S BENCH.

CVII. HERRING AND BADLOCK'S CASE.

A replevin was brought by Herring against Badlock, who avowed for damage-feasant, and shewed, that the Lady Jerningham was seised of such a manor, whereof the place where, &c. and leased the same to the defendant for years, &c. The plaintiff said, that long **[81]** time before King Henry the Eighth was seised of the said manor, and that the place where, &c. is parcel of the said manor demised and demiseable by copy, &c. And that the said King, by such a one his steward, demised and granted the said parcel unto the ancestor of the plaintiff, whose heir he is, by copy in fee, &c. and upon that there was a demurrer, because that by that bar to the avowry the lease set forth in the avowry is not answered, for the plaintiff in the bar unto the avowry ought to have concluded; and so was he seised by the custome, until the avowant prætextu of the said term for years entred: and so it was adjudged.

3 Len. 94.

TRIN. 28 ELIZ. IN THE KING'S BENCH.

CVIII. MOOR AND SIR JOHN SAVAGE'S CASE.

In an action upon the case by Moor against Sir John Savage and his wife, for that the said lady had reported, that Moor was a lying knave, and a perjured knave; the defendant justified, that where an estate for life absolute was devised to the said lady by her former husband, the plaintiff had deposed, that the said land was devised to the said lady, if she kept her self sole: to which the plaintiff replicando said, of his own wrong without such cause: Egerton, Solicitor, did demur upon it; for he said, The plea goeth to all the justification before; for where part of a plea, (scil.) the justification is matter of fact, and part is matter of record, there, of his own wrong, &c. is no good plea, but there ought to be a special traverse, absque hoc, that he so deposed, or absque hoc, that the devise was absolute: and this plea here, of his own wrong, &c. goes to matters in fact onely, and such which lie in the notice of the jury: see 5 H. 7. 6. Although that divers matters are alledged in the Bar, yet this plea, of his own wrong without such cause, &c. extends to all, where no matter of record is alledged in the plea: as in false imprisonment, a capias is directed to the sheriff, being defendant, to arrest the plaintiff, in such case such general plea is not good; but there he may plead nul tiel record: see also 13 H. 7. 3. 21. H. 6. 5. And here a principal matter in the justification is matter of record, and therefore such a plea here is not good. Altham contrary, If the principal matter in such justification be matter of record, then such a plea is not sufficient; but if the matter of record be but inducement, then the plea is good enough: and he vouched 45 E. 3. 7. In trespass the defendant saith, that he is forester of the said forest of B. and at a swanmoot it was presented by the foresters, verderors, regardors, and agistors, that the plaintiff had taken deer in the said forest, upon which the defendant came to the plaintiff, and prayed him to find pledges to answer before justices in eyre, &c. and he refused so to do, for which cause he kept the plaintiff until he made agreement, and demanded judgment, if any wrong, &c. and the plaintiff replicando said, of his own wrong, &c. and the issue was accepted of by the Court; yet he said the presentment in the swanmoot was not matter of record, but onely inducement, and the request to find sureties, which he would not, for which cause he took and imprisoned him, the same was the

principal matter, and but matter in fact; and therefore he said, that the plea was good; and he said, that in this case the oath is not on record. And Coke said, that in the cases put by Altham, of his own wrong without such cause, is a good plea, with an absque hoc unto the matter of record: see the Book of Entries 320. see 30 H. 8. Action upon the Case 104. without that, that he swore modo & forma: it was adjourned.

Postea 102, 103.

[82] TRIN. 28 ELIZ. IN THE COMMON PLEAS.

CIX. FIRRELL AND THE HUNDRED OF B.'S CASE.

In an action upon the Statute of Hue and Cry by Firrell against the hundred of B. the defendants pleaded, not guilty, and in evidence, the plaintiff, to prove that he was robbed, as he had declared, offered to the jury his oath, in making good his declaration, which Anderson and Periam Justices, utterly refused. But Windham affirmed, that such an oath had been accepted in the case of one Harrinton, where the plaintiff could not have other evidence to prove his cause, in respect of secrecy; for those who have occasion to travel about their business, will not acquaint others what money, or other things they have with them in their journies: and we see, that in some causes, the law doth admit the oath of the party in his own cause; as in debt, the defendant shall wage his law: Periam, That's an ancient law, but we will not make new presidents, for if such oath be accepted in this case, by the same reason in all cases where is secrecy, and no external proof, upon which would follow great inconveniences: and although such an oath hath been before accepted of, and allowed here, yet the same doth not move us; and we see no reason to multiply such presidents. The declaration is, that the plaintiff was robbed of 10l. de denariis ipsius querentis; and upon the evidence it appeareth, that the plaintiff was the receiver of the Lady Rich, and had received the said money for the use of the said lady, and exception was taken to it by Shuttleworth, but it was not allowed; for the plaintiff is accomptable to the Lady Rich the said money. And it was agreed, that if he who was robbed, after he hath made hue and cry, doth not farther follow the thieves, yet his action doth remain.

MICH. 29 ELIZ. IN THE KING'S BENCH.

CX. LARGE'S CASE.

[See *In re Rosher*, 1884, 26 Ch. D. 819.]

The case was, A. seised of lands in fee, devised the lands to his wife, until William his son should come to the age of 22 years, and then the remainder of part of the lands, to his two sons, A. and John, the remainder of other part of his lands, to two others of his said sons, upon condition, that if any of his said sons before William should come to the age of 22 years, shall go about to make any sale of any part, &c. he shall for ever lose the lands, and the same shall remain over, &c. And before his said son William came to the age of 22 years, one of the other sons leased that which to him belonged, for 60 years, and so from 60 years to 60 years, until 240 years ended, &c. Bois, A. and J. are joynt-tenants of the remainder, and he said, that the opinion of Audley, Lord Chancellor of England, is not law, (scil.) where a man deviseth lands to two, and to their heirs, they are not joynt-tenants, as to the survivor, but if one of them dieth, the survivor shall not have the whole, but the heir of his that dieth shall have the moyety: see 30 H. 8. Br. Devise 29. And he said, that this lease, although it be for so many years; is not a sale intended within the will, and so is not a joynture. 46 E. 3. One was bounden, that he should not alien certain lands, and the obligor did thereof enfeoff his son and heir apparent, the same was held, to be no alienation within the condition of the obligation: of the other side it was argued, the remainder doth **[83]** not vest presently; for it is incertain, if it shall vest at all; for if William dieth

before he cometh to the age of 22 years, it was conceived by him, that the remainder shall never vest, for the words of the will are, then the lands shall remain, &c. 34 E. 3. Formedon 36. Land is devised to A. for life, and if he be disturbed by the heir of the devisor, that then the land shall remain to D. Here D. hath not any remainder, before that A. be disturbed; it was farther argued, that here is a good condition, and that the devisee is not utterly restrained from sale, but onely untill a certain time, (scil.) to the age of William of 22 years. And it was said, that this lease is a covenous lease, being made for 240 years, without any rent reserved: as such a lease made for 100 years, or 200 years, is mortmain, as well as if it had been an express feoffment, or alienation. But it was said by some, that here is not any sale at all, nor any lease; for the lessor himself hath not any thing in the land demised: as if a man disseiseth a feme sole, and leaseth the lands, and afterwards marrieth the disseisie, he shall avoid his own lease, 5 E. 3. One was bound that he should not alien such a manor, the obligor alieneth one acre, parcell of it, the obligation is forfeit, see 29 H. 8. Br. Mortgage 39. A. leaseth to a religious house for 100 years, and so from 100 years to 100 years, untill 800 hundred years be encurred, the same is mortmain, vide stat. 7 E. 1. colore termini emere, vel vendere. And in the principal case, if the devisee had entred into a statute to the value of the land leased, by the intent of the will, the same had been a sale; and such was the opinion of the whole Court: and by the Court, the word in perpetuum, shall not be referred to the words precedent, but unto the words following; (scil.) in perpetuum perdat the lands. And if a custome be in the case that the infant of the age of 15 years may sell his lands; if he make a lease, the same is not warranted by the custome: and afterwards it was adjudged by the whole Court, that the lease made as before, was a sale within the intent of the will of the devisor.

3 Len. 182. Antea 36, 37.

Hill. 29 Eliz. In the King's Bench.

CXI. Brooke's Case.

Sir Thomas Holcroft's Case.

Appeal of burglary was brought against Brooke, who was found guilty; and before judgment given, the plaintiff died, and now Egerton moved that judgment should be given for the Queen upon that verdict, or at least that the declaration in the appeal should be in lieu of an indictment, and that the appealee be thereupon arraigned and put to answer the same. For if the appellant had been nonsuit, or released, the defendant should be arraigned at the suit of the Queen. Coke, God hath now by the death of the party, delivered the defendant: and it is not like, where the plaintiff releaseth, for there it is the default of the act of the party, but here it is the act of God; and he held it for a rule, that where auterfoits acquit is a good plea, there also auterfoits convict shall be a good plea: and it was holden in Sir Tho. Holcroft's case, that where the party is convicted at the suit of the Queen, there the appeal doth not afterwards lie. Wray, If the appellant dieth before verdict, the defendant shall be arraigned at the suit of the King; but if his life hath been once in jeopardy by verdict, he conceived, that it shall not again be drawn into danger; and some were of opinion that the defendant should be arraigned at the suit of the Queen upon the whole record, and plead auterfoits acquit, and that they said was the surest way.

[84] 29 Eliz. In the Exchequer.

CXII. Ognel and Paston's Case.

Clement Paston was defendant in an action of debt brought against him by George Ognel, upon an escape; and the case was this: Francis Woodhouse was bound in a recognizance to the said Ognel; whereupon Ognel sued forth a scire facias, and upon

two nihils retorned, had judgment, and upon that a levari facias, and then a capias ad satisfaciendum, upon which Paston the defendant, as Sheriff of Norfolk, to whom the capias was directed, took the party, and afterwards suffered him to escape. The defendant pleaded, that before the said capias, the said Francis Woodhouse was committed to him, and in his ward continued for felony; and after the capias was endicted thereof, and arraigned, and found guilty, after which he escaped; and all this was found by special verdict: first it was argued, if upon a recognizance acknowledged in the Chancery an action lieth; and it was said by Bois, that it doth not lie in the mouth of the sheriff to say, that this capias doth not lie in the case: as if a justice of peace maketh a warrant to a constable, which warrant is not good in law, yet the constable is not to examine that, or to dispute the validity of it, 5 H. 7. And a capias hath lain in such case, and so it hath been the course for the space of 200 years: and he said, that although Francis Woodhouse was convict of felony, yet the same is not any discharge of the execution, as 35 H. 6. 8. although the husband be attainted of felony, yet he is not so dead in law, but if the King pardon him afterwards, he shall be restored, and his wife shall have dower; and if he be killed, his wife shall have an appeal: 12 H. 4. My villain is attainted, the same is no discharge of his villainage as to me; but if the King pardon him after, he shall be my villain, 6 E. 4. 4. One is in execution pro fine Regis, and afterwards is outlawed for felony, and hath his charter of pardon for the felony yet he remains in execution for the interest of the party, for there the execution is not extinct, but onely suspended. Godfrey contrary, Capias doth not lie upon a recognizance; but if debt be brought upon a recognizance, and the plaintiff recovereth, then a capias lieth; which see 14 Eliz. Dyer 306. Puttenham's case. 2 H. 4. 6. In dower the demandant recovereth her dower, and damages, and prayeth a capias ad satisfaciendum for the damages, but he could not have it; for no capias lieth upon the original; and to the same purpose, see 8 R. 2. Fitz. Execution, 164. 15 H. 7. 15. Capias pro fine lieth for the King, where no capias lieth in the original; but no capias ad satisfaciendum for the party; no capias in debt before the statute of 25 E. 3. and see the stat. of West. 2. cap. 18. cum debitum fuerit recognit. si in electione sequent. execut. habere per fiere facias, or elegit, therefore no other manner of execution; for the statute hath provided ut supra. And he said, that debt doth not lie upon a statute merchant, or staple: see 15 H. 7. 16. Another reason why a capias doth not lie in such case, is upon the words of the recognizance, et nisi fecerit, tunc concedit, quod summa prædict, levetur de bonis & catallis, terris & tenementis; ergo, not of the body. And when Woodhouse was convict of felony, the Queen had an interest in his body, and upon the pardon, the execution which was suspended during the conviction, is now revived: and he confessed the case of villainage; that during the attainder, the lord cannot meddle with the villain in the presence of the King, see 27 Ass. 49. and see 2 H. 4. 65. A. was condemned to B. in certain damages upon an action of trespass brought by B. against A. and A. was committed to Newgate, in execution upon a capias ad satisfaciend. and afterwards was arraigned of felony, and thereof attainted, **[85]** and committed to the ordinary, as clark, attaint. And the justices commanded the ordinary, that after that the prisoner had made his purgation, that he should not let him go at large, but should conduct him to the prison of Newgate again: and there is a quære made by the reporter, if after purgation the ordinary might suffer him to escape; and if he at whose suit he was condemned in trespass shall have debt against the ordinary for such escape. At another day the matter was argued by Coke for the plaintiff, at the common law, no land was subject to execution, i. no lands of the debtor himself; but yet the lands of the debtor being descended to his heir, should be chargeable to the obligee of the debtor, in which he and his heirs were bound, and that seemed to be very strange; and he conceived, that in that point, custome and usage had encroached upon the common law: the statute of West. 2. c. 13. gave elegit of the moyety of the lands; but yet there was no capias in debt before, 25 E. 3. cap. 17. before which statute, it was a general rule, that no capias lay at the common law, but where the King was to have a fine, see 35 H. 6. 6. At the common law capias did not lie but where the action is vi & armis, or that the King is to have a fine; for there was outlawry at the common law in such case. It will be objected, that the statute of 25 E. 3. which gave capias in debt, doth not extend to a scire facias upon recovery; that such process shall be made in a writ of debt, as is used in a writ

of accompt; and here is no writ of debt, but a scire facias onely: if my debtor upon an obligation cometh without a writ, and confesseth the debt, I shall have a capias against him, and yet the same is not in a writ of debt: ergo, so in case of recognizance. Where a statute speaks precisely of a writ original; yet oftentimes by equity it shall extend to a scire facias, and other judicial process: as upon the statute of 25 E. 3. cap. 7. which enables the incumbent to plead in a quare impedit. It shall extend to a scire facias upon a recovery in a quare impedit, 46 E. 3. 13. And in our case a capias doth not lie by the letter, yet it lieth by equity: and he said, That statute which helps the subjects to get their debts and rights, are to be, and have been taken beneficially and liberally expounded, in advantage of the creditors. And see 48 E. 3. 14. where a scire facias is sued upon a recognizance, a capias doth not lie, but there it is holden, that in a scire facias, upon a recovery in debt, a capias lieth. And as to this capias, the sheriff is but the minister to the Court, and he is not to controll the Court, but to accept of the same, as the same is directed to him. It is a common learning in our law, that although the Court doth proceed inverso ordine, yet it shall not be utterly void, 36 H. 6. 34. Judgment given at the common law of lands within the five ports; for the five ports in times past, were parcel of the Crown: but of lands in Wales it was otherwise before the statute of 27 H. 8. by which Wales is united to the Crown. And although that the capias erronice emanavit, the same is but erroneous, and so voidable, and not void; for error may be as well assigned in the executione judicii, as in redditione judicii, 16 H. 7. 6. Outlawry without an original writ, is not void, but voidable, 2 R. 2. and the reason thereof is given, 11 H. 7. in Collins's case, but they are Judges of the cause, although that their proceedings be not according to law. But the sheriff, or any other stranger, shall not take advantage thereof, see 8 E. 4. 21 E. 4. and he cited to this purpose, 13 E. 3. Barre 253. The jailor shall not take advantage of undue proceedings of the auditors against an accomptant; and he insisted much upon the usage and precedents, and customs of Courts which are laws in such cases. And although that by strict and precise rule of law, a capias doth not lie naturally nor properly upon a recognizance, where the suit begins by scire facias, yet because the usual practice, and common experience hath allowed of it, and ad-[86]-mitted thereof from time to time: it is safer to suffer a mischief to one, than an inconvenience to many. And although the proverb, Exempla illustrant, non docent aut probant, may hold place in some arts and sciences, yet in our law, examples are good arguments, 11 E. 4. 3. In the King's Bench, a man in custodia marischalli, shall be put to answer a bill, but in the Common Bench, a man who is in the custody of the guardian of the Fleet, shall not be put to answer to a bill, and that is by reason of the several usages and customs in the said several Courts; so as custome and usage makes a law in such case. 39 H. 6. 30. in a writ of mesne, the Judges were clear of opinion, that the plaintiff ought not onely to shew the tenure betwixt him and the tenant peravail, but also betwixt the mesne and the lord paramount; yet when they had conferred with the prothonotaries, and saw the precedents of former times in such cases, they would not change the former courses, notwithstanding that their opinions were to the contrary: so 2 H. 7. 8. the venire facias is, 12 liberos & legales homines, and the sheriff retorned 24, and holden good, by reason of the usual course of the Court in such cases; and yet in our law, the number of persons is not material, which see in the Earl of Leicester's case, 15 H. 8. but custome dispenseth with the same.

Atkinson argued the contrary; At the common law for execution in debt within the year, a levari facias, and a fieri facias lay; after the year the party was put to a new original; and there was no capias at the common law, but in cases of contempt, force, or other notable misdemeanour, untill the statute of 25 E. 3. cap. 17. which gave it in debt, detinue, &c. And the statute of West. 2. cap. 18. gave fieri facias and elegit, but no capias was given upon a recognizance by any statute, and he relied much upon the book of 48 E. 3. before cited, the rule of which book is, that in a scire facias upon an original in which a capias lieth, the scire facias shall follow the nature of the original upon which it is founded; but where a capias ad respondendum doth not lie, there not a capias ad satisfaciendum, 34 H. 6. 451. In debt against executors, they appear and plead fully administred, and it is found against them, and judgment is given for the plaintiff, who after the year sueth a scire facias against the executors, and execution awarded by default, and thereupon a capias and exigent: and that

matter being shewed to the Court, a supersedeas was granted, because the capias improvide & erronice emanavit: for no capias lieth against executors where they plead, &c. although it be found against them, ergo, neither a scire facias grounded thereupon. And although the stat. of 25 E. 3. gives a capias in debt, yet if debt be recovered in a justicies, a capias doth not lie by the equity of the said statute: and he relied very strongly upon Puttenham's case, 13 Eliz. cited before. And as to that which hath been said, that notwithstanding, that the capias was against the law, and so his imprisonment by colour thereof wrongfully, yet, de facto, he was in prison, and the sheriff hath taken him, and he shall excuse himself in a false imprisonment brought; yet I say, that this erroneous process appearing to you, you will not again err, by allowing these erroneous proceedings, but rather reform them: for the sheriff himself, who is a stranger to the record, cannot have error to reverse these proceedings, and so without remedy, unless the Court doth relieve him therein. And he said farther, that this capias, posito quod legitime emanavit, cannot fasten or work upon Francis Woodhouse, being imprisoned, and convict of felony; for being imprisoned, and restrained of his liberty, how can he (his restraint continuing) be de novo restrained before that he be enlarged and restored to his liberty? Nam omnis privatio præsupponit habitum; and ergo, imprisonment, liberty precedent. And so he concluded, that Francis Woodhouse, neque de facto, nor de jure, was in [87] prison: and that no capias lieth in the case, especially after the year, as here it was, and the party being convict and in prison, cannot be taken, &c. Manwood, If within the year a levari facias, or a fieri facias be sued forth and be retorned, not served, or that vicecomes non misit breve, and so the year passeth in the default of the sheriff; yet the plaintiff shall not be put to a scire facias. At another day it was argued by Tanfield for the defendant, that upon this scire facias no capias lieth, and then no lawfull execution, and then no escape. Where there is no capias in the original, there is no capias in the execution, but here in our case, there is not any original, because it is a scire facias upon a recovery, ergo, no capias can be where there is not any original. As to that which hath been said, that the ancient presidents and course in cancel. is against us; be it so; yet the course in the King's Bench and Common Pleas is with us, that a capias doth not lie in such case of scire facias. And the Chancery as to the common law ought not to vary from these Courts, for one and the same common law ought to be in all the said Courts, of things of the common law, and the presidents alledged of the other side are silent, and sleeping proceedings and presidents, slips of clarks, which were never drawn into question; the ancientest of which was hatcht but in the later part of the reign of King H. 8. And if the common law doth not warrant such executions, truly the presidents cannot make such imprisonments lawfull without Act of Parliament. It hath been said, that executions ought to be favoured, that is true, but also liberty, to which the law hath special respect: see the Statute of Magna Charta, nullus liber homo capiatur, vel imprisonetur, nisi per legale judicium parium suorum, vel per legem terræ; and this is not lex terræ, but usage onely: and malus usus est abolendus, 26 Eliz. Error was brought upon a judgment given in Curia de Woodstock, which is a Court of Record, and error assigned, for that they had awarded execution secundum consuetudinem villæ, against one who had bailed the defendant without a scire facias first sued forth against him, i. the bailee, and it was adjudged error, and the custome could not maintain it, for the bailee might have a release or other matter of discharge to plead: and he cited the case of 13 and 14 Eliz. Dyer 306. that upon a scire facias out of a recognizance in Chancery, judgment was given for the plaintiff, and the warden of the Fleet was commanded to detain the conusor in his custody, in execution for the plaintiff, and afterwards the conusor escaped, the plaintiff not satisfied, and it was holden no escape, for his body was not liable; in case of a recognizance, to the execution: and see also the Book of Entries, 500 there is a rule put, if the recognizee will have execution within the year, he may have a fieri facias, or elegit, but not a capias ad satisfaciendum. And he conceived; that this process is not onely erroneous; but also utterly void: as a capias in a formedon, contrary where in debt a capias is awarded after the year where it ought to be scire facias, the same is but erroneous; for such process lieth upon such judgment, if he had not surceased his time. Another matter he moved, because this issue is not well tried, for it was tried by nisi prius

out of the Exchequer, and the statute of West. 2. cap. 30. Mar. 14 E. 3. cap. 1. do not give nisi prius in causes out of the Exchequer but onely out of both Benches; but causes out of the Exchequer are tried by commission; and here their commission was insufficient; for it was directed, Chr. Wray and Williel. Periam, without saying, et eorum alteri; so as it was joynt, and not several, and Wray at the time of the trial, was at the Parliament at London, and so the cause was tried before Periam onely, and therefore coram non judice. At another day, the case was argued by the Barons of the Exchequer. And Clark Baron, conceived that the plaintiff ought to recover, and he said, that upon the escape, the common law gave an action upon the case against the sheriff; and the reason why the [88] sheriff shall be charged, is, that one cannot be in execution but once; and then if the sheriff should not be charged, the party plaintiff should by negligence of the sheriff lose his suit, and also his debt: and admit that a capias doth not lie in the case, yet the execution by force thereof is not void, but voidable onely; and error may be assigned as well in the execution, as in the judgment; which see 17 Ass. 24. where the recognizor in a statute merchant aliened the land, and afterwards the conusee sued forth execution, so as the land was extended, supposing the payment, i. Solvend. 14 E. 3. where as in truth it was 16 E. 3. and the feoffee brought a writ of error thereupon, and it was allowed; but the sheriff shall not take advantage of the same: and truly the common course is, that a capias lieth upon a recognizance: and 7 H. 4. 101. upon a recognizance acknowledged for the peace, a capias lieth for the King: and a recognizance is but an obligation of record; and wherefore should not a capias lie thereupon, as well as upon an action brought upon an obligation? The statute of West. 2. cap. 45. Si recens sit cognitio statim habeat querens breve de executione illius recognitionis: and the statute doth not speak in certain what manner of writ, or what manner of execution, therefore we ought to resort to the common law for it, as that is a capias. Gent, Baron argued and agreed in every point with Baron Clark.

Manwood, Chief Baron, argued, that the plaintiff should recover; and he put the case of recognizance: the plaintiff sueth two scire facias's, upon which two nichel's are retorned; and afterwards a levari facias, and upon that also nihil is retorned, and then issueth a capias ad satisfaciendum for to take the said Francis Woodhouse, who then was in prison for felony, upon which capias the sheriff did arrest him, and he being afterwards convicted of felony, escaped; upon this matter debt is brought against the sheriff. A recognizance taken in the Chancery is a thing upon record in a Court of Record, an obligation of record, and a debt upon record. It hath been objected, where no capias lieth in the process upon the original, there no capias lieth upon the execution: but it is good to examine the reason thereof; for lex plus laudatur quando ratione probatur: the capias upon a recognizance is not by 25 E. 3. but by the common law: for here is a debt upon record, wherefore shall not this body be subject to it, as well as in the case of a debt upon a bare obligation. I do admit the rule, that where there is no capias ad respondendum, there is no capias ad satisfaciendum, but that ought to be intended in cases where there is an original, and mesn process before judgment; but here is no original, nor mesn process before judgment, ergo, our case is not within the same rule: but I will put a good rule; it is debt upon record, ergo a capias lieth: in the King's Bench, if the defendant comes in by latitat, if the cause whereof the action is brought be of importance, he is to put in special bail; and those who bail him shall be bounden in a recognizance, &c. The defendant is condemned in the action: now if the defendant cannot be found, so as execution may be sued forth against him, then a scire facias shall issue forth against the sureties which bailed him, and upon that a capias, and that is very frequent there in use: so also is the course of the Court of Common Pleas; ergo it shall be so in the Chancery in case of a recognizance. If one be taken in execution upon a statute staple, and sueth an audita querela upon a release, or other matter, and be bound with sureties in the double value, &c. to the King, and to the party: if he be condemned in the audita querela, &c. and cannot be found, a scire facias shall issue forth against the sureties, and thereupon a capias. And this question, if the capias in this case lieth, or not? is to be decided either by audita querela in the Chancery, or by error in the King's Bench: for the said Courts have authority to affirm the proceedings, [89] or to disaffirm them. And here the question was, if

Woodhouse were imprisoned or no? and not, if the capias erronice emanavit or not? And he took a difference where process is awarded out of a Court which hath not authority of the principal cause; there it is coram non judice, and the process is void; and if the sheriff taketh the party by force of such process, it is meerly void, and he a trespassor; but contrary if the Court hath authority of the principal cause, there if the process be misconceived, it is onely erroneous. An unskilfull man in Chancery makes an appeal of murther, retornable in the Common Pleas; and there an unskilfull clark makes a capias upon it, the same is coram non judice, and not all together void: but if in a writ of entry, in the nature of an assize, the demandant hath judgment to recover debt and damages, and thereupon issueth a capias, the same is not void, for it is but a misawarding of the process, & provide emanavit. If out of the Common Pleas immediately a writ issueth to the Sheriff of Chester, which is a County Palatine, where the King's writ doth not run, the same is void, and false imprisonment lieth upon such a taking. A formedon brought in the King's Bench, and upon that a capias, is void, & coram non judice; and the sheriff is bound to take notice of the law in such cases, that those of the King's Bench have not authority to hold plea in real actions. As to that, that Woodhouse was convict of felony, the same shall not avoid the execution; but I grant, that the King shall be satisfied before the subject, &c. And he relied much upon the said case cited before, 13 E. 3. Bar. 253. as to the matter of the capias: 19 H. 9. In escape the defendant pleaded a release of him who recovered to the prisoner being in execution, and it was holden no plea. And in the principal case judgment was given for the plaintiff.

1 Cro. 764. Antea 77. 10 Co. 76.

MICH. 29 ELIZ. IN THE EXCHEQUER.

CXIII. BRIDGET CLARK'S CASE. ANTEA 30, 31.

The case was, Clark was indebted to Archdel by obligation, and afterwards delivered to Andrews certain hogsheads of wine to satisfie the said Archdel the said debt: and afterwards the obligation of Clark is assigned to the Queen for the debt of Archdel: and if the property of the said hogsheads of wine were altered by the delivery of them to Andrews before the assignment? was the question. Egerton, Solicitor, The property is not altered, for the bailor might have an action of account against Andrews before that he hath delivered the same over according to the bailment: but if he hath delivered them over, the same is a good bar in an account: but if one be accountable to me upon a bailment, and afterwards I do require him to deliver the goods over to A. the same is not in bar of account, but is good in discharge of account before auditors; for the same is matter after the bailment, not upon the bailment. If goods be bailed to bail over upon a consideration precedent of his part to whom they ought to be bailed, the bailor cannot countermand it; otherwise it is, where it is voluntary and without consideration; but where it is in consideration of a debt not countermandable, contrary, if it be to satisfie the debt of another. Manwood, Where the debtor of the King is sufficient there a debt due to him ought not to be assigned to the King, but onely where the debt of the King is doubtfull, and that was the ancient course; but now at this day multi videntur & habentur divites, qui tamen non sunt; and therefore omnis ratio tentanda est, for the recovery of the King's debts. But as to the case before us; the wife is executrix to her husband, who was indebted to Archdel, and she delivers the goods to Andrews to satisfie Archdel, and all that is before the assignment: and I am of opinion, that the property of the said **[90]** goods is altered; for, as the case is, Andrews was surety for Clark, and hath a counter-bond of Clark to save him harmless: if I borrow 100l. and deliver unto the lender plate for the security of it, the property general of it is in me, yet the bailee hath a special interest in it, untill he be paid. If goods be delivered to A. to pay unto B. A. may sell them. An executor hath goods of the testators, and he with his own monies payeth the debts of the testator, he shall retain the goods, and the property is altered. And here in our case, Andrews may by virtue of this bailment sell the goods, and with the monies arising thereof pay the said

Archdel. And afterwards judgment was given accordingly, that the property of the goods by the delivery over by Andrews was altered.

MICH. 29 ELIZ. IN THE EXCHEQUER.

CXIV. FOSKEW'S CASE.

Francis Foskew, seised of the manor of Foskew in his demesn as of fee in consideration of a marriage to be had on Francis his son with M. daughter of Sir Edw. Huddleston, 9 Feb. 25 Eliz. covenanted to levy a fine of the manor aforesaid; and that the said fine should be to the use of himself and his wife for their lives, and after their deaths to the use of the said Francis their son, and M. and the heirs of their bodies begotten, with remainders over: the fine was levied accordingly: afterwards, 19 Octob. 27 Eliz. Francis the father acknowledged a recognizance to the Queen, and died, his wife died; and now this manor is extended for the debt to the Queen by force of the statute of 33 H. 8. And now Coke came into Court, and prayed that the said manor might be discharged of the debt to the Queen, because it is not chargeable by the said statute; the words of which statute are, All manors, lands, tenements, &c. which hereafter shall descend, remain, or revert in fee-simple, tail general or special, by, from, or after the death of any his or their ancestor or ancestors as heir, or by gift of his ancestor whose heir he is; which said ancestor or ancestors was, is, or shall be indebted to the King, or any other person or persons to his use, by judgment, recognizance, obligation, &c. In every such case, the said manors, &c. shall be charged, &c. This statute was made for the benefit of the King in two points: 1. To make lands entailed liable to the King against the issue in tail for the King's debts in the cases aforesaid, where they were not liable. 2. To make bonds taken by the officers of the King to the use of the King, as also of statutes. We cannot deny but that we have lands of the conusor, and of the gift of the conusor our ancestor, whose heir we are, who was indebted to the Queen, and yet we are not within this statute: was or shall be indebted, shall not be intended after the gift made; for if he first convey his land, and afterwards becomes indebted, the same is not within the statute: and where a mischief is to be remedied by a statute, the remedy in exposition of the statute is to be applied according as the mischief doth require: [shall be] is to be intended of future debts after the statute: and in our case, the father was not receivor, or other officer to the Queen; and if this statute should be so construed, the father might take 10,000l. for the marriage of his son, and assurance of lands unto him; and then if he will acknowledge a debt to the Queen, he should defeat the whole, which should be a very great mischief: the words are, [by gift after the debt acknowledged to the Queen.] And he cited the case, 19 Eliz. Plow. 191. betwixt Ludford and Gretton, upon the statute of 18 H. 6. the words of which are, [That whatsoever warrant hereafter to the Chancellor of England addressed, the [91] day of the delivery of the same it be entred of record in the Chancery; and that the Chancellour make letters patents upon the same warrants, bearing date the day of the said delivery in the Chancery, and not before: and all letters patents made to the contrary shall be void.] And the case was, that a warrant was directed to the Chancellour, for the making of letters patents, and delivered to him before the making of them, but the day of the delivery was not entred of record, &c. And it was holden, that notwithstanding that, the letters patents were good; for the mischief at the common law intended to be reformed by that Act, was not the post-dating of the letters patents, but the ante-dating, and therefore that ought to be principally taken into consideration: which mischief being understood, the words of the said statute are to be applied to it; ipsæ etenim leges cupiunt, ut jure regantur; i. with an equity according to the mischief, and not always according to the precise words: and in that case it is sufficient if the letters patents bear date after, and not before the delivery of the warrant, and that was the matter intended to be reformed. Also, as our case here is, we are not within this statute; for the words are, of the gift of his ancestour, but here the son hath not the lands of the gift of his ancestour, but rather by the Statute of Uses, and so he is in the post and

not in the per, by his ancestour: for here the fine was levied to divers persons unto the uses aforesaid: and here the gift was not a mere gratuity to his son, but in consideration that he should marry the daughter of Sir Edw. Huddleston; and also the father was the King's debtor after the gift, and not before.

Popham, Attorney-General, to the contrary: The letter of the statute is with us, for he comes in of the gift of his ancestour, who was indebted to the Queen: and although that the gift was by way of use, yet the precedents in the Common-Pleas and other Courts are, that he may declare, of the feoffment of such a one, although it was by way of use: and he said, if A. be bound to enfeoff B. of such lands, if he maketh a feoffment to the use of B. and his heirs, he hath well enough performed the condition: and if the case should not be within the statute, then should that branch of the statute be idle, and to no purpose: for if the ancestour be seised, and becometh indebted to the Queen, and after makes a conveyance ut supra, the same is provided for by the first branch of the statute: for the land is liable to the recognizance or obligation made to the King, and that they shall be as effectual as a statute staple; and reason requires, that the son, who comes in by mere gratuity of his ancestour, should be charged: and it was a common practice before the making of that statute, that the King's officers would convey their lands to their children, and then become the King's debtors; for the remedy of which mischief the statute was made, and the statute of 27 Eliz. doth not respect the heir, because he is heir, but as a purchasor onely, and that upon good consideration: Coke, If any fraud can be found in our case, then without doubt we should be within the statute, but being upon good consideration, it is out of the statute; nor was there any purpose in the father when he made the said conveyance, to become the King's debtor, or officer to him, for if there were, then he is within the statute, also the gift had been a mere gratuity &c. And afterwards, at another day, the case was moved by Coke, and he said, that here is not any gift, because it was in consideration of marriage, and then no gift, for it is an old proverb, What is freer than gift? Egerton, The father giveth to his son and heir, the same is within the statute, and yet here is consideration, (scil.) of blood; Coke contrary, Where the father giveth to his younger son, or to his daughter, which is not his heir; and of that opinion was Manwood, Chief Baron; and afterwards, (as Coke reported) the son and his lands were discharged.

[92] MICH. 26 ELIZ. IN THE KING'S BENCH. ERROR.

CXV. AMNER AND LUDDINGTON'S CASE.

Error was brought in the King's-Bench by Amner against Luddington, Mich. 25 and 26 Eliz. Rot. 495. The case was, that one Weldon was seised, and leased unto Pierpoint for ninety nine years, who devised the same by his will in this manner, I bequeath to my wife the lease of my house during her life, and after her death I will that it go amongst my children unpreferred. Pierpoint died, his wife entred, and was possessed virtute legationis prædict. and took husband one Fulshurst, against whom one Beswick recovered in an action of debt 140l. upon which recovery issued forth a fieri facias, and upon that a venditioni exponas, upon which the sheriff sold the said term so devised to one Reynolds: Fulshurst died, his executor brought error to reverse the judgment given against the testator at the suit of Beswick; the wife did re-enter, and sold the land, and died. Alice, an unpreferred daughter of Pierpoint, did enter, and upon that matter found by special verdict in the Common-Pleas, the entry of Alice was adjudged lawfull: upon which judgment error was brought in the King's-Bench. And it was argued upon the words of the devise, because here the house is not devised, but the lease it self, (scil.) all his interest in the thing devised: and it is not like unto the case betwixt Welchden and Elkington, 20 Eliz. Plow. 519. where the case was, that Davis being lessee for years, devised that his wife should have and occupy the land demised for so many years as she should live; nor unto the case of Paramour and Yardley, 21 Eliz. Plow. 539. for there the lessee devised, that his wife shall have the occupation and profits of the lands until the full age of his son: for in these two cases the land it self is quodam modo devised, but in our case

all the estate is devised, i. the lease it self. And also in those two cases a certain person is assigned and named in the will, who should take the residue of the term which should be expired after the death of the wife: but in the case at bar, there is not any person certain appointed, &c. but the devise, as to that, is conceived in general words, to children unpreferred; therefore neither any possibility, nor remainder in any person certain, therefore all the term is wholly in the wife, and then she might well dispose the whole. But all the Court was to the contrary, and that in this case the possibility should rise well enough to the death of the wife, to that daughter unpreferred. Another matter was moved, if the said term, being sold in the possession of the wife of the devisor by force of the execution aforesaid; if now, the judgment being reversed, the sale of the term be also avoided: for now the party is to be restored to all that which he had lost. And it was argued by Coke, that notwithstanding the reversal of the judgment, the sale did stand good; for the judgment for the plaintiff in a writ of error is, that he shall be restored to all that which he hath lost ratione judicii prædict. and the judgment was, that the plaintiff should recover 140l. and therefore by the judgment in the writ of error he shall be restored to so much, but the mean act, (scil.) the sale of the lease, shall stand, and shall not be defeated or avoided. As 7 H. 6. 42. a statute staple is bailed in ouster le main, the conusee brings detinue against the bailee, and hath judgment, and recovers the statute, and upon that hath execution: the baylee brings a writ of error, and reverseth the judgment given in the detinue, yet the execution shall stand, and audita querela doth not lie for the conusor: and see 13 E. 3. t. Bar. 253. Accountant found in ar-[93]-rearages, committed to the next gaol, escapes, and reverseth the judgment given against him in accompt, by an ex parte talis, yet the action upon the escape lieth: and the Court, as to that point, all agreed; but that point did not fall in judgment; for by the sale nothing shall pass, but the interest in præsenti, which was in the wife of the devisor; but the possibility to the children unpreferred, was not touched thereby; and afterwards the judgment was affirmed.

3 Len. 89. 8 Co. 96.

MICH. 36 ELIZ. IN THE EXCHEQUER.

CXVI. EDWARDS AND HALINDER'S CASE.

See the Case reported in Popham's Reports fol. 46. very short, but not with the Arguments.

Rice Edwards brought an action upon the case against Halinder, and declared, that whereas one Banister had demised unto the plaintiff a cellar, to have from week to week, quandiu ambabus partibus placuerit; and also whereas the said Banister had leased to the defendant a shop, directly over the said cellar, there the defendant had laid so great a burthen upon the floor of the said shop, that thereby the said floor fell down, and brake certain vessels of the plaintiff's full of wine, by reason whereof the plaintiff lost his wine, to the value of, &c. to his damages, &c. The defendant said, that before the charging of the floor, ut supra, the said floor had sustained greater weight; and farther, that the said Banister let unto him the said shop, for to lay there the weight of 30 tun, and he had laid there but the weight of 12 tun; and also that the walls of the said cellar are so weak, that the floor of the said shop fell by reason thereof: upon which there was a demurrer in law. It was argued by Godfrey for the plaintiff; Where injury or wrong is done unto any, the law gives remedy to the party grieved; and although that the shop was let unto him to lay wares there, which he hath done, and that it was not his intent to surcharge the said warehouse, although the event be contrary, yet forasmuch as by the laying of wares there, a wrong and damage follow to the plaintiff, the defendant shall be punished; for the rule is sic utere tuo, ut alienum non lædas: if I have a house, and another buildeth so high over me, that rain-water descends and falls from his house upon my house, an action upon the case lieth, see F. N. B. 184. So if by his building he stops my light, as it was lately adjudged in the King's Bench, in the case betwixt Bland and Mosely: see 6 E. 4. 7. & 8. damages recovered for a wrong done against the will of the party:

and see other cases upon this learning, 13 H. 4. t. Action upon the Case 48. The plaintiff had sold certain trusses of hay to the defendant, within such a meadow, to be carried away from the said meadow within a certain time; but the defendant let the hay lie there without carrying the same away, so it putrified the meadow, by reason whereof the plaintiff lost the profit of his meadow for a great time; and thereupon brought an action of the case against the defendant, and the action was adjudged maintainable: see 22 E. 4. 8. where the owners of the plough in turning of the plough, according to the custome in the common fields upon the land of another; one of the plough cattel, against the will of the driver, takes a mouthful of grass, the same is justifiable, but if the driver of the cattel suffereth the same to continue, an action will lie against him: so 22 E. 4. 49. Where I am bound to enclose my land against another, and in default of enclosure, the cattel of the other escaped into my land and close, I shall not punish him; but if he after notice, doth suffer them to continue there, he shall be punished, although it be through my default: also it is alledged in our declaration, that the defendant intending to hurt and spoil the plaintiff's wines, did lay such a weight, &c. And the **[94]** defendant answers thereunto, that the floor fell in default of repairing of the walls of the cellar, or for the ruinousness of them, where he ought to have pleaded farther, absque hoc, that the shop was surcharged with the intent to hurt the plaintiff's wines; in an action upon the case, upon a trover, the defendant pleads, that the goods whereof, &c. were pawned unto him for the security of certain money not yet paid, the same is no plea without saying farther, absque hoc, that he did convert, &c. See 43 E. 3. 33. In an action brought against a smith, for his negligence in curing of a horse which he took upon him to cure; the defendant was driven to traverse, absque hoc, that the horse perished in default of his care: Dalton contrary, Where in doing of a lawfull act, by a mishap a damage cometh to another, against the will of the doer, no punishment shall follow: see the case cited by the other side in 6 E. 4. 7. & 8. If he might have done more than he had done to have prevented the mischief, he should be punished; but if he could not have done more than he hath done, or otherwise than he hath done to prevent it, he is dispunishable, and he may, uti jure suo, although it be to the prejudice of another: see 12 H. 8. 2. & 3. Harcourt's case: if I cannot otherwise let the water out of my land, I may justifie the letting of it in your land which is adjoining, although that your land be drowned thereby: sometimes ignorance of the party shall excuse the offence: as if my dog worry your sheep, if I do not know of such ill quality in him, I shall not be punished for the same. And it doth not appear that the defendant had notice of the ruinousness of the walls, although now it appeareth that they were ruinous, and for that cause the floor fell; for the defendant said, that the walls were ruinous, in occultis & absconditis partibus ipsorum; and here needs not any traverse: for it is confessed, that the floor of the shop was surcharged, but the same is avoided and excused, because that the walls were ruinous, in occultis & absconditis ipsorum partibus; and forasmuch as our landlord (who is also the landlord of the plaintiff,) hath let to us the shop, to lay there the weight of 30 tun, therefore the defendant hath good right, as to such weight against the lessor of the plaintiff, and all others, claiming under him. And here the plaintiff hath declared of a lease from week to week, quamdiu ambabus partibus placuerit, and hath not averred the continuance of his lease, &c. Godfrey, A lease is made from year to year, ut supra, &c. The lessor brings debt for the second year, he need not to aver the continuance of the lease; for when the second year doth begin, the lessor cannot put him out that year; but we, upon the matter, have averred the continuance, for we have said, Et sic possessionatus existens, &c. Manwood, The declaration is, that the defendant, nequitur & malitiose intendens, &c. tantum ponderis, was laid upon the floor, ita quod vi ponderis dirupta fuit contabulatio: and the plea of the defendant is, quod muri in partibus occultis & absconditis ruinosi fuerunt, &c. & ideo corruerunt. So as the plaintiff speaks of the floor, and the defendant of the walls, and so the defendant doth not answer the plaintiff; for the shopman ought not to go into the cellar, nor the cellar-man into the walls. But Dalton said, that the plea was, quod diruptio & fractio contabulationis fuit ex eo quod muri ruinosi fuerunt in partibus occultis & absconditis. At another day, it was argued by Flemming for the plaintiff, a voluntary and unlawfull act is laid to the

charge of the defendant, who pleads special matter to excuse himself, but doth not answer the point of the action, but onely that the fall was sudden, et quia muri fuerunt ruinosi in partibus occultis, &c. whereas we have declared, that the weight was the cause thereof: 3 H. 6. Double Plea 31. In an action upon the case, for negligent keeping of fire, the house of the plaintiff was burnt, he ought to take a traverse, without that, that it was burnt by the ill keeping of the fire of the defendant: and he needs not to aver the continuance **[95]** of the tenancy at will: 38 H. 6. 27. A lessee for life assigns his estate to B. who leases at will to C. B. is disseised by D. and C. ousted, C. re-enters, and brings trespass, he must aver the life of A. but not of B. nor the continuance of the will. Atkinson contrary; I conceive there needs no traverse, for the matter of the declaration is expressly confessed, and avoided, 5 H. 7. 12. 13. where one makes title to common, or rent by prescription, if the other pleaded unity of possession, he needs not traverse; so where he claims B. for his villain, &c. B. saith, that he is a bastard, there needs no traverse. We have confessed in pleading, quod gravitate ponderis, the floor fell down; but we say farther, that the cause was, because the walls were ruinous, &c. and here is matter in law; who ought to repair them: the lease was made unto the defendant, 29 Julii, and the floor fell 30 Julii, the day following: and if by law the defendant ought to repair them, it was impossible for him to do it, and that shall excuse him: if one hath a shop, and another a cellar under it, and the shop minatur ruinam, there is a writ in the register, de reparatione facienda. 153, &c. And it lieth against him who ought to repair by prescription, or by the law. And we who are the lessee, are not bound to repair; for if the ground timber be in decay, and so the house ruinous at the time of the lease, it is a good plea in an action of waste, if the house fell in such defect; for the lessee is not bound to such reparation, (scil.) for great timber, which was rotten at the time of the lease. But if after the lease it becomes rotten for want of covering, it is otherwise, see 12 H. 8. 1. And here the plaintiff hath remedy against his lessor, for he is bound to the reparations by the law, and not the lessee; and as he may have the said writ, de reparatione facienda, before the mischief, so he may now have after the mischief: and therefore no law binds the defendant to repair; nor is there any custome pleaded to that purpose: and also for as much as the occasion of the cause of action was the ruinousness of the walls, the defendant shall not be charged with the same: and also he shall not be charged with a thing he could not prevent. Manwood, The defendant hath pleaded, that the fall of the floor was, eo quod, the walls were ruinous in partibus occultis, which was a secret thing, and unknown unto the defendant, upon which the plaintiff hath demurred, and so confessed the plea of the defendant to be true; and that he was ignorant of the feebleness of the walls, and therefore he needs not any traverse. And here the defendant hath pleaded, that the shop was demised to him for greater carriage. Gent, Baron, was of opinion, that the defendant had not fully answered to the declaration; for he is charged with the laying of so much weight upon the floor there, so as, vi ponderis, it fell down; to which the defendant hath said, that the walls were ruinous, in occultis partibus; and doth not answer to the surcharging, (scil.) absque hoc, that he did surcharge it: Clark, Baron, It is a general rule, that every material thing alledged in the pleading, ought to be traversed, confessed and avoided, which the defendant hath not done here but he would excuse himself through the default of another, and answer nothing to that with which he himself is charged: and afterwards judgment was given in the Court of Exchequer for the plaintiff. Whereupon, afterwards, the defendant brought a writ of error in the Exchequer Chamber, where the case was argued again; but there the judgment given in the Court of Exchequer was affirmed. See this case reported short, in Popham's Reports lately published.

[96] TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CXVII. LINACRE AND RHODE'S CASE.

The case was, That Linacre was bound in a statute; and his body taken in execution, and the sheriff voluntarily set him at large, and afterwards the conusee sued

execution of the lands of the conusor; who thereupon brought an audita querela. It was moved by Yelverton, Serjeant, that by that voluntary discharge of him by the sheriff, the whole execution was discharged, for the execution is intire: see 15 E. 4. 5. Where the conusee in a statute merchant, hath the body and lands of the conusor in execution, and afterwards the conusee surrendreth his estate which he hath by extent; now the execution of his body is discharged; and the conusor shall have a scire facias, or audita querela to discharge his body: so if three conusors be in execution, and the conusee doth discharge one of them, the same is a discharge of them all, and in the principal case, the body is the principal, and therefore the discharge of the principal part of the execution is the discharge of the whole. Hammon, Where the conusee himself dischargeth the execution in part, it is good for the whole, but where discharged by the sheriff, nihil operatur: Anderson, If the conusor dieth in execution, yet the conusee shall have execution against his heir of his land, for the having of the body in execution, is not any satisfaction to the party; for his body is but a pledge untill the money be paid; and there is no reason, that the act of the sheriff should discharge the execution. Windham, to the same intent; And if the conusee sueth execution, and hath the body of the conusor in execution this day, he may the next day sue execution of the lands, and the next day after, of the goods; and if the conusee doth discharge the body, the whole execution is discharged, and it is true, that if A. recovereth against B. in an action of debt, and B. is taken by a capias ad satisfaciendum, and afterwards the sheriff permitteth B. voluntarily, to escape, here B. is discharged, although it be not the act of the party; for there the plaintiff had a full execution, which is not here; for in case of execution upon a statute-merchant, the execution by the body is not the full execution, and therefore although the sheriff hath discharged the body, yet the conusee may have execution of the goods and lands, but not of the body; and afterwards judgment was given against the plaintiff; that the audita querela did not lie, and that execution might be sued of the goods and lands but not of the body.

Co. Rep. Blomfield's Case. 3 Len. 230.

TRIN. 32 ELIZ. IN THE COMMON PLEAS.

CXVIII. WEBBE AND MAINARD'S CASE.

In ejectione firmæ, the case was, Walter Goldsmith, seised of certain lands, made a feoffment to the use of himself for life, and after to the use of John his eldest son in fee; proviso, that after his death, his said son shall pay unto his younger son, William, 30l. by 3l. per ann. at the Feast of St. Michael untill the entire sum be paid, and if he fail of payment, then to the use of the said William and his heirs; Will. Goldsmith the feoffor dieth, the money is not paid, but afterwards the said younger son makes an acquittance, and thereby acknowledgeth the receipt of the said money, according to the proviso, John dieth; now, if the younger son may enter? And first, if the **[97]** younger son be concluded by that acquittance, to say that the 30l. was not paid? And if he be not concluded, then if because that the words are but words of limitation, the younger brother hath title of entry? and then, if this entry be bound by the descent from John to his heir? or if John by continuance of the possession, after the breach of the proviso, be a disseisor, or not? were questions propounded to the Court, which the Court took time to consider of, yet it was then said, that the use was settled in William, and the possession executed unto it, but not such a possession upon which an assise or trespass lieth.

HILL. 31 ELIZ. IN THE KING'S BENCH. ROT. 647.

CXIX. WILLIS AND JERMINE'S CASE.

In ejectione firmæ, it was found by special verdict, that the Dean and Chapter of Exeter leased the land, where, &c. to Jermine, rendering rent to be paid at their

chapter-house at Exeter, and for default of payment, that such lease shall be void and cease; and that the said Jermine conveyed his interest to the defendant, and afterward the rent was demanded at the chapter-house, but not paid; and afterwards, the dean and chapter, by the name of Dean and Chapter of St. Mary of Exeter, where they are incorporate by the name of Dean and Chapter of St. Mary in Exeter, make an indenture of lease for forty years, in their chapter-house to Willis, and thereunto put their seal in the chapter-house, and made a letter of attorney to another to enter, and to make livery of the said deed, which was done accordingly: it was moved by Harris, Serjeant, that this lease made in manner, &c. is not good, for the corporation is misnamed, i. of Exeter, for in Exeter; but the Court disallowed that exception; for there is not any material variance, and so it was said, it hath been ruled. And he said, that for another cause the lease is not good; for when the dean and chapter in their chapter-house make this indenture of lease, and set their chapter-seal to it, it was their deed presently, without other delivery: and then Jermine being in possession at the time of the putting of the seal to it; they were out of possession thereof, and so the new lease void, because they were not in possession at the time of the making of it; for no delivery is necessary to the deed of a corporation; but the date of the sealing of it, makes it a perfect deed, and then the delivery of the same by the attorney is of no effect. Wiat to the contrary, This lease is good: for Jermine was but tenant at sufferance at the time of this lease; but if Jermine had been a disseisor, then delivery in the chapter-house was void, and then the second delivery upon the land good. And Harris agrees, that if Jermine be but tenant at sufferance, then the second lease made of the land was good enough. But it was agreed by the whole Court, that the lease is good enough for the manner, and there is not other form or means for a corporation to make a lease than this here: and it was moved; that the first lease was not utterly ceased without entry, and then the new lease being made before, entry is void; but Wray was clear of a contrary opinion; and said, that the dean and chapter might make such a lease before entry; but Gawdy, Justice, doubted of it, vide 28 H. 8. 6. Dyer and Com. 2. and 3. Ph. and Ma. 132. Browning and Beston's Case.

Harris the attorney hath not pursued his authority, for his warrant is to enter into the land in the name of the corporation, and claim it to their use, and then to deliver the lease made upon the land; **[98]** but the jury have not found such matter, but have found onely that he came by virtue of the said letter of attorney, and delivered the same upon the land, but do not find that he entred, and claimed the same to the use of the said dean and chapter, but the Court held the same good enough; for in a special verdict, every particular circumstance need not to be found, and in pleading it ought to be; and because it is found, that the attorney, by virtue of the said warrant of attorney, hath delivered the deed upon the land, he hath pursued his warrant in all. Gawdy, Delivery of the deed is as necessary in case of a corporation; as it is in the case of other persons.

1 Cro. 167. Roll Tit. Estate 830. Davis Rep. 42.

Trin. 31 Eliz. Rot. 768. In the King's Bench.

CXX. Rymersly and Cooper's Case.

In an action upon the case, for slanderous words, the plaintiff declared, that where, by the custome of the City of London, it hath been used, if the mayor, recorder, or any alderman, being a justice of peace there, might take the deposition of any person produced before them, or any of them to be deposed in perpetuum rei memoriam ex parte alicujus personæ, which depositions are there recorded, in perpetuam rei memoriam; and are good matter to be given in evidence to any jury there to inform their consciences of the truth of the thing in question, and declared farther, that he himself was produced before one bond, as a witness to testifie his knowledge in quadam causa ibid. ex parte Edw. Stapleton, before whom he deposed, &c. The defendant

spake these words in scandal of the plaintiff, Rymersly was forsworn in the said oath before, &c. The defendant pleaded, that the plaintiff made not any such oath, and upon that the plaintiff did demur in law. George Crook prayed judgment for the plaintiff, for the same is no plea; for the oath is but an inducement, and therefore not traversable; for the ground of the action is the speaking of the words; and admit there were not any such oath taken by the plaintiff, the offence of the defendant was the greater, nam peccavit in utroque, tam in juramento, quod nullum omnino fuit, quam in perjurio, quod sine juramento esse non potuit; for if one saith, A. Murdravit J. S. whereas there never was any such J. S. yet the action lieth for the scandalous words: also this plea doth amount but to the general issue, see 4 E. 6. Action, sur le Case 113. 34 H. 6. 28. And as to the words, they are actionable; for (forsworn) amounts to purjured, being spoken upon on oath taken in a Court of Record, and so was it lately holden in the case betwixt Brook and Doughty: Godfrey, contrary, The declaration is not good, for the custome in London is not well laid, or pursued; and therefore, upon the matter, it is but an oath taken before a private man; for he hath declared, that in the City of London, it hath been used, &c. but doth not say, that the City of London is antiqua civitas, as he ought. See the case of the Prior of Lantony, 12 E. 4. 8. and 22 H. 6. Prescription, 47. If a man alledgeth a custome within a town, he ought first prescribe, that the said town is an ancient town. Also it is not set forth in the declaration: that bond, at the time of the deposition taken, was a justice of peace in London, and then the custome is not well persued. But afterwards, the record was looked upon, and allowed to be good by the Court, and the Court conceived, that the plea of the defendant was good enough, as 13 E. 4. 8. In debt against an abbat, the plaintiff counted upon a borrowing by the predecessor, &c. the defendant pleaded, that he did not borrow, and it was holden a good plea, and yet the plaintiff in such case might plead the general issue, see [99] 26 H. 8. and 34 H. 6. Br. Action sur le Case, 103. 3. Ma. Dyer. 121. The Lord Mounteagle's case, 34 H. 6. 43. by Moile. In trespass, quare servientem suum verberavit, &c. It is a good plea, to say, that he was not the servant of the plaintiff; and if in the principal, the defendant plead, not guilty, he should thereby confess, that the plaintiff was sworn. Wray, Chief Justice, The plea of the defendant is good: and it was moved by Egerton, Solicitor General, that the custome to take oath, as is alledged, is not allowable, because it is not a reasonable custome, that such depositions should be taken, in perpetuam rei memoriam, if there be not a suit depending in the cause; and because that such custome not alledgable, it is not reasonable, and then the plaintiff ought not to have judgment; and such also was the opinion of Wray and Gawdy, Justices, but for the default in the declaration, that it is not alledged, that London is antiqua civitas, judgment was given against the plaintiff.

1 Cro. 168, 169.

TRIN. 31 ELIZ. ROT. 901. IN THE KING'S BENCH.

CXXI. ALEXANDER AND DYER'S CASE.

In debt for rent reserved upon a lease for years, the plaintiff declared, that he leased to the defendant 27 Sept. certain lands, to have and to hold from the Feast of St. Michael next ensuing, for a year, rendring 10l. rent, virtute cujus, 29 Sept. the said lessee entred, and enjoyed the said land, from the Feast of St. Michael, all the said year; and because the rent was behind, &c. And upon nihil debet pleaded, it was found for the plaintiff. It was moved in arrest of judgment, that upon the plaintiffs own shewing, here is no rent behind, and then no cause of action; for it appeareth in the declaration, that the lessee entred 29 Sept. which is before the term begins; for the words of the habendum are, From the Feast of St. Michael, therefore the Feast of St. Michael is no part of the term, and then was the defendant a disseisor, and the day after, the term began, which cannot alter his estate, but that he continueth a disseisor, and then he is not in by force of the said lease, and so no rent can be due: Williams, As the declaration is here, the same is not any disseisin; for the plaintiff set forth in his declaration, that the lessee, the defendant hath occupied

the land demised, the whole year, and so hath not admitted any disseisin, it being in his election to make it a disseisin or not: Clench, Justice, Be it a disseisin or not, or be it that the defendant entreth or not, he is to pay the rent: Gawdy, The lessee is a disseisor, and continueth a disseisor, and yet debt lieth against him for the rent, by reason of the privity of contract: which see Rysden's case, 24 H. 8. Dyer 5. And so in our case, quod fuit concessum per totam curiam, and afterwards judgment was given for the plaintiff.

1 Roll. 605. 1 Cro. 169.

HILL. 32 ELIZ. IN THE KING'S BENCH. ROT. 561. ERROR.

CXXII. MONINGS AND WORLEY'S CASE.

In debt upon an obligation brought by Mary Worley, against Monings in the Common-Pleas. The condition was, that if Mary Worley the plaintiff in the said action doth not depart out of the service of the defendant without license of the defendant Monings; nor marry her self, but with his consent, then if the defendant shall pay to the said Mary within twenty eight days after demand by her made (of Monings) at his house at Waldersey, 100l. that then, &c. And the de-[100]-fendant in the said action pleaded, that the said Mary the plaintiff, in the said action, 4 Maii, 30 Eliz. departed out of his service without licence, the plaintiff Mary, by replication said, that 6 Septemb. the same year she departed out of his service with licence, and that 4 Octob. after, she demanded the said 100l. at Waldersey aforesaid, and he refused to pay it, absque hoc, that she departed out of his service 4 Maii, 30 Eliz. without licence, and the writ bare date, 18. of October, next after the demand; and it was found for the plaintiff, and judgment given for her in the Common Pleas; and now a writ of error is brought by Monings. Tanfield, The judgment ought to be reversed; for always the replication in such cases, ought to contain sufficient cause of action, and sufficient breach of the condition, or otherwise the plaintiff shall not have judgment, although that the issue be found for him: as 7 E. 4. 31. In trespass for taking of goods, of A. and B. A. pleads not guilty, B. justifies, the plaintiff makes title to the goods by a gift, B. traverseth the gift, and it is found for him against the plaintiff, A. is found guilty: now, although A. be found guilty, yet the plaintiff shall not have judgment against him; for it is found, that he hath not any title to the goods. As in debt upon a bond against A. and B. A. pleads non est factum; B. pleads the release of the plaintiff, and it is found the deed of A. and that the plaintiff hath released to B. the plaintiff shall never have judgment; for upon the verdict, it appears, that he hath not cause of action: and here in the replication, there is not a sufficient breach shewed of the condition; for although that Mary hath not departed from the service of the said defendant, yet the same is not material; but the defendant had twenty eight days after the demand, to pay the 100l. but the same is not so here, for the plaintiff hath prevented the defendant; for the demand is alledged to be 4. Oct. and the writ bears date 18. Octob. the same year, and so the defendant had not his time allowed him. Gawdy, The issue is taken upon the departure out of his service, so as the demand is not now material, and therefore the alledging of the same is surplusage, and shall not hurt: and the defendant hath pleaded in bar, the departure of the plaintiff out of his service, upon which he relieth, and the demand set forth in the replication, is not to be regarded, as to prejudice the plaintiff: as 3 Ma. Dyer 115. Lessee for years covenants that he will not cut any trees, the lessor assigns the breach of the covenant in succidendo twenty oaks, the lessee pleads, that he did not cut the twenty trees, nor any of them; the jury found, that the defendant had cut down ten trees, the plaintiff upon that verdict shall have judgment, for the rest is but surplusage; and more put in issue than there needs to be. Fenner, It is not any full plea to say, that the plaintiff did not depart out of the service of the defendant 4 Maii, for if she departeth at any other time, she shall not recover, for which cause she ought to have pleaded, that she continued in his service untill such a day, and then she departed with his licence, and the inducement to the traverse ought to be sufficient matter, otherwise

it is not a full plea, nor the traverse is not good. And if it be surplusage, yet if it be not matter against her self, it makes the plea naught, which see 1 H. 7. 29. 6 H. 7. 16. Gawdy conceived, that the judgment was well given, for the defendant was at his liberty to plead the departure of the plaintiff without his licence, or to stand upon the demand. And now, although he pleads the departure, yet the demand is not confessed. And afterwards the judgment given in the Court of Common Pleas was affirmed.

[101] 27 ELIZ. IN THE KING'S BENCH.

CXXIII. BASHPOOL'S CASE.

The case was this, The father seised of lands, is bound in an obligation, and deviseth his lands to his wife untill his son cometh to the age of twenty one years, the remainder to the son in fee, and dieth; and no other lands descend or come to the son from his father. It was moved by Godfrey, that the heir in that case at his election might wave the devise, and take by descent or è contra: see 9 E. 4. 18. by Needham. But Gawdy and Shute, Justices, were of opinion, that the son should be adjudged in by descent: Clench contrary.

Stiles Rep. 148. 3 Len. 118.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

CXXIV. BENNET AND SHORTWRIGHT'S CASE.

The case was, The defendant sued the plaintiff in the Spiritual Court for tythes in kind, and now the plaintiff prayed a prohibition, and suggested, that they had used in the said parish, time out of mind, &c. to take the tenth sheaf in satisfaction of tythe of corn &c. and in those years in which the plaintiff had supposed the subtraction of his tythes, he had severed the tenth sheaf from the nine parts, and the parson would not take them away: and that he had offered that matter by way of plea in the Spiritual Court, but they there would not allow of it: and the Court was clear of opinion, that the suggestion was good; for if the parishioner setteth out his tythes, and the parson will not take them, or if they be destroyed by cattel by his laches, he shall not have tythes again: and therefore if the Ecclesiastical Court will not allow that plea, it is reason that the party have a prohibition, for after severance transit decima in catalla: but it was said by the Court, that if the parishioner doth set forth his tythes, and takes them again, he may be sued for tythes in the Spiritual Court, and the setting forth shall not excuse them.

1 Cro. 206.

MICH. 32 ELIZ. IN THE KINGS BENCH.

CXXV. WALTER AGAINST PERY AND SPRINGE.

Walter brought a scire facias against Pery and Springe, sureties for one Brook upon bail in an action of debt: the defendants pleaded the death of Brook before judgment given against him: and all the justices (except Wray) held, that the plea was not good, for it is a surmise against the judgment: for judgment cannot be given against a dead man. Wray, The same is error in fact, and of such error the party may have advantage in this Court. Gawdy, The surety cannot take advantage of error, nor plead it, for he is a stranger to the record. Wray, He may plead, that the defendant is dead after the judgment, quod fuit concessum: but it was ruled, that the defendants should be sworn that their plea was true.

[102] MICH. 32 ELIZ. IN THE KING'S BENCH.

CXXVI. ALDERSLEY AND DUPARRIE'S CASE.

In debt upon an obligation bearing date 4. Julii, 30 Eliz. the defendant pleaded, that it was endorsed with condition to pay 50 li. before 15 Octob. 31 Eliz. and pleaded, that he had paid it before the 15. of Octob. aforesaid, scil. the ninth of June, 30. Eliz. which is three weeks before the date of the obligation, upon which the action is brought: and they were at issue, that the defendant non solvit before 15 Octob. &c. And the jury have found, that the defendant had not paid it before 15 Octob. and that matter was assigned for error; for that plea is contrary and repugnant in it self, to alledg the payment before the date of the obligation: but it was moved, that here the day of payment is not material, and but matter of surplusage; for the issue is, whether the defendant paid the money before the 15 day of October? and the jury have found the negative, so as the day in the scilicet is not material, and the alledging of that is matter of surplusage: as 20 H. 6. 15, trespass quare clausum fregit, & herbam consumpsit, continuand. transgress. from such a day usque ad diem impetrationis brevis prædict. scilicet, 14 F. 17 H 6. whereas the date of the writ fuit 12. Octob. 17 H. 6. scil. the October before February: but it was not allowed; for the day of the writ brought is certain enough, and the mistaking in the scilicet is not to any purpose. Wray, Payment before the day is not a good plea, if he doth not shew the day and place. It was adjourned.

TRIN. 31 ELIZ. IN THE KING'S BENCH.

CXXVII. PARKER AND BURTON'S CASE.

In an action upon the case for slanderous words, (scil.) that the plaintiff was perjured: the defendant doth justifie, that whereas a suit was prosecuted in the Exchequer Chamber at Westminster betwixt the defendant and another, and from thence a commission was awarded out of the said Court to divers persons, to examine certain witnesses at B. in Berk. and there, by virtue of the said commission, the plaintiff was deposed, & false deposuit, prætextu cujus, he spake the said words. The plaintiff replicando saith, de injuria sua propria absque tali causa: upon which issue was joined, and tried in Berk. and found for the plaintiff. And it was moved by Coke in arrest of judgment, that the said issue ought not to be tried in Berks. onely, but by both counties Mid. and Berks; for all the matter of justification doth arise out of both counties; the suit and the commission which was in Midd. and the execution of the commission and the oath which were in Berks; all which matters is but one case: as 2 H. 7. 3. and 4. Atkinson, The trial is well for the manner, for the matter of the justification is the perjury, and the suit and commission are but induction and conveyance to the action: also the defendant hath not shewed, that the Exchequer Chamber is in the county of Midd. as he ought: as where a man pleads a thing done in any Court, except in the Common Pleas, he ought to shew in what county the said Court was at the time that such thing was done, for communia placita teneantur in loco certo. Gawdy and Wray, When the defendant doth justifie by reason of the perjury, and the plaintiff replies without such cause, the same amounts to as much as if he had traversed the per-**[103]**-jury, which being supposed to be committed there, shall be tryed there. Coke, It was the case of one Loveday, 25 Eliz. In an action upon the case for slanderous words, the defendant did justifie, by reason of a robbery committed by the plaintiff in another county; and the plaintiff pleaded de son tort demesne sans tiel cause: the same shall be tryed by both counties: see 2 H. 7. 3. Also it was moved, that here it is not shewed in what county the Exchequer Chamber is: admit that it be in Berks, yet it ought to be tryed by both counties, and that was Chelderlie's case: and although it be not shewed in what county the Exchequer Chamber is, the plaintiff had judgment to recover, and the tryal was held good enough.

Antea 811.

HILL. 31 ELIZ. IN THE KING'S BENCH.

CXXVIII. SIR THO. BACON'S CASE.

A writ was awarded out of the Court of Admiralty against Sir Thomas Bacon and Sir Thomas Heyden, to shew cause, (whereas the Earl of Lincoln, late High Admiral of England, had granted to them by letters patents, to be vice-admirals, in the counties of Norfolk and Suffolk,) why the said letters patents ought not to be repealed and adnulled? and so the said writ was in the nature of a scire facias. And now it was moved by Coke, that although the admiral had but an estate for life, yet the patents did continue in force after his death: as the Justices here in the Common Pleas, although they have their places but for life, yet they may grant offices which shall be in force after their deaths, &c. And because this matter is determinable at the common law, he prayed a prohibition; for in the Admiral Court they will judge according to the civil law: and the Court gave day unto the other side, to shew cause unto the contrary, or otherwise a prohibition should be awarded.

Postea 114.

MICH. 31 ELIZ. IN THE KING'S BENCH.

CXXIX. WESHBOURN AND MORDANT'S CASE.

In an action upon the case, the plaintiff declared, that whereas he was possessed of a parcel of land called the Parsonage, lying adjoyning to a certain river, from the 29 of May, 29 Eliz. untill the day of the bringing of this writ, the defendant had the said twentieth day of May stopt the said river with certain loads of earth, and so it continued untill the fourteenth day of February, by which his land was drowned, and so he had lost the profit of it by that time. And it was moved in arrest of judgment, that upon the declaration there doth not appear any cause of action, for the plaintiff hath made title to the land drowned from the twentieth of May, so as that day is excluded, and the nusance is said to be made the twentieth day, and so it appeareth the nusance was before the possession of the plaintiff; and if it were so, then cannot he complain of any wrong done before his time: to which it was answered, that although the stopping was made before his possession, yet the continuance of the same is after, and a new wrong, for which an action lieth: as 5 H. 7. 4. It was presented, that an abbat had not cleansed his ditch, &c. by reason of which the highway is stopt: the successor shall be put to answer to the said indictment, by reason of the continuance of it: and see, that continuation of a nusance is as it were a new nusance, 14 and 15 Eliz. 320. And it may be that the plaintiff was not damnified **[104]** untill long time after the twentieth day of May, (scil.) after the stopping: and the words of the writ here are satisfied and true: and afterwards judgment was given for the plaintiff.

1 Cro. 291. 1 Len. 247. 3 Len. 174.

PASC. 31 ELIZ. IN THE KING'S BENCH.

CXXX. TRUSTO AND EWER'S CASE.

In this case it was agreed for law, that if a controversie be betwixt two for the title of a lease for years, and they submit the matter to arbitrement: and the arbitrators award, that one of them shall have the term: the same is a good gift of the interest of the term: see 12 Ass. 25. 14 H. 4. 19. 24. But if the award be, that the one shall permit the other to enjoy the term, the same is no gift of the interest therein: see, as to the arbitrement, 9 E. 4. 44.

1 Cro. 23.

PASC. 32 ELIZ. IN THE KING'S BENCH.

CXXXI. ANDREW'S CASE.

[See *Baynes & Company* v. *Lloyd & Sons* [1895], 2 Q. B. 616.]

In the case of Andrews of Grays Inn, it was holden by Gawdy and Fenner, Justices, that if a lease for years be made by deed indented with these words, demisi & ad firmam tradidi; that upon that writ of covenant lieth against the lessor, if he himself entreth upon the lessee; but contrary if a stranger enter, if it hath not clause of warranty: for by Fenner, when covenant is brought upon that word demisi, the plaintiff shall recover the term it self, but not damages, and that cannot the plaintiff do when a stranger entreth; and that was holden for clear law: see 9 Eliz. Dyer 257. A covenant against the heir in such case.

1 Cro. 214.

HILL. 32 ELIZ. ROT. 549. IN THE KING'S BENCH.

CXXXII. BIGG AND CLARK'S CASE.

In an action upon the case in the Court of Hertford, the plaintiff declared, how that the defendant hired a horse of the plaintiff to carry three bushels of coals from Ware to his house in Hertford, and that the defendant in consideration thereof did promise the plaintiff, quod ipse in via prædicta nollet onerare the said horse aliter, than with the said three bushels of coals: and the plaintiff said, that the defendant had loaded the said plaintiff's horse with a greater weight than with the said coals, and so had hurt his horse, upon which the plaintiff recovered; and error was brought, and the error assigned was this, that it is not specially shewed, how the defendant aliter loaded the said horse, with what thing: as 19 H. 6. In debt against executors, they plead, that they have onely expended such a sum of the goods of the testator in funeral expences, absque hoc, that they have administred aliter, vel alio modo; the plaintiff cannot reply and say, that they have administred aliter, vel alio modo, without shewing how. Another error was assigned, because it is not certainly shewed, how the horse was hurt; but that exception was not allowed, for it is not the point of the action: but for the first matter, the judgment was reversed.

[105] TRIN. 32 ELIZ. IN THE KING'S BENCH.

CXXXIII. TOLEY AND WINDHAMS CASE.

In an action upon the case, the plaintiff declared, that whereas certain controversies were betwixt the plaintiff and defendant for the profits of certain lands which the father of the defendant had taken in his lifetime: and whereas he had brought a writ of subpœna out of the Chancery against the defendant for the said profits taken by the father of the defendant in his life, intending to put in a bill against the defendant in the said Court: the defendant, in consideration that the plaintiff would stay his intended suit, promised, that if the plaintiff can prove, that the father of the defendant took the profits, or had the possession of the said land under the title of the father of the plaintiff, that he should pay to him for all the said profits: and farther declared, that he had proved, that his father had taken the profits under the title of the father of the plaintiff. Coke took exception to the declaration, because it is not shewed, how and by what means, under the title of the father of the plaintiff, he took the profits, as by lease, for that is traversable. Gawdy, Justice, The son hath not any cause of action or suit for the profits taken in the time of the

father, therefore the staying of suit arising from such matter is not any consideration: but as to the other exception, because it is not shewed how, and by what title he took the profits, it is well enough. As unto the other exception, it was moved at another day, that there was a case betwixt Stone and Withypool; an infant promiseth to pay a simple contract, and thereupon there was a suit in the Chancery, but it was holden that it was not maintainable, for the promise was void, because there was no consideration. And it was agreed by all the justices, that this action would not lie; for the plaintiff hath declared, that where certain controversies were betwixt the father of the defendant and him, (scil.) the plaintiff himself, for the profits of certain lands, which the father of the defendant had taken in the time of the father of the plaintiff, &c. and he doth not shew, that he himself is heir or executor of his father, and therefore the Chancery cannot give him any remedy: and on the other side, if the plaintiff had any remedy, the same ought to be against the executors of the father of the defendant; and the plaintiff hath not alledged, that the defendant is executor to his father, and therefore he hath not any colour of suit against him, nor therefore is there any consideration. Fenner, The defendant by the law is not chargeable, nor in conscience, upon this matter he shall be charged; for by the same reason he should be charged for the simple contract of his father, and a promise to pay it will not bind him: and afterwards judgment was given against the plaintiff.

1 Cro. 206. 3 Len. 150.

Trin. 32 Eliz. In the King's Bench.

CXXXIV. Veal and Robert's Case.

In an ejectione firmæ, the plaintiff declared, how that John Veal leased to him, 30 Eliz. for twenty one years ten acres of land called M. The defendant pleaded, that before the demise and ejectment, one John Roberts was seised of the said ten acres called M. in fee, and 14 Eliz. demised the same to one John Cox for life, and afterwards 25 Elizab. **[106]** John Roberts dyed, and the reversion descended to the now defendant; Cox demised the land to John Veal for thirty years, who leased unto the plaintiff, as in the declaration, of which he was possessed quousque, &c. Cox dyed 30 Eliz. after whose death the defendant entred and ejected prout was lawfull for him to do, &c. The defendant by replication saith, that before John Roberts had any thing, one Wall of P. of Glocester was seised of the said ten acres inter alia, and 29 H. 8. demised to John Veal, father of the lessor of the plaintiff, the said land inter alia, by the name of two messuages and two yard lands in the county of Glocester, nuper in tenura J. S. and of two other houses and a yard land tunc in tenura E. H. nec non de ten acres vocat. M. lying inter C. & J. tunc in occupatione E. W. for term of years yet during, habendum dict. four messuages and three yard lands, in tenura J. S. & E. H. nec non the said ten acres to the said John Veal, à tempore mortis sur sum redditionis forisfactur. vel determinationis status vel terminor. prædict. J. H. & W. in eisdem, for sixty years; by force of which he was possessed of the interest of the term aforesaid: and afterwards 14 Eliz. the estate of the said E. W. in the said ten acres ended, for which the said John Veal entred, and 25 Eliz. dyed intestate; and administration was committed to J. S. lessor of the plaintiff, by force of which he entred, and leased to the plaintiff, and so he was possessed untill ejected: the defendant did rejoyn, and said, that long before John Roberts had any thing, William Roberts was seised in fee, and enfeoffed the said John Roberts before the ejectment supposed, who demised unto John Cox, and so as in the bar, absque hoc, that the said abbat demised to the said John Veal, modo and forma prout the plaintiff replicando allegavit, the which matter he is ready to aver, & petit judicium: the plaintiff said, that the abbat demisit ut supra, & hoc petit quod inquiratur per patriam: and it was found for the plaintiff. And it was objected by Snag, that this issue was not well taken, for the estate of John Veal was not to begin before all the estates, being in esse at the time of the making of the lease by the abbat of Glocester, are expired. Coventry contrary; and that the estates do begin severally, and singulatim, as the estates precedent shall end, and shall not expect untill the other

estates be determined; which see Justice Needham's case, now reported by Coke, 5 part. 37 Eliz. and see Pollard's case there cited. At another day it was objected by Snag, that the new estate could not begin in any part untill all the former estates be determined; for if this new lease be made, reserving rent; and one part thereof is now come in possession, then he should pay for that part all the rent: but the Court was clear of opinion, that the lease in the ten acres did begin presently, without having regard to the other estates in demand, for the intent of the lessor was, that no mean time should be betwixt the expiration of the lease for ten years, and the beginning of the new: as in the case betwixt Wrotesley and Adams, 1 Eliz. Plo. Com. 198. A lease is made to begin after the expiration of a former lease for years; the first lessee takes a new lease of the lessor, which was a surrender of the former lease; if the lease, (scil.) the second lease, shall now begin? was the question: or should expect untill the first lease shall end by expiration, for the former lease is ended, but not expired, i. by effluction of time: and it was holden, that the said second lease should begin presently; for the intent of the lessor was that no mean time should be betwixt the end and beginning of the said estates. And afterwards judgment was given for the plaintiff.

1 Cro. 199.

[107] CXXXV. PASCH. 32 ELIZ. IN THE KING'S BENCH.

Note, if a record be removed out of the Common Pleas into the King's Bench by writ of error, and the plaintiff shall not assign his errors, then a scire facias shall issue forth, quare executionem habere non debet: and upon summons, or two nichels retorned, the plaintiff shall have execution, yet the plaintiff may assign his errors. And to such a scire facias exception was taken, because the writ was coram nobis apud Westm. where it should be, ubicunque fuerimus in Anglia: and for that cause a supersedeas was granted. It was also holden, that although a writ of error doth not lie here, upon a judgment given in London; yet upon a judgment given at Newgate, which is upon commission in their sessions, error lieth here.

PASCH. 32 ELIZ. IN THE KING'S BENCH.

CXXXVI. BOWS AND VERNON'S CASE.

Debt upon an obligation was brought by Bows against Vernon and Hennington, who pleaded the statute of 23 H. 6. and shewed, that Vernon was in execution, and that the bond was made for his deliverance against the statute: the plaintiff replied, and said, that at the time of the making of the said bond, the said Vernon suit sui juris, and at large, absque hoc, that he was in prison tempore confectionis scripti prædict. modo & forma, &c. Egerton, Solicitor, moved, that the traverse was not good; for if a man be in prison in execution, and makes a promise to make a bond, for which he is inlarged, and within an hour after he makes the bond, the same is within the statute: and therefore this issue is not well joined, but it ought to be absque hoc, that it was pro deliberatione, &c. and of such opinion was Fenner and Gawdy, Justices: see Dive and Manningham's case, 4 E. 6. Plo. Com. 68, 69. acc.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CXXXVII. HUNT AND SONE'S CASE.

In an action upon the case, the plaintiff declared, that whereas the said plaintiff was seised in his demesn as of fee, of certain land, and shews the certainty of them; the defendant Sone, in consideration that the said plaintiff permitteret the said Sone, occupare terras prædictas ab eodem die, (scil.) 20 Julii, 27 Eliz. usque ad secundum diem Novembris, quod esset in anno. Dom. 1589. super se assumpsit, quod ipse idem W. Sone ad festum omnium sanctorum proxime sequen. 10l. 2s. 6d. ac abinde

annuatim durante termino dicto 20l. & 5s. at Festa Annunciationis beatæ Mariæ, ac omnium sanctor. per æquales portiones solvend. eidem Hunt (the plaintiff) bene & fideliter contentare vellet: ac licet prædict. W. Hunt permisit præfat. Sone occupare terras prædict. à dict. 20 die Julii, 27 Eliz. usque ad secundum diem Novemb. 28 Eliz. Licet que post dictum 20 diem Julii. 27 Eliz. & ante prædict. diem 2 Novemb. anno 20 Eliz. dictum festum omnium sanctor anno 27 Eliz. supradict. ac Festum Annunciationis beatæ Mariæ Virginis, ac festum omnium sanctor. 28 Eliz. præterierunt, præd. tamen W. Sone dict. 10l. 2s. 6d. ad præd. festum **[108]** omnium sanctor. proxime sequent. post permissionem & assumptionem præd. ac aliud 10l. 2s. 6d. ad Festum Annunciationis 28 Eliz. ac alia 10l. 2s. 6d. ad fest. omnium sanct. anno 28 Eliz. supradict. nondum solvit, &c. The defendant pleaded, that the plaintiff entred into parcel of the premisses ultimo Octob. 28 Eliz. & eadem occupare eidem W. Sone non permisit: upon which they were at issue, and it was found for the plaintiff: and now it was moved in arrest of judgment, that the plaintiff had not cause of action before the whole term be expired, for it is an intire assumpsit, and cannot be by action severed; and therefore it was said, that if I promise to pay you 20l. viz. at such a feast 5l. and at such a feast other 5l. &c. there before the last day of payment no action lieth, for the sum of 20l. is one and entire: but if I promise to another at Easter next 10l. and at Midsummer as much, &c. here are several assumpsits; and upon default of payment of the first sum actio oritur, without respecting the last payment: but at the last the Court was agreed, that judgment, notwithstanding the said exception, should be given for the plaintiff: and said, that the declaration was well enough, as well in respect of the exception aforesaid, as also that this word [licet] is effectual enough for the setting down the permission.

Owen Rep. 42. 1 Cro. 118. 1 Roll. 30. 4 Len. 13.

Trin. 30 Eliz. In the King's Bench.

CXXXVIII. Roper's Case.

Roper was robbed by Smith, and within a week after the robbery he preferred an indictment against him, and within a month after the robbery he sued an appeal against Smith, and prosecuted the same untill he was out-lawed; and thereupon Coke moved to have restitution of the goods taken: and B. of the Crown Office said, that the fresh-suit was not enquired; for upon an appeal one shall not have restitution without fresh-suit. Coke, The books are, that if the defendant in an appeal of robbery be attainted by verdict, the fresh-suit shall be enquired of: but here he was attainted by outlawry, and not by verdict, and so the fresh-suit cannot be enquired: and here the indictment within a week, and the appeal within a month after the robbery, is a fresh-suit. Wray, Fresh-suit in our law is to persue the felon from town to town, but the suing of an appeal is not any fresh-suit: see 21 E. 4. 16. Restitution granted upon an outlawry in an appeal of robbery without fresh-suit enquired: 1 H. 4. 5. if he confess the felony: see 2. R. 3. 13.

Stamf. 166, 167. Terms of the Law, 75, 76. Inst. 131.

Trin. 30 Eliz. In the Common Pleas.

CXXXIX. Piggot and Russel's Case.

Note, it was agreed per curiam in this case, that if tenant for life being of full age, and he in the remainder within age levy a fine, and afterwards the infant reverseth the fine as to him for the inheritance, he shall not enter for forfeiture, because he joined in the fine, and so assented to it.

1 Cro. 124. 1 Co. English his Case.

[109] TRIN. 29 ELIZ. IN THE KING'S BENCH.

CXL. SIR JOHN SAVAGE'S CASE.

In trespass, the defendant justified, because Sir John Savage was seised of the manor of D. within which manor the custome is, that if any man taketh to wife, any customary tenant of the said manor, and hath issue, and shall overlive his wife, he shall be tenant by the curtesie; and pleaded farther, that he took to wife one Ann, to whom, during the said coverture, a customary tenement of the said manor did descend, and that he had issue by the said Ann, and that she is dead, and so, &c. and it was adjudged, that the husband by this custome upon this matter, should not be tenant by the curtesie; for Ann was not a customary tenant of the said manor at the time of the marriage.

Postea, 208.

TRIN. 29 ELIZ. IN THE KING'S BENCH.

CXLI. STAINSBY AND HALES'S CASE.

In a second deliverance by Stainsby against Hales, challenge was taken for the hundred, and it was shewed and confessed, that the hundred of Feversham in Kent, was and is within the lathe of Seray, and that there is not, nor ever had been any Court holden in the said hundred of Feversham, but that all the inhabitants within the said hundred have used to go to the Court of the lathe of Seray: and it was holden by all the justices, that in this case challenge ought to be taken for the lathe, and not for the hundred, for no Court had been holden in the hundred: see 2 H. 4. 6. 11 H. 4. 2. A juror was challenged for the hundred, and the triors said, that the party challenged was not of the said hundred, where, &c. but they farther said, that there were six hundreds, all which came to one Court; and the same was holden a good answer to the challenge, and the party challenged was sworn.

TRIN. 27 ELIZ. ROT. 1201. IN THE KING'S BENCH.

CXLII. SANDS AND HEMPSTON'S CASE.

In a replevin, the case was, that Henry, Earl of Westmerland, was seised of the manor of Kennington in fee, and granted a rent-charge to William Cordel, afterwards Master of the Rolls, for life, and afterwards made a feoffment thereof to Sir John Clifton, who granted a copihold to Sands for life; according to the custome of the said manor, the same being an ancient copihold; Sir John died seised, the rent is behind, Sir William Cordel died, Hempston as bailiff of Cary, executor of Sir William Cordel, distrained for the arreages upon the possession of Sands, and it was clearly holden by the whole Court, that the possession of the said copiholder was not chargeable to distress upon this matter, for the copiholder is not in by him who ought immediately to pay the rent, but is also in by the custome: note by some, that the possession of a copiholder is not liable to the executor, by the statute of . If it be so, that the lord of the manor be within the degree limited by the said statute.

Dy. 270. 2 Brownl. 26. 3 Len. 59. 1 Leon. 4. 16. Postea, 15. 2 Roll. 157.

[110] TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CXLIII. HOOPER'S CASE.

Hooper of Salisbury was brought to the bar, to wage his law in an action of debt, and upon examination, the matter appeared to be, that the defendant was indebted to

the plaintiff upon a simple contract, and upon communication betwixt them, it was agreed, that one J. S. should become bounden to the plaintiff in an obligation for the said debt, to be paid at a day certain, which J. S. became bound accordingly, and the defendant was also bound to the said J. S. in a counter-bond for to save him harmless against the plaintiff. And the Court was clear of opinion, that upon this matter, the defendant could not safely wage his law; for by this obligation, made by a stranger to the contract, the contract upon which the action is brought is not determined: and also here the obligation was made after the contract; but if J. S. had been bound, ut supra, upon the contract it had been otherwise; and upon that reason, the case of one Pudsey was adjudged. Where, upon the contract, a stranger to the contract being present, made promise to enter into a bond unto the party, &c. for the paiment of the money, agreed upon the contract, and afterwards became bounden accordingly; in that case the contract was determined, because the obligation was pursuant to the contract; and in the principal case, the Court would not admit the defendant to wage his law, although he earnestly desired it.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CXLIV. KNEVIT AND TAYLOR'S CASE.

Knevit enformed against Taylor in the Common Pleas, upon the Statute of Usury, and the parties were at issue, and the matter depended four terms untried after issue was joined; and now the defendant prayed, for his own expedition, that he might have nisi prius with proviso, as the course is in the Exchequer in such case, to send commissions into the countrey where the information is laid for the trial of the issue joined in the said Court, and that at the suit of the defendant. And it was much doubted, if the Court might grant such nisi prius, because the Queen is quodammodo a party to the suit. And by Fleetwood, Serjeant, the common course is so; but where the Queen herself is merely party, no such nisi prius shall be granted: and he said, that the informer might be nonsuit, although that the Queen be in such manner party. Nelson, Prothonotary, said, that he never saw such a precedent. See F. N. B. 241.

Postea, 116.

TRIN. 29 ELIZ. IN THE KING'S BENCH.

CXLV. ALFORD AND LEA'S CASE.

Alford brought debt upon a bond against Lea, and the case was, that the parties were bound the one to the other upon condition, to stand to the award of B. and C. who award, that the said Lea, before such a feast, shall make a release to Alford, but no place assigned where the release shall be delivered to the plaintiff. Lea, before the said feast, sealed a release according to the award, and delivered the same to one Pine, to the use of the plaintiff, who delivers it to one **[111]** Mason, one of the servants of Alford, the plaintiff, who two or three dayes after, offers it to Alford, but he refused it, it was holden by Wray, that the award upon this matter was well performed, notwithstanding the refusal of Alford, see Tawe's case, 1 Eliz. Dyer 167. A. enseals, quoddam scriptum obligat. and delivers the same to one C. for to deliver it to the obligee, who delivered it accordingly, as the deed of A. who refuseth to receive it; and after gets the obligation, and recovers upon it.

1 Cro. 54. Post. 181.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

CXLVI. MARSH AND RAINSFORD'S CASE.

In an action upon the case: the case was, that a communication was had betwixt the parties, that the plaintiff should marry the daughter of the defendant, in con-

sideration of which, the defendant promised the plaintiff to give him 200l. but they could not agree upon the days of payment of it, after which they stole away the defendant's daughter, and secretly married her, without the defendant's knowledge; yet afterwards the defendant gave his consent to it, and allowed of the said marriage; and in consideration of the said marriage, promised to pay the plaintiff 100l. Egerton, Solicitor General for the defendant, that the action upon this matter will not lie; for here the consideration is precedent to the promise, whereas the consideration in such cases, ought to be future and subsequent; and as the case is here, the plaintiff is out of the course of consideration of marriage; for he hath stolen away and married his wife, without the knowledge or consent of her father: see such case, 10 Eliz. Dyer 272. The servant of one A. is arrested in London, and two friends of his master bail him, and afterwards A. promiseth to them, for their friendship, to save them harmless from damages and costs, &c. It was holden that the action doth not lie, for here is not any consideration, for the bailment was of their own heads, and it is executed before the promise; but if the master before the enlargement of his servant had requested the plaintiff for to bail his servant, and he had so done, the action would have lien. Wrey, Justice, Although the consideration be precedent, yet if it were made at the instance of the other party, the action would have lien. But here the natural affection of the father to his daughter, is sufficient matter of consideration. If one cometh to a serjeant at law to have his counsel, and the serjeant doth advise him, and afterwards the client in consideration of such counsel, promiseth to pay him 20l. an action lieth for it. And so Popham said, it had been adjudged in the Exchequer: and it is the common practice in this Court, in consideration quod querens deliberasset to the defendant &c. He promiseth to pay him so much; and as it was late adjudged betwixt Style and Smith: if a physician, who is my friend, hearing that my son is sick, goeth to him in my absence, and helps and recovers him, and I being informed thereof, promise him in consideration, &c. ut supra, to give him 20l. an action will lie for the money; and afterwards in the principal case judgment was given for the plaintiff.

1 Leon. 102.

Trin. 30 Eliz. In the King's Bench.

CXLVII. Williams and Linford's Case.

Smith and Johnson's Case.

Williams brought an action upon the case against Linford, for slanderous words spoken of the plaintiff's land, viz. Williams is worth nothing, and do you think that the manor of D. is his? It is but a com-**[112]**-pact between his brother Thomas and him; and farther declared, that at the time of speaking of the words, he was in speech with one J. S. to give to the said J. S. the said manor of D. for his manor of K. and that by reason of the said slanderous words, the said J. S. durst not proceed in the said intended exchange. It was objected, that upon this matter, an action upon the case doth not lie; for the scandalous words were not spoken to him who was to be the purchasor of the said manor, but to a stranger. For in the case betwixt Smith and Johnson, Johnson was in speech with another to sell his lands to him; and Smith said to him who was to purchase them, Will you buy Johnson's land? Why, it is troubled with more charges and incumbances than it is worth. Wray, Justice, There is no difference, whether words be spoken to the party, or unto a stranger, for in both cases the title of the plaintiff is slandered, so as he cannot make sale of his lands: judgment was given for the plaintiff.

3 Len. 177. 1 Cro. 346, 787.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

CXLVIII. BAREFOOT AND LUTER'S CASE.

The case was, A. B. and C. joynt-tenants in fee, C. granted his part unto D. and afterwards A. B. and D. leased for years, rendring rent, and afterwards A. died, and they brought an action of debt for the rent reserved, and declared generally, and upon the evidence, the special matter appeared, that two parts of the rent did belong to B. and but the third part to D. And the opinion of the Court was; that the declaration ought to have been special upon the whole matter; for prima facie, it was conceived that each of the plaintiffs ought to have had the moiety of the rent, and that is a supposal of the declaration: but now upon the evidence, it appeareth to the contrary; so as the defendant nil debet, in that form; another matter was, the plaintiff declared of rent of a whole year, ended at the Feast of St. Michael last past, whereas the rent was not due at Michaelmas, as the plaintiff had declared, but the thirtieth day after.

TRIN. 32 ELIZ. IN THE KING'S BENCH.

CXLIX. BROWN AND ORDINACRE'S CASE.

Henry Brown, and Joice his wife, executors of Thomas Brown, brought an action upon the case against Van Ordinacre, alien, and declared, that where A. and B. were indebted to the testator, the defendant, in consideration that the testator respectuaret the said A. and B. pro solutione debiti prædict. per spacium unius septimanæ tunc proxime sequen. to pay the debt to the said plaintiffs, modo sequent. viz. one moyety within one week after, and the other moiety at the end of the said week; and farther declared, that the testator did forbear by the space of a week; and after imparlance, Joice was summoned, and severed. The defendant pleaded, that he did not promise, modo & forma prout prædict. Brown allegavit, and that it was alledged by both executors. And by a jury, de medietate linguæ, it was found for the plaintiff. It was objected by Coke, that here is not any issue, prout Brown querens allegavit, where in truth, it was alledged by both the executors, before severance, and not by Brown onely. Also here is not any sufficient consideration alledged; for the plaintiff hath declared, that he hath forborn by a week, without saying, next following, as the con-[113]-sideration is laid in the declaration; but that was not allowed, for so it shall be intended. It was also objected, that the declaration is contrary to it self; for it shewed, that in consideration that the testator should forbear for a week, he promised to pay him within a week; but that exception was not allowed: for the week, in the assumpsit, shall be construed, the week after the week in the consideration. Another exception was against the trial; for the defendant being an alien, the venire facias was to summon twelve persons, quorum quilibet eorum habeat 4l. in lands of annual rent, and that cannot be; for aliens cannot have lands, not being made denizens: by the common law before the statute of 27 E. 3. an alien by the grant of the King, might have an action depending betwixt him and a denizen, per medietatem linguæ, which see 22 E. 3. 14. and afterwards to make the same a general law, the statute of 27 E. 3. was made; but the same doth not extend to cases where the King was party, which defect was supplyed by the statute of 28 E. 3. cap. 13. Afterward came the stat. of 2 H. 5. by which it is enacted, that where the debt or damages amount to 10 marks every juror retorned for the trial, should be able to expend lands of the value of 40s. which was mischievous as to aliens; and for the remedy of that, the statute of 8 H. 6. cap. ult. was made, which took away the effect thereof, as unto aliens; then came the statute of 27 Eliz. which enacted, that every juror, &c. should expend 4l. lands, but that is where 40s. was required onely, and doth not extend to our case; and therefore the venire facias in our case, was not well awarded, to which it was said by the clarks, that after the stat. of 27 Eliz. it had always so been, to make the venire facias generally according to the

statute; but that is not a thing material, and the sheriff needs not regard that: wherefore it was holden; that the venire facias in the principal case was well awarded.

PASC. 32 ELIZ. IN THE KING'S BENCH.

CL. MINGEY AND EARL'S CASE.

In debt upon an obligation, the defendant pleaded, that the obligation was with condition, that whereas the defendant had sold to the plaintiff certain wood, growing upon certain lands, called S. in the county of Sussex. If the plaintiff might quietly take and enjoy the said woods; and if the ground whereupon it groweth be four miles from the town of Rye, that then, &c. And for plea he said, that the plaintiff had quietly taken and enjoyed the said wood, and that the said land, by the next high and usual way for carriages, is 4000 paces from the town of Rye, reckoning to every pace five foot; upon which the plaintiff did demur in law. Gawdy, Justice, For the computation of a mile, in common understanding, it is 1000 paces, and if it shall be counted by the common way, is the doubt; but the meaning of the parties was, that the plaintiff by felling of that wood, should not encur the damage of the statute of 23 Eliz. cap. 4. And the statute doth not respect the way of carriage, but that altogether, and to all intents, it be the distance of four miles betwixt the place where, &c. and the said town of Rye; and here it is not material which is the common and usual way to Rye for carriages; but the nearness of the place where, &c. Quomodocunque, is the matter; and therefore the defendant ought to have pleaded, that the place where, &c. is every way distant four miles from Rye; and as to that, that he hath answered four miles, with 4000 paces, the same is well enough; for although he doth not answer directly the words; yet if he doth **[114]** answer in effect, it is well enough; for 1000 paces, and a mile, are all one in substance: Wray, The distance shall be accounted the nearest way, not as a bird may fly.

1 Cro. 212, 267.

TRIN. 31 ELIZ. IN THE KING'S BENCH.

CLII. WELLOCK AND HAMMON'S CASE.

[See *Pickwell* v. *Spencer*, 1871-72, L. R. 6 Ex. 191; L. R. 7 Ex. 105.]

This case is reported by Sir Edw. Coke, in his 3 reports: see the principal case there. Here is a limitation, and not a condition; for if it should be a condition, it should descend to the heir at the common law, which is the devisee, and so shall be extinct in his person, and then the restraint is of no effect, for there shall be then no means to compell the heir who hath the land, to pay the legacies, nor have the legatories any remedy to compell the son to pay the legacies, which shall not have effect, if it be not taken by way of limitation: and to that intent, Scholasticas case was cited, 15 Eliz. Dyer, 317. And this word, paying, in a devise, shall never be construed to be a condition. And it was holden by the justices, that where a man deviseth lands to his younger son, paying such a sum unto such, the devisee hath a fee-simple; and if he do not pay the monies accordingly, his estate shall determine, by the same limitation, and shall go to the heir without any other limitation, and the quantity of the monies, be it great or small, is not material: and they were of opinion also, that here the monies were not payable, but upon request: Coke, If a man be bound to perform covenants, and one covenant is to pay legacies, there he needs not pay them without a demand; but where one is expresly bounden to pay such a legacy, there he must pay it at his peril. And he said, that the case, 28 H. 8. Dyer 33. is not law; for there it is holden by Fitz-herbert and Baldwin, that where land was devised unto the prior, and convent of S. Barthol. ita quod reddant annuatim Decano & Capitulo Sancti Pauli. 5l. and they fail of payment of it, that their estate shall cease, and the dean and chapter, &c. shall have, &c. such conditions void. And that upon one fee-simple, another fee-simple cannot be limited; for by Coke, Common

experience is otherwise, that upon a fee-simple determinable, another fee-simple may be limited; which Gawdy, Justice granted: and as to the principal case, judgment was given, with the limitation.

3 Co. 20. 1 Cro. 204, 205. 2 Cro. 56, 57. 1 Roll 439.

PASC. 28 ELIZ. ROT. 485. IN THE KING'S BENCH.

CLIII. PARKER AND HARROLD'S CASE.

In debt upon an obligation, the condition was, that whereas the plaintiff and defendant be now joyntly seised of the office of the register of the Court of Admiralty, if the defendant shall permit the plaintiff to use the said office, and take the profits of it wholly to his own use during his life, without lett or interruption done by him, that then, &c. The defendant pleaded, that the custome of the realm of England is, that the Lord Admiral for the time being, might grant the said office, and that such grant should be good but for the life of the grantor; and shewed farther, that the Lord Clinton, Lord Admiral; granted the said office unto the plaintiff and the defendant, and died; and that the Lord Howard was appointed Lord Admiral, and that he 27 Eliz. granted the said office to one Wade, who ousted and interrupted him, before which time, the defendant did suffer the plaintiff to enjoy the said office, and to take the profits of it, upon **[115]** which the plaintiff did demur in Law, Coke argued for the plaintiff, that the plea of the defendant is not good; for he hath not entitled the Lord Admiral to grant the office; for he hath said, that the custome of the realm of England is, and that cannot be good, for it cannot be tried; for a visne cannot be from the realm of England: also if it lie through all the realm, then the same is common law, and not custome, which see, Br. Custome 59. and see 4 & 5 Ph. & Ma. 152, 153. an express case of the same office, and there he prescribed, per consuetudinem in curia, &c. and also that such grant is good but during the life of the admiral who granteth it: also he doth not answer to any time after the grant of the Admiral Howard; for if we were lawfully put out by Wade, yet the defendant against his bond, shall not put us out, or interrupt us: as 5 E. 4. 115. In a quare impedit against an abbat, and the incumbent, who make default upon the distress, upon which a writ was awarded to the bishop for the plaintiff, upon which the bishop retorned, that the incumbent had resigned, of which he hath given notice to the prior, and lapse incurred; and the bishop collates the former incumbent, and then this writ came to him; now, although the incumbent be in by title, yet he is bound by the judgment: so here, although the defendant hath another title, and the former title of the plaintiff be determined, yet against his own bond and deed, he shall not put out the plaintiff, &c. And the Court was clear of opinion, that judgment should be given for the plaintiff; but afterwards the cause was compounded by order of the Lord Chancellour.

3 Len. 142. Antea. 103.

TRIN. 32 ELIZ. IN THE KING'S BENCH.

CLIII. BEDEL'S CASE.

The case was, that A. leased to B. certain lands for 40l. per ann. and a stranger covenanted with A. that B. should pay unto him the 40l. for the farm and occupation of the said lands. A. brought an action of covenant; the defendant pleaded, that before the day of payment the plaintiff ousted B. of his farm: it was moved by Godfrey, that it was no plea, because this is a collateral sum, and not for rent issuing out of land: also the defendant is a stranger to the contract for the farm: but the opinion of the Court was to the contrary; for the defendant hath covenanted, that the lessee shall pay for the said farm and occupation 40l. so it is as a conditional covenant, and here is quid pro quo; and here the consideration upon which the covenant is conceived (scil.) the farm, and the occupation of it, is taken away by the act of the plaintiff himself.

3 Len. 159.

PASCH. 30 ELIZ. IN THE KING'S BENCH.

CLIV. HEAL'S CASE.

Heal, a bencher of the Inner Temple, being at the bar; Wiat, another apprentice at law, informed the Court against the said Heal, and shewed, that where his client had obtained a judgment in the King's Bench: the said Heal, being of council with the other part, did advise his client to bring the party, who had obtained the judgment, into the Chancery, and he procured an order against him, by which he was cast into prison: which matter Heal could not excuse, but submitted himself to the Court, saying, that he had seen a precedent which induced him so to doe: and that was the case of one **[116]** Prince, where a judgment given in this Court was drawn into question and examined in the Chancery: but the Justices said, that the same was an ill precedent, and against the statute of 4 H. 4. which is, that no judgment be undone but by error or attaint.

Co. 3 Inst. 12. 123, 124. 4 Inst. 86, 91.

PASCH. 30 ELIZ. IN THE KING'S BENCH.

CLV. GRAY AND CONSTABLE'S CASE.

Sir Thomas Gray covenanted with the Lady Constable, that where he is possessed of a lease for twenty one years of certain lands, that he will assure, convey and assign the said lease to one Nevil, excepting the two last years of the said twenty one years: and he said Sir Tho. Gray was bound in a bond to perform the covenants of the said indenture; upon which indenture the lady brought debt against the said Sir Tho. Gray, who pleaded the conditions, and the performance of them: the plaintiff replicando said, that the defendant non assuravit, conveiavit, & transposuit, Anglice, set over, the said lease; upon which they were at issue: and at the day of the nisi prius, it was moved by Cooper and Beaumont, that the issue was misjoined; for the defendant pleads (as the covenant it self is) that he had assured, conveyed, and assigned the lease, and so pleaded the performance of other covenants, &c. The plaintiff assigned the breach in this, quod non assuravit, conveiavit, & transposuit, Anglice, set over; which word [transposuit] is not in the covenant, nor in the pleading of the performance thereof: and the English word [set over] although it sounds the same with assigning, doth not help the matter; and if the Latin word doth not agree with the matter, non refert of the English word, although in the plea there be this word Anglice [set over.] Note, the covenant was (ut supra) the plaintiff assigned the breach, quod non assuravit, conveiavit, & transposuit, Anglice [set over,] &c. And the defendant pleaded, quod assuravit, conveiavit, & transposuit, Anglice, set over, &c. And the Court was clear of opinion, that the issue for that cause was not well joined: and afterwards, by the assent of the parties it was amended.

PASCH. 30 ELIZ. IN THE KING'S BENCH.

CLVI. DOGHEAD'S CASE.

An information was upon the statute of 27 Eliz. cap. 4. by the party grieved; which statute gives unto the King one moyety of the value, and the other moyety to the party grieved: the plaintiff was nonsuit; it was holden by the Court, that he shall not pay costs and damages by the statute of 18 Eliz. for the statute (as the title of the same doth imply) is to redress disorders in common informers; and so is the preamble: and the words also of the clause of costs and damages are [every such informer] and so by Ive, secondary of the Crown Office, an action given to the party grieved is not a popular action; and the statute of 18 Eliz. extends onely to popular actions.

Hutt. 35. Hob. 250. Antea 110. 1 Cro. 177. And. 116.

[117] PASCH. 30 ELIZ. IN THE KING'S BENCH.

CLVII. CONY AND CHOMLEY'S CASE.

In an ejectione firmæ, after verdict in arrest of judgment, it was moved, that the plaintiff had declared in ejectione firmæ, quod cum Robertus Diggon per indenturam suam gerent. dat. 20 Maii, dimisit, &c. where he ought to have said, iisdem die & anno: for although the indenture bear date (ut supra) yet it may be that it was delivered at another day, and then it doth begin to be a demise. And if in an action upon the case upon assumpsit to pay money upon request, although it be found for the plaintiff, yet if no day be put in the declaration when the request was made, but onely [licet sæpius requisitus] in case where a request ought to be made, there the plaintiff shall not have judgment; as it hath been oftentimes adjudged, quod omnes justiciarii concesserunt: but yet afterwards, notwithstanding the objection aforesaid, judgment was given for the plaintiff.

1 Cro. 773. 890.

MICH. 29 AND 30 ELIZ. IN THE COMMON PLEAS.

CLVIII. MARSH AND JONES'S CASE.

In a replevin, the case upon the evidence was, that before the Statute of Quia Emptores terrarum, a man made a feoffment in fee, to hold of him by the service, solvendi post quamlibet vacationem sive alienationem, the value of the annual profits of the lands: and it was holden by the Court, that the value shall be intended such a value, as was the value at the time of the feoffment made, and not as it is improved by succession of time.

3 Len. 114.

MICH. 29 AND 30 ELIZ. IN THE KING'S BENCH.

CLIX. WILLOUGHBY'S CASE.

William Willoughby and two other were indicted, that whereas the parson of the church of D. and all his predecessors have used to have common in such a place, the said Willoughby, &c. vi & armis, &c. had inclosed it, and the inclosure was upon their own lands: it was moved, that upon this matter they ought not to be indicted, but the party grieved is put to his action; as where a presentment is made of a disseisin: see 27 Ass. 20. And it was the case of one Morden, 29 Eliz. upon the stopping of a way upon his own land: and it was said, that if it should be upon the lands of another, it were not material; for it is but a hindrance from the taking of common, which cannot be vi & armis. Also it was said, that the indictment is recorded and certified, as found before the justices of assise and gaol-delivery, and they cannot take such presentments: and although the said justices of assise and gaol-delivery were in rei veritate also justices of the peace, yet the indictment being recorded, and certified to be taken before them, in quality of justices of the peace, will not help it: for the Court shall not respect any other authority, but that which appeareth upon record; and therefore for the causes aforesaid they were discharged by the Court.

1 Cro. 3 Len. 216. 1 Cro. Maddox Case.

[118] HILL. 30 ELIZ. IN THE KING'S BENCH.

CLX. COLLET AND ROBSTON'S CASE. ERROR.

Collet and Andrews recovered in a writ of account against Robston: Hil. 29 Eliz. Rot 1. and now Robston brought a writ of error, and assigned for error, that whereas the said writ of account was brought against the said defendant as receiver of monies, for to render account, quando ad hoc requisitus fuerit, the said writ ought to have been more special: but the opinion of the Court was, that the writ in his generalty was holden good: and so it was adjudged in the case of one Gomersal, (scil.) quod reddat ei rationabilem computum suum de tempore, quo fuit receptor denariorum ipsius A. Another error was assigned, that the jury had assessed damages which ought not to be given in an action upon account: which see 2 R. 2. Acco. 45. and 2 H. 7. 13. But see the Book of Entries, fo. 22. In a writ of account against one, as receivor to account render, damages were given: for if my bailiff, by imploying of my moneys, whereof he was the receivor, might have procured to me profit and gain, but he neglects it, he shall be chargeable to me in right, and shall answer for it. And here in our case, damages shall be given: and afterwards, notwithstanding all objections made to the contrary, the judgment given before was affirmed.

3 Len. 149. 1 Leon. 302.

HILL. 30 ELIZ. IN THE KING'S BENCH.

CLXI. YATES'S CASE.

A writ of error was brought by Yates and others upon a judgment given in a writ of partition; and it was assigned for error, that the writ of partition was not sufficient; for it is there set forth, that the plaintiffs insimul & pro indiviso tenent cum defendente, &c. and do not shew, of what estate, or whose inheritance: see F. N. B. 61. 5. and 62. a insimul & pro indiviso tenent de hæreditate quæ fuit A. matris of the plaintiff and the defendant. And yet see F. N. B. 62. A. A writ of partition betwixt strange persons, without naming hæreditate in the writ: and see also that a partition of lands in London, without shewing of what estate: see Register 76. 6 Eliz. in a partition by Courtney against Polewheel, no estate shewed in the writ: so betwixt Finch and Firrel, and betwixt Fry and Drake, 14 Eliz. Devon. 26 Eliz. betwixt the Lord Cheney and Bell: and Mich. 4 and 5 Ph. and Ma. Rot. 208. It was holden, that it is not necessary in such a writ to shew the estate: and such also was the opinion of the Court in the principal case: but tenants in common ought to shew it in the count: and the judgment given was affirmed.

3 Len. 231. 1 Cro. 759, 760.

MICH. 29 AND 30 ELIZ. IN THE KING'S BENCH.

CLXII. PHILLIPS AND STONE'S CASE.

In debt upon an obligation, the defendant pleaded the statute of 23 H. 6. upon which this special matter was found, that one J. S. had heretofore recovered against him 100l. in an action of debt, and upon the capias ad satisfaciend. he was taken and committed to the plaintiff, who was gaoler, &c. to the sheriff, and so being in exe-[119]-cution he escaped and afterwards he was re-taken by the plaintiff, and kept in prison; and so being in prison, made the bond upon which the action is brought: it was said by the Court, that if a prisoner being in execution, escapes with the permission of the gaoler, the execution is utterly gone and extinguished, and the plaintiff, at whose suit he was taken in execution, shall never resort to him who escapes, but shall hold himself to the goaler for his remedy: but if such a prisoner escapeth of his own wrong

without the privity or consent of the gaoler, the gaoler may well take him again for his indemnity, untill the plaintiff hath determined his election, whether he will have his remedy against the gaoler, or that he will maintain his execution : 13 H. 7. 1, and 2. But as unto the statute of 23 H. 6. the Court was of opinion, that posito that the party who escapes cannot be taken again ; yet being taken, the bond which is taken colore officii, is within the said statute, because the party was re-taken colore executionis, and so the bond was void.

MICH. 29 AND 30 ELIZ. IN THE KING'S BENCH.

CLXIII. GERING'S CASE.

In debt upon an obligation, against one as executor; the case was, that t testator of A. by his will, appointed certain lands, and named which should be so by his executor, and the monies thereof coming, to be distributed betwixt his daughters when they have accomplished the age of one and twenty years. The lands are sold, and if the monies thereof being in the hand of the executor, untill the full age of the daughters shall be assets to pay the debts of the testator, was the question; and it was the opinion of the whole Court, that the said monies should not be assets: for they said, that that money is limited to a special use: quære of this case; for I have heard, that it was afterwards resolved in another case, that the monies in the like case remaining in their hands should be assets.

1 Len. 87.

MICH. 29 AND 30 ELIZ. IN THE COMMON PLEAS.

CLXIV. DAVIES AND PERCIE'S CASE.

Between Margaret Davies and one Perce, the case was, that one Anth. Perce, upon speech of a marriage to be had betwixt the said Anthony, and the mother of Margaret, covenanted by indenture with certain friends of the mother, to pay to all the daughters of the mother 20l. a piece at their several ages of four and twenty years, and to perform the covenant, was bound to the said friends in an obligation. Anthony Perce made his will, and willed, that his executors should pay to each of the daughters 20l. at their several ages of four and twenty years, in discharge of the said covenant, and died; now the said Margaret sued the executors in the Spiritual Court for the 20l. bequeathed to her, and upon this matter, the executors prayed a prohibition: and by the Lord Anderson, a prohibition will lie; for here is no legacy, but the will refers to the covenant, and is in discharge of the covenant: as if A. be indebted to B. in 20l. And if A. by his will willeth that his executors shall pay to the said B. 20l. in discharge of the said debt, the same is not any legacy, but a declaration that the intent of A. is, that the debt shall be paid. Periam, Justice, was of the same opinion as the Lord Anderson; and Anderson said, if a legacy be bequeathed to me, and the executor covenants to pay **[120]** me the said legacy, and afterwards J. sueth the executor in the Spiritual Court, he shall have a prohibition; quod cæteri justiciarii negaverunt, see F. N. B. 44 Br. If the testator by his will charge his executors to pay his debts and his creditors, they do not pay them, and the creditors sue them in the Spiritual Court, they shall not have a prohibition, which Anderson vehementer negavit; and afterwards the justices looked and advised upon the indenture, and found that the indenture and obligation were made to the friends of the mother of the daughters, and not to the daughters themselves, to whom the legacies were give and bequeathed; and therefore were of opinion, that a prohibition did not lie.

2 Roll 284. Goldb. 58. Vide 6. H. 3. Prohib. 17.

HILL. 30 ELIZ. IN THE COMMON PLEAS. ROT. 336.

CLXV. THORP AND TOMSON'S CASE.

In ejectione firmæ, it was found by special verdict, that one Thimblethorp was seised of the lands where, &c. and by contract, sold the same to Thorp, but no assurance was yet made; and afterwards, Thorp before any assurance made, sold likewise the said lands to Tomson, and afterwards, Thimblethorp made assurance thereof to Tomson, and afterwards Tomson being seised, devised the lands to his younger son, by these words: I bequeath to R. my son, all the lands which I purchased of Thorp, whereas, in speaking the truth according to law, he purchased them by immediate assurance of Thimblethorp, although he did contract with Thorp for the same; and the opinion of the whole Court was without argument either at bar, or at the Bench; that the devise was good; for in the repute of the people, they preseised of Thorp, for Tomson paid the monies for the same to Thorp, and the Court commanded judgment to be entred accordingly: and afterwards exception was taken to the verdict, because it is not found by what service the land devised was holden, socage, or knight-service; nor that the devisor is dead; and these were holden to be material exceptions, and for that cause, the judgment was stayed, and afterwards the verdict was rejected, and a venire facias de novo awarded.

Dyer 376.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CLXVI. GROVE AND SPARRE'S CASE.

An action of trespass was brought by Grove against Sparre, process continued untill Sparre was outlawed; and now it was moved unto the Court, to avoid the outlawry, that the original writ, and all the judicial process thereupon are directed Vicecom. Wigorn. and in the filazar's roll, in the margent is written, Hereford, and in the body of the said roll is written, Et prædictus Grove obtulit se quarto die post, et vicecomes modo mandat. quod prædictus Spar non est inventus, &c. Ideo præceptum est vicecom. &c. and at the capias retorned, it is entred in the roll as before, Hereford: whereas the capias is directed Vicecom. Wigorn. as of right it ought to be: and the roll was perused by the Court, and it was, ut supra, and that without any suspicion of rasure; for which the Court gave day to the Queens Serjeants to advise themselves to maintain the outlawry; and the defendants council prayed, that a recordatur be made in what estate the roll now is, for doubt of amendment by way of rasure, or otherwise; which was granted by the Court.

[121] MICH. 33 ELIZ. IN THE EXCHEQUER.

CLXVII. RUSHTON'S CASE.

See this Case vouched in C. 4 part, in Palmer's Case.

Rushton was indebted to the Queen in 200 marks, upon which issued an extent against him out of the Exchequer to levy the said sum to the sheriff of Suffolk; and it was found by inquisition, that Rushton 22 Junii, 22 Eliz. was possessed of a lease for the term quorundam annorum adhuc venturorum; and the debt of the Queen did begin 12 Febr. 17 Eliz. Exception was taken to this office, because that the term is not certainly found but generally quorundam annorum; and it was said by Coke, that the office was good, notwithstanding that exception, for the Queen is a stranger to the lease, and therefore ought not to be forced to find the precise certainty; which see in Partridge's case in Plowd. The defendant had made a lease pro termino quorundam annorum contra formam statuti: also Rushton came not to the lease by contract, but

by compulsary means, as by execution, &c. And here we are not in the case of pleading, but of an office, where such precise form is not requisite: as if it be found by office, that J. S. was seised in tail, without shewing of whose gift the same was, it is good; so an indictment, de morte cujusdam hominis ignoti, the same is good, but such endictment taken before the coroner, is not good: and that a lease for years may be extended, see 21 Ass. 6. If a man be indebted to the Queen, being a lessee for years, and afterwards before any extent comes, sells his term, the same cannot be extended after. And here it appears, that this lease was to begin at a day to come, and that the lessee did enter before the day, by which he was a disseisor; and so he said he had lost his term. Tenant for the life of another is disseised, and dieth, he remains a disseisor, and the occupancy doth not qualifie such disseisin: and afterwards the inquisition for the incertainty aforesaid was holden void, and a new commission was awarded.

3 Len. 204.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CLXVIII. HOLLAND AND BOIN'S CASE.

In a replevin by Thomas Holland against William Boin's, who made conusans, as bailey to Thomas, Lord Howard, and shewed, that the prioress of the late dissolved priory of Hollywell was seised of the manor of Priors in the county of Hertford, and granted the same by words of dedi & concessi pro certa pecuniæ summa, to Thomas Audley, Chancellor of England, and his heirs, who entred and died seised, and that the said manor, inter alia, descended to Mary, daughter and heir of the said Thomas Audley, who entred, and also died seised, by force whereof the said manor descended to the said Thomas Lord Howard, &c. and shewed, that the said conveyance, by the prioress to Audley bore date 4 Novemb. 29 H. 8. and then enrolled in the Chancery. The plaintiff in bar of the avowry, shewed, that after the making and enrolling of the said conveyance, the said prioress leased the said land to Sir H. Parker for 99 years, and conveyed the said land to him, and shewed farther, that the said conveyance specified in the conusans was primo deliberatum, 4 Nov. 31. H. 8. Absque hoc, that the said prioress, the said 4 Novembris, 29 H. 8. dedit & concessit, the said manor to the said Audley, upon which it was demurred in law; and the Court was clear of opinion, that the averment of primo deliberatum, **[122]** against a deed enrolled ought not to be averred, for by the same reason it may be averred never delivered, and so upon the matter, non est factum: and it was farther objected, that bargain and sale by a corporation is not good; for a corporation cannot be seised to another use, and the nature of such conveyance is to take effect by way of use in the bargainee, and after the statute to draw the possession to the use; but the Court utterly rejected that exception was dangerous, for such was the conveyance of the greater part of the possessions of monasteries: and by Shuttleworth Serjeant, Although such a corporation cannot take an estate to the use of another, yet they may charge their possessions with an use to another.

Note, Pasch. 30 Eliz. it was adjudged for the plaintiff in the replevin; (scil.) the conveyance of the prioress was not well pleaded; for it ought to be plead as a bargain and sale, and not as a grant: and judgment was given accordingly.

3 Len. 175. 1 Len. 183. Ow. 138.

MICH. 28 & 29 ELIZ. IN THE KING'S BENCH.

CLXIX. VENABLE'S AND SERJEANT HARRIS'S CASE.

The case was, a lease was made to A. and B. for their lives, the remainder to Thomas Venables in tail, who 3 Eliz. was attainted of felony; 23 Eliz. was a general

pardon: Thomas Venables 24 Eliz. levied a fine, and suffered a common recovery to the use of Harris Serjeant. An office is found, Harris traverseth the office, and upon that there is a demurrer. Leke argued, that traverse doth not lie in this case: 4 H. 7. 7. where the King is entitled by double matter of record, the party shall not be admitted to traverse, nor to his monstrans de droit, but is put to his petition, which see, 3 E. 4. 23. in the case of the Earl of Northumberland, where the tenant of the King is attainted of treason, and the same found by office: see also 11 H. 4. in the case of the Duke of Suffolk, and that is not helped by the statute of 2 E. 6. cap. 8. for the words are untruly found by office, but here the office is true. By this attainder, Thomas Venables is utterly disabled to do any act; for by Bracton, a person attaint, shall forfeit patriam, regnum & hæreditatem suam: 11 H. 4. one was attainted of felony, and before office found, the King granted over his lands: also he is not helped by the general pardon; for before the general pardon, he had a special pardon, so as the general pardon non operatur. But the justices said, the forfeiture did remain untill the general pardon. Harris, contrary; And he put the case of Sir James Ormond, 4 H. 7. 7. where the King is entitled by matter of record, and the subject confesseth the King's title, and avoids it by matter of as high nature as that is for the King, traverse in that case lieth: and if the King be entitled by double matter of record, if the party doth avoid one of the said records by another record, he shall be admitted to his traverse; and so here we have the pardon, which is a record, and that shall avoid the record of the King: see 3 E. 4. 24. in the Earl of Northumberland's case; and here the pardon hath purged the forfeiture, in respect of the offence: and he said, tenant in tail being attainted of felony, shall not lose his lands, but the profits onely, for he hath his estate by the will of the donor, and there is a confidence reposed in him: as in Walsingham's case, he cannot grant his estate over: and see Wrothe's case; an annuity granted, pro consilio impendendo cannot be granted over or forfeited, for there is confidence: and see Empson's case, and Dyer 2. 29 Ass. 60. If the issue in tail be outlawed of felony in the life of his father, and getteth his charter of pardon in the life of his father, after the death of his father he may enter; but by Thorp, if the issue in tail getteth his charter of pardon after the death of his father, then the King shall have the profits of the lands during the life of the issue: and the case of **[123]** Cardinal Pool was debated in the Parliament, 27 Eliz. that he being Dean of Exeter, was seised of lands in the right of his church, and was attainted of treason: it was holden, that he should forfeit the profits of such lands: but admit, that by this attainder the land be forfeited, yet the party hath the freehold until office found: see Nicols's case in the Commentaries: and see also the case of the Dutchy in the first Commentaries. And here the pardon hath dispensed with the forfeiture. Tenant of the King alieneth in mortmain, before office found, the King pardons it, this is good. The Lord Poynings conveyed all his lands to Sir Adrian Poynings, who was an alien, and afterwards is made a denizen, and the King pardons him, and releaseth unto him all his right in the said lands without any words of grant; and it was adjudged, the same shall bind the King. And he said, that he had found a good precedent, 14 H. 7. where a general pardon before seisure into the King's hands was allowed, contrary after seisure without words of grant. See Br. 29 H. 8. Charter of Pardon 52. If a man be attainted of felony, and the King pardons him all felonies, & executiones eorundem, the same shall not serve for life and land, if no office be found, but it shall serve for the goods without words of restitution and grant; for the King is entituled to them by outlawry without office, but the King is not entituled to the lands untill office be found: see ibid. 33 H. 8. 71. The heir intrudes, and before office found the King pardons; now the heir is discharged as well of the issues and profits, as of the intrusion it self, and also of livery: but a pardon given after office is available for the offence, but not for the issues and profits: and he cited the case of Cole in the first Commentaries, where a pardon was granted mesne betwixt the stroke and the death: see 35 H. 6. 1. 1 E. 4. 1. 8 Eliz. Dyer 249. Brereton's case, 11 Eliz. Dyer 284, 285.

Egerton, Solicitor to the contrary; This traverse is not good; for he that traverseth, hath not made title to himself as he ought, upon which the Queen may take issue; for it is at the election of the Queen to maintain her own title, or traverse the title of the party. At the common law, no traverse lay but where the livery might be sued;

but that is helped by the statute of 34 E. 3. cap. 14. but where the King is entituled by double matter of record (as in our case he is) no traverse is allowed until 2 E. 6. cap. 8. And in such case two things are requisite: 1. That the office be untruly found: 2. That the party, who is to be admitted to his traverse, have just title or interest of estate of freehold, &c. But in our case, the office is confessed by the traverse to be true, although that the conveyance be not truly found: also Harris, at the time of the office found, had not just title but an interest came unto him long time after the office found: also the traverse is not good, for he traverseth the matter of the conveyance, which is not traversable; for if the King hath title, non refert quomodo, or by what conveyance he hath it. As to the matter in law (scil.) tenant in tail in remainder is attainted of felony, if the King during the life of tenant in tail shall have the freehold: and he conceived that he should, for it shall not be in abeyance, and it cannot be in any other; for when he is attainted, he is dead as unto the King. The chief lord cannot have it, for tenant for life is alive, and also he in the remainder in fee, &c. the donor shall not have it, for the tenant in remainder is not naturally dead, but civilly: and the land cannot revert before the tenant in tail be naturally dead without issue: but if there were any other in whom the freehold might vest and remain, then the King should not have the freehold, but onely the profits. So if the tenant be attainted, the lord shall have the lands presently; 3 E. 3. 4 E. 3. The husband, seised in the right of his wife, is attainted of felony; the King shall have but the profits, for the freehold vests in the wife, and if the lord entreth, **[124]** the wife shall have an issise. And tenant in tail may forfeit for his life, as he may grant for his life: see old N. B. 99. If tenant in tail, for life, dower, or by the curtesie, be attainted of felony, the King shall have the lands during their lives; and after their deceases, he in the reversion shall sue unto the King by petition, and shall have the lands out of the King's hands: and there it is farther said, that the lord by escheat cannot have it, for the party attainted was not his very tenant, nor he in the reversion, for the term yet endures. But now it is to see, if the freehold be in the King without office: and he conceived and argued, that it was: where the King is entituled to an action, there the King ought to have an office, and a scire facias upon it: as where the King is entituled to a cessavit, action of waste, &c. 14 H. 7. 21. where the entry in case of a common person is necessary, there it is requisite that there be an office for the King: as if a villain of the King purchaseth lands, or an alien born, &c. so for a condition broken, mortmain, &c. And in some cases, an office is onely necessary to instruct the King how he shall charge the officer for the profits which may be supplied as well by survey, as by office: as if the King be to take by descent, or as the case is here. And true it is, that a person attainted of felony may during his attainder purchase lands, and yet he cannot hold it against the King: and it is clear, that by the common law in such cases, the land was in the King, but not to grant, for the statute of 18 H. 6. was an impediment to it: but now that defect is supplied by the statute of 31 H. 8. cap. 20. So that now the King may grant without office: see Doughtie's case, 26 Eliz. And in our case an office is not necessary to entitle the King, but for explaining of his title: and see 9 H. 7. 2. The lands of a man attainted of high treason are in the King without office; so where the King's tenant dieth without heir; or tenant in tail of the gift of the King dieth without issue: see Br. Office before the Escheator 34. and see 13 H. 4. 270. A man is attainted of treason, the King before office grants his lands and goods. Things which lie in grant, as advowsons, rents, remainder, such things upon attainder are in the King without office. As to the general pardon of 23 Eliz. he said, that that doth not extend to this case; and that this interest of the Queen by this attainder doth not pass by that pardon out of the Queen, so if the Queen had but a right or title onely.

Popham, Attorney General; By this attainder the estate of him in the remainder in tail, accrueth unto the Queen for the life of him in the remainder; for by our law, felony is punished by the death of the offendor, and the loss of his goods and lands for the examples of others, therefore nothing is left in the party: tenant for life is attainted of felony, the King pardoneth him his life, yet he shall have his lands during his life, and he may dispose of the same for his life: and so is it of tenant in tail, for he may forfeit all that which he hath, and that is an estate for his life, which

is a freehold. If lands be given to one and his heirs for the term of the life of another, and the donee be attainted of felony, the King shall have the land during the life of cestuy que vie, for the heir cannot have it, because the bloud is corrupt, and there is not any occupancy in the case: for 17 E. 3. the justices would not accept of a fine for the life of another, because there might be an occupant in the case: but for a fine of land to one and his heirs for the life of another, they would take a fine, for there is no mischief of occupancy. Land is given to A. for life, the remainder to B. for life, the remainder to the right heirs of A. who is attainted of felony; B. dieth, now the King hath the fee executed. And here in our case, if the tenant for life had been dead, no præcipe had lien against him in the remainder **[125]** being in possession, but the party who hath right is to sue unto the King by petition. 4 E. 3. If one seised of lands in the right of his wife for life be attainted, the King shall have exitus & proficua: but he conceived that case not to be law: for see F. N. B. 254. D. The husband seised in the right of his wife in fee, is outlawed for felony, the King seiseth, the husband dieth; now shall issue forth a diem clausit extremum, the words of which writ in such case are, quia A. cujus terr. & tenement, quæ ipse tenuit de jure & hæreditate N. uxoris suæ adhuc superstitis occasione ejusdem utlagar' in ipsum pro quadam felonia unde indictatus fuit, &c. in man. domini H. patris nostri extiterunt, &c. therefore the King had not the issues onely, but also the lands: see to the same purpose the Register 292. b. Stamford's Placita Coronæ, 186, 187. affirms, that tenant in tail being attainted of felony, shall forfeit his lands during his life. And he said, that the estate of Thomas Venables was in the King without office not to grant, for that is restrained by the statute of 18 H. 6. but it is in him before office, so as he who hath right ought to sue to the King by petition, if he will have his land: yet he conceived, that before the statute of 18 H. 6. the King might grant the land before office, as it appeareth by Thirning, 13 H. 4. 278. who was before the said statute: so if the King's tenant makes a lease for years, the remainder over to another in fee, who dieth without heir; the remainder is in the King without office, because a common person in such case cannot enter, but a claim is sufficient, and therefore it shall be in the King without office. As to the pardon, he said, that it doth not extend to this estate, for this is a freehold, ergo, not within the pardon: as if the King's tenant be attainted of felony, and the King pardons him all offences, and all things which he may pardon, these words shall not go nor extend to freeholds, but onely unto personal matters, and such punishments and peins which do concern chattels. But it may be objected, that by this pardon, title of quare impedit, and re-entries for conditions broken are excepted; and therefore if they had not been excepted, they had been remitted by the pardon; and therefore this pardon shall extend to inheritances and freeholds: as to that, I say, that such exceptions were not in use in the time of H. 4. and yet inheritances and freeholds were not taken to be within such pardons, and such exceptions did begin 5 Eliz. And he said, he had been of council in such cases where it hath been taken, that such pardons did not extend to freeholds: as an abbat was disseised, and afterwards during the disseisin the abby is dissolved; the King makes such pardon, the same doth not transfer the right of the King, and in that pardon are divers exceptions of goods and chattels in many cases, and therefore it cannot be intended that the pardon doth extend to freeholds. And see the said Act of pardon: the Queen grants all goods, chattels, debts, fines, issues, profits, amercements, forfeitures, sums of moneys; which word [forfeiture] shall be intended of a personal forfeiture, & non aliter, for it is coupled with things of such nature. And as to the traverse, he said, it did not lie in this case; for the office is not untrue, but true in substance, although void in circumstance: and also the King here is entituled by double matter of record, (scil.) the attainder and the office: and he said that the statutes of 34 and 36 E. 3. which gave traverse, are are to be intended of offices found virtute officii, and not virtute brevis, for then escheators were very troublesome: and the statute of 2 E. 6. doth not give traverse, but where the office is untruly found; as if tenant of the King be disseised, and the disseisor be attainted; the Queen seiseth the land: now the disseisee hath not remedy by traverse upon the statute of 2 E. 6. but is put to his monstrans de droit, for the office is true: but if I **[126]** be tenant of the King, and seised of land accordingly, and it was found that J. S. was seised of my land, and attainted, &c. whereas in truth

he had not any thing in my land, there traverse lieth, for the office is false; and so in our case, for the traverse it is at the common law: and it was true that Venables was seised.

Coke to the contrary; and he said, that by the attainder the Queen hath gained but a chattel; and that notwithstanding this forfeiture, if Venables had been in possession, a præcipe should be brought against him: and where it hath been said by Mr. Attorney, that writs set down in the register are the best expositours of our law, the same is not so; for the register saith, that waste lieth notwithstanding a mesn remainder, which is not now law, but it hath been clearly ruled to the contrary: and see accordingly 50 E. 3. the register therefore and the writs are subject to the judgment of our law; and the writ of diem clausit extremum is not to the contrary; for I confess, that in such case the land shall be seised into the hands of the King, but the King shall not have but a chattel therein: it hath been argued, it may be granted, therefore it may be forfeited; nego consequentiam: for a man seised in the right of his wife, may grant, but not forfeit: gardian in socage may grant, but not forfeit; the husband may grant a term for years, which he hath in the right of his wife, but he cannot forfeit it. A woman inheretrix taketh a husband, who afterwards is attainted of felony, the King pardons him, they have issue, the husband shall be tenant by the curtesie, which proveth, that the King hath not the freehold by that attainder. Before the statute of Westm. 2. tenant in tail, post prolem suscitatam, might forfeit his lands, but now the statute hath so incorporated the estate tail to the tenant in tail, that it cannot be devested, even a fine levied by him ipso jure nullus, although as to the possession it be a discontinuance; and that is the reason wherefore tenant in tail shall not be seised to another's use. See Stamford 190. The husband seised in the right of his wife is attainted of felony, the King shall have the profits of the lands of the wife during the life of the husband, &c. So if tenant in tail be attainted of felony, and that is but a chattel in the lands of the wife, and also in the lands of the tenant in tail: and if the possessions of a bishop be seised into the Queen's hands for a contempt, in such case the Queen hath the possession, and not the profits onely: the same law of the lands of tenant in tail, or for life, being attainted of felony: so of seisure for alienation without license, or of the possessions of priors, aliens. See Brook Reseiser 10. So where the seisure is for ideocy. And he said, that in the principal case nothing is in the King until office: and as to the case of 13 H. 4. 6. he confessed the same; for at that time many, and amongst them lawyers and justices, were attainted by Parliament, and so was Sir John Salisbury, whose case it was; and their lands by Act of Parliament given expresly to the King: and therefore I grant that their lands were in the King before office. Tenant in fee of a common lord is attainted of felony, his lands remain in him during his life until the entry of the lord, and where the King is lord untill office be found: but in the case of a common person, after the death of the person attainted, they are in the lord before entry, and in the case of the King before office, for the mischief of abeyances. And see the Lord Lovel's case, 17 and 18 Eliz. 485, 486. Plow. where it is holden, that upon attainder of treason by Act of Parliament, the lands were not in the King without office in the life of the party attainted, upon the words of the Act, shall forfeit. See Stamford Prerogat. 54, 55. acc. He said, that this interest which came unto the King by this attainder, is but a chattel, and then it is remitted by the pardon; and so he conceived, if it be a freehold: for the words of the **[127]** general pardon are large and liberal [pardon and release all manner of treasons, &c. and all other things, causes, &c.] and here forfeitures are pardoned; and this word [things] is a transcendent, &c. and although it be a general word, yet by the direction of the Act of General Pardon it ought to be beneficially expounded and extended, as if all things had been specially set down: also the words are [pardon them and their heirs,] therefore the pardon extends to inheritance, for otherwise there is no use of that: and he conceived, that by the first branch of this Act, that the same extends to inheritances, and to acquit the lands of all incumbrances, for every offence not excepted, for there is the word [heirs,] and the third branch concerns onely chattels, and that is by the word [grant,] where the first is by words of acquittal: see 33 H. 8. br. Charter of Pardon 71. Tenant of the King dieth seised, the heir intrudes, office is found; by pardon of Parliament all intrusions are

pardoned; in that case the offence is pardoned, but not the issues and profits of the lands; but by a pardon before all is pardoned. But here in our case the office is not void; for the statute makes all precepts, commissions, &c. void, being awarded upon such forfeiture. See also in the second branch, vexed or inquieted in body, goods, or lands: and see also among the exceptions, that persons standing indicted of wilfull murther, and forfeiture of goods, lands, tenements, grown by any offence by such person: by which he said, that if such exception had not been, the land of such person, if he had been attainted upon such indictment, should be forfeited: as to the traverse, he said, that because the office is true, our plea is in the nature of monstrans de droit, although it concludes with a traverse: we vary from the office in number of the persons, and in the day of feoffment, and every circumstance in case of the King is to be traversed, and our plea in substance confesseth and avoideth the offence. Although that here the King be intituled by double matter of record, (scil.) the attainder and the office: yet one of the said records, (scil.) the attainder, is discharged by another record, (scil.) the pardon, and then but one record remains, (scil.) the office, and therefore our traverse well lieth. And he said, that by the common law there was a traverse; as where it was found by office, that the lessee of the King had committed waste, or had cessed for two years; and that in such case the lessee and tenant, in an action brought against them, may traverse the offence; therefore there was a traverse at the common law, where the King was entitled by single matter of record: so upon office finding alienation without licence, there was a traverse by the common law: see traverse in such case in the case of William de Herlington, 43 Ass. 28. See Br. Traverse of Office 54. Petition is by the common law, and traverse by the statute: Frowick in his Reading. See Stamf. Prerogat. 60. That traverse in case of goods was at the common law, but for lands by office, by 34 E. 3. 14. for before the remedy was by petition. See Co. 4. part the Sadler's case 55, 56. Traverse was at the common law concerning freehold and inheritance, but that was in special cases, (scil.) when by the office the land is not in the King's hands, nor the King by that is in possession, but onely by the office is entitled to an action, and cannot make a seisure without suit, for there in a scire facias brought by the King in the nature of such action to which he is entitled, the party may appear to the scire facias, and traverse the office by the common law. It was adjourned.

Hughs R. 13. 3 Len. 185. 4 Len. 112. 3 Len. 75. Roll. Tit. Grant. 4 Len. 112. ac. ' Godb. 351. a.

[128] MICH. 29 ELIZ. IN THE KING'S BENCH.

CLXX. SCOTT AND SCOTT'S CASE.

In a replevin, betwixt Scott and Scott, the case was, George Scott, 2 H. 8. being tenant in tail of certain lands, suffered a common recovery to the use of his last will; and 15 H. 8. made his will, by which he did declare, that the recoverors should make a good and favourable lease to Hugh Scott his younger brother: and 25 H. 8. they make a lease of the same land to the said Hugh for 199 years according to the will of the said George Scott, rendring rent, 11l. 6s. 8d. payable at the Feast of the Annunciation and S. Michael, by equall portions, and that to the recoverors, their heirs and assigns; and there was a covenant, that after the death of the recoverors, the said rent should be paid to cestuy que use, his heirs and assigns, any thing in the said indenture notwithstanding. Proviso, that if the lessee make his heir male his assignee of that term, that then he shall pay the said rent to the recoverors, their heirs and assigns, and the lessee shall not pay the rent to the heirs of cestuy que use, upon which a distress is taken, and thereupon a replevin brought. Drew argued for the plaintiff: When a condition is created, the law saith, that it shall be taken and construed favourably in the behalf of him who is to perform it: as if one be bounden to appropriate such a church to such a house before such a day at his own costs, and the obligor grants a pension out of the said parsonage, and afterwards appropriates the said church, it was holden that the condition was well performed, 3 H. 7. 4. A lease for years upon condition, to scowre the ditches, if the lessee scowreth them once, it is

well enough; and as to this word proviso, it is to see, if here it be a word conditional: in some cases, this word pro, makes a condition, as 45 E. 3. 8. Grant of a ward, pro bono servitio, if the grantee departeth out of his service, the grant is void: so if an annuity be granted unto a physician pro consilio impendendo, the same is a condition, 41 E. 3. 6. for the grantor hath not means to compell the grantee to give his council; but in some cases, this word pro, doth not make a condition: as if before the statute of West. 3. land was given pro homagio suo, there, if the homage be not done, the feoffor could not re-enter, but he ought to distrain. And I conceive, that in our case, proviso doth not make a condition. 7 H. 6. 44. A feoffment in fee with warranty, proviso, that the feoffee shall not vouch: so a grant of a rent-charge, proviso, that the grant shall not extend ad onerand. personam of the grantor; for here the proviso is rather an exception than a condition: a lease for years without impeachment of wast, proviso, that he shall not do voluntary wast, the same is a qualification of the liberty for doing wast. Grant of a manor, proviso, that it shall not extend to wood growing upon the manor, the same is an exception, not a condition. See the Bishop of York's case, 5 Eliz. Dyer 222. The said bishop made a lease for certain years of certain lands, proviso, quod tempore vacationis, the rent shall be paid to the chapter, it was holden that the proviso was not a condition. And here in this case, the will of George Scott was, that the recoverors should make to the said Hugh, a favourable lease, which cannot be, if it be a conditional lease; another point was; because the rent is not well demanded; for he hath demanded the whole rent of the year, whereas but half a years rent was onely due. Coke, contrary: Where the proviso is parcel of one sentence which contains a covenant, or abridgeth the covenant, there it shall not amount to a condition, but to an exception, as a grant of a rent-charge, **[129]** proviso, that he shall not charge the person, abridgeth the force of the grant: so a lease without impeachment of wast, proviso, that the feoffee shall not do voluntary wast, the same abridgeth the liberty; but in our case, this proviso makes a condition, and not a qualification of the sentence, or of any covenant contained in the sentence, nor doth it participate altogether with the sentence, but stands substantively, for it was a full sentence before: a feoffment in fee with warranty, proviso, that when he is impleaded, he shall not vouch J. S. the same is a good condition, for J. S. is a stranger: contrary, that he shall not vouch the feoffor: and a proviso never makes a covenant, and therefore it shall be either a condition, or void. And he said, that by the devise, Hugh Scott had a lease without any lease to be made by the recoverors. As unto the demand of the whole rent, where but half a years rent was due, the same is good enough. And so was it adjudged in a case betwixt Andrew's and the Lord Cromwell; for he is at his peril to pay the one moyety, and in as much as he denieth the whole, he denieth every part. It was adjorned.

1 Cro. 73. 3 Len. 225. 4 Len. 70.

MICH. 29 ELIZ. IN THE KING'S BENCH.

CLXXI. HAWKINS'S CASE.

One Hawkins was seised of three messuages in Bury in his demesn as of fee, and had issue, Robert, Christian, and Joan; and devised all his said messuages to his wife for life, the remainder of one of the said messuages to his son Robert and his heirs; the remainder of another of his said messuages to his daughter Christian and to her heirs, and the remainder of the third messuage, to Joan and her heirs. And farther, by his will devised, that if any of the said issues die without issue of his body, that then the other surviving shall have totam illam partem, &c. between them equally to be divided. The devisor dieth, the wife of the devisor dieth, Joan dieth, having issue, Robert dieth without issue, Christian entreth into all the house of Robert, and dieth, and her husband holds in as tenant by the curtesie. Coke, The surviving child shall have the whole, and the issue of Joan shall have nothing; and he said, that by this devise, they have an estate in tail, for the fee doth not vest in any of them; for it is written, who shall survive: but when one overlives, he shall have in fee, for these words, totam illam partem, go to the whole estate, as well as to

the whole land. I devise my land wholy to one, he hath fee thereby: and he said that the three devisees have fee-tail, and fee expectant each severally as to the messuage to him limited. Golding, contrary; Each hath an estate tail in the house devised to him, and but an estate for life, expectant upon the death of the other without issue, for there are no words by which it may appear what estate he shall have by the survivorship. I grant the case which Perkins denies, but Littleton affirms (scil.) a devise to one of lands in perpetuum; for there the intent appeareth; but where there are not words of inheritance, nor words amounting to so much, then it shall be but an estate for life: and as to the words, totam partem illam, the same is all one as if he had said, partem illam without the word totam. And also he said, that where one onely survives, no farther the estate vests; for there ought to be two to take by the survivor; for the words are, equally to be divided betwixt them, and then if it cannot accrue by survivor, then it shall descend; and if it had accrued to two by the survivor, they shall be thereof tenants in common, not joynt-tenants by reason of these words, equally to be divided. Clench, Justice, The words, totam illam partem, go to the house, and not to the estate in it: Shute, Justice, accordingly: and he [130] said, if both daughters had survived, they should have fee in the house of Robert, but not by the will, but by descent in coparcenary: also when two are dead, the son and one daughter, then it cannot be divided, therefore the will as to that is void, and then the common law shall take place, and put the house to the issue of one daughter, and of the other daughter surviving. Gawdy, Justice, Here is but an estate for life in the survivor; it hath been objected, that then having but an estate for life, the same estate is drowned by the descent of the fee-simple, so as now the estate limited by the will, is void; to which it may be answered, that although now, upon the matter it be void, yet, ab initio, it was not so; for it became void by matter of later time, (scil.) by the descent of the fee-simple; for if one of the daughters had died without issue before the death of Robert, so as the house of such daughter should have come to the said Robert and the other sister, there is no coparcenary, for the son hath all the fee, and the moyety of the same is executed, and the other moyety expectant, and the sister hath a moyety for life, and then the devise not void: also here are not two survivors, so nothing is to be divided, and therefore the law shall say, that the house of Robert is descended, (scil.) the fee of it to the daughter of Christian and Joan, and so judgment was given against the husband, who claims to be tenant by the curtesie of the whole messuage.

Postea 193. 1 Cro. 53. 3 Len. 180.

Pasc. 27 Eliz. In the Common Pleas.

CLXXII. Wye and Throgmorton's Case.

In debt upon a bond by Wye, against Throgmorton, the condition of the obligation, was to perform covenants in a pair of indentures; and the covenant wherein the breach was assigned was, that if R. W. brother of the plaintiff, should say, make assurance of such a manor to the defendant, as the council learned of the said defendant should advise, then if the defendant pays unto the plaintiff 50l. the obligation to be void; the defendant by advice of council, demanded a release with warranty, &c. And by Periam and Windham, the same is not any assurance, but a means to recover in value. Anderson, contrary: That it was a collateral warranty, &c.

Hill. 28 Eliz. In the King's Bench.

CLXXIII. Cropp and Hambleden's Case.

In trespass by Cropp against Erasmus Hambleden, upon the special verdict, the case was, that one Martin Hastings was seised of the lands, where, &c. in the right of his wife, for the life of the wife; and that they both did lease unto the defendant for years, rendring rent, payable at the Feast of S. Michael, and the Feast of the Annuncia-

tion, &c. with clause of re-entry, if the rent be behind, by a month after any of the said feasts, and after the Feast of S. Michael, 26 Eliz. and before the month expired, the lessee, the now defendant, sent his servant unto the house of the lessor, for to pay to him the rent then due; the servant went unto the house of the lessor, and there asked for him, to whom it was answered by one Mary Briggs, daughter of the wife of the lessor, who there dwelt in the said house with her mother, that the lessor was not at home, for which the said servant delivered the said rent to the said Mary, requiring her to deliver the same over to the lessor, upon his return to the house, in the name of his servant; **[131]** Mary received the said rent, and upon the return of the lessor, at his house, told him all the matter aforesaid, and that the servant of the lessor, the defendant, had required her to tender the said rent to the lessor, in the name of the defendant, and thereupon offered and tendered to him the said rent, and the lessor refused it. And the jury found, that the third half year before the tender mentioned before, the lessor commanded the said Mary to receive the rent then due, who did accordingly, and that the next half year then following, the said Mary did receive the said rent, without commandment of the lessor, but after the lessor agreed unto it, and that the immediate half year before this tender in question, the defendant paid the rent then due, to the lessor himself, who received it, and it was the opinion of Wray, Chief Justice, that this tender was good, and it is not like unto the case of an obligation; for there the obligee cannot have an action of debt before the last day: but here the lessor might have distrained, or have had an action of debt before the month expired, and so the lessor is bound by this tender; and by Gawdy, Justice, this tender cannot be said a tender by a stranger, for here Mary came in privity of the servant of the lessee, and as it is found by verdict, Mary tendered it to the lessor, as being requested by the servant of the lessee: and afterwards, upon consideration had betwixt the justices themselves; the justices viz. Clench, Gawdy and Wray, (for Shute was then sick) it was clearly resolved against the plaintiff, and that the said tender, as it is found in the verdict, is a good and sufficient tender; and the Lord Wray delivered the reason, as before, and farther said, that if the said rent had been reserved payable at the feasts aforesaid, or within a month after each of them, there the tender as above, had not been good, nor should bind the lessor; for in such case the lessor could not distrain, or have an action of debt for the said rent before the month expired. And this is a case of extremity, and deserves no favour; and here is no mischief to the lessor, for he might have had his rent in due time if he would, and his captious refusal shall not avail him; and judgment was given accordingly.

1 Cro. 48.

Trin. 33 Eliz. In the Common Pleas.

CLXXIV. Bostock and Covert's Case.

Bostock and his wife brought a writ of dower against Covert, son and heir of her former husband, who pleaded, that the husband of the demandant was seised of lands, amounting to the number of 300 acres; and held the same by knights-service, and died seised, after whose death, by virtue of the statute of 34 and 32 H. 8. he entred into 100 acres of the said lands, as the third part of the said lands descended, and held the same in severalty, being the third part of the clear yearly value of the whole discharged of dower; and that the wife ought to have all her dower out of the two parts devised. And Anderson said, that the plea was not good; for the heir who will take advantage of the statute in that point, ought to enter generally as tenant in common with the devisee, and then in a writ of dower it is a good plea: so if after his entry as tenant in common partition be made betwixt him and the devisee, such a plea is good; but here he hath entred severally into a third part, distinct from the residue, and so hath ousted the devisee of a third part severally; for which cause he cannot have advantage of this plea: to which the rest of the justices, non contradixerunt.

[132] PASCH. 37 ELIZ. IN THE EXCHEQUER.

CLXXV. SIR JOHN SOUTHWEL'S CASE.

Sir John Southwel of the county of Lancaster, 7 Julii, 19 Eliz. made a conveyance of his lands to divers feoffees and their heirs, upon condition, that they should find him and his wife, and so many persons in his house, &c. prefer his daughters in marriage, pay his debts, &c. And if there fell out at the years end upon accompt made by the feoffees any surplusage, that then at the end of every such year, they should answer such surplusage as should then remain in their hands unexpended of the rents and profits of his said lands; with clause of revocation, &c. Afterwards, the said conveyance being in force, came the statute of 23 Eliz. concerning recusants; upon which statute, the said Southwel is now endicted; and afterwards upon a commission issuing out of the Exchequer to the Sheriff of Lancaster, to enquire of the lands of the said Southwel, although against the said conveyance it was given in evidence, that after the said conveyance, the said Sir John Southwel had granted trees from off the said lands, and had received fines and incomes for leases, &c. yet the jurors charged to enquire, would not find that the said Sir John Southwel had any lands, &c. And by special command from the Queen, it was referred out of the Exchequer, to all the Judges of England, if the lands of the said Sir John Southwel conveyed as aforesaid, were subject to the said statute, and the penalties thereof. And upon a great deliberation, it was by them all resolved and agreed, that notwithstanding the said conveyance, the said lands were liable to the said statute. And as to the jurors, who against the evidence given to them for the Queen, gave their verdict (ut supra) process was awarded against them out of the Court of Exchequer, for to appear before the Lord Treasurer and the Barons. And for their said contempt, they were committed to the Fleet, and each of them fined 50l.

3 Len. 147.

TRIN. 27 ELIZ. IN THE EXCHEQUER.

CLXXVI. MOORE AND SAVIL'S CASE.

In an ejectione firmæ, by Moore against Savil, the case was, that tenant in tail leased the land to the father, mother and son for their lives, by indenture, in which it was comprehended, that forasmuch as the lessor is but tenant in tail, and so cannot by law limit these estates by way of remainder, but jointly in possession; and his intent was, that because this lease was procured and obtained at the special suit, and costs and charges of the father, that the said son should suffer his father, and after him his mother, to take the profits of the said lands demised, and to occupy and hold the said lands to their onely profit without interruption of the said son, notwithstanding his joint estate in possession with them, provisum igitur est, that if the said son shall challenge, claim, demand or take any profits of the lands so demised, or enter into the same, during the life of his said father or mother, that then the estate to him limited by the said indenture should cease and be utterly void. And it was the clear opinion of the whole Court, that this condition and proviso was utterly void, for it is contrary to the estate limited before; as in the case cited by Coke at the bar. If I lease to you my lands for 20 years, proviso, that you shall not occupy the same the two first years, the same proviso is void and contrary, and repugnant to the estate.

[133] MICH. 28 ELIZ. IN THE STAR CHAMBER.

CLXXVII. LORD CROMWEL AND TOWNSEND'S CASE.

Henry Lord Cromwel, exhibited a bill in the Star Chamber, against Roger Townsend, Esquire, for that the said Roger Townsend, in an action betwixt James Taverner plaintiff, and James Cromwel farmor, of the said Lord Cromwel defendant,

in trespass, in the favour and unlawfull maintenance of the said Taverner, did procure a partial jury to be retorned. And upon the hearing of the cause, the matter given in evidence was, that the said Taverner was a copiholder of the said Lord Cromwel, and that the said Lord Cromwel, pretending that the said Taverner had forfeited his copihold, caused the said James Cromwel to make an entry, in the right of the said lord, upon the said Taverner; upon which entry, Taverner brought an action of trespass against the said James Cromwel, in which action the parties were at issue upon the forfeiture. And before any venire facias issued forth, Taverner hearing that one Steward, who was bailiff of the franchize, under the Earl of Arundel, and who ought to make the pannel, &c. was purposed to have made the said pannel not duly; viz. to retorn therein, great gentlemen of the county, who were lords of manors, in favour of the said Lord Cromwel, went unto the said Roger Townsend, who was then one of the principal servants and agents of the said earl, and shewed to him, that if those great persons and lords of manors be retorned for the trial of that issue, peradventure they would not so easily appear for the expedition of the parties, as people of lesser condition; and also many of them being lords of manors, and having customary tenants, and therefore not indifferent to try that issue, and prayed his order to the said Steward, for the making of an indifferent pannel; where, upon a conference with the said Steward for the making of an indifferent pannel, and shewing to him, the making of the said pannel was not convenient, or any equal course to retorn knights, esquires or lords of manors, but rather such sufficient persons, for the greater expedition of justice, and indifferency of the trial; and afterwards the said Taverner exhibited a petition, shewing all the special matter, and praying him to give order for the making of an indifferent pannel for the trial of that cause, which petition was delivered to the said earl by the said Townsend, in the name of the said Taverner. Upon which the earl did refer the said matter to three of his chiefest agents and counsellours, i. Dicksey, Townsend and Carrel, and delivered to them the book of freeholders within the said franchise, who, according to their commission made a pannel, which was retorned; and the jury passed with the said James Cromwel in the right of the said lord: and if this intermedling of Townsend with this matter, as abovesaid, &c. especially his conference with the bailiff, be maintenance or not, was the question. And by the Lord Anderson and the Lord Wray, Chief Justices, it was delivered for law, that because the said Townsend was in manner a servant of the said earl, who had retorn of writs, and one of his principal counsellours and agents, and hearing, ex insinuatione, of the said Taverner, the misdemeanour of the bailiff of his lord could not do better, than to shew to the bailiff his duty, for it concerned the honour of his lord, and also his inheritance in the franchise; but if the said Townsend had been a mere stranger to the said earl, so as no such privity had been betwixt them, it had been clearly maintenance in Townsend; as it was lately adjudged in this Court, in the case of one Gifford; where the parties being at issue, and a venire facias was to the sheriff to retorn a jury, a stran-**[134]**-ger wrote to one of the jurors who was retorned in the pannel, praying him to appear at the day, and to doe in the cause according to his conscience; and that was adjudged maintenance. And afterwards, upon the full hearing of the cause, the said Townsend, by the sentence of the said court, was acquitted of every maintenance, with great allowance and approbation of many lords of the council there present: Bromley cancellario tantum exclamante.

33 Eliz. In the Exchequer.

CLXXVIII. Sir Moil Finch's Case.

The case was this; the King and Queen, Philip and Mary, leased for seventy years for certain rent payable at the Feasts of Saint Michael and the Annunciation; proviso, that if the rent be behind, and not paid by the space of forty days after any of the feasts aforesaid, that the lease shall cease and be void. At Mich. 9 Eliz. the

rent was not paid according to the proviso, but a month after the said forty days it was paid, and acquittance given for it; and so the rents due after unto 30 Eliz. were duly paid, and acquittances given for the same. The Queen gave and granted the reversion in fee to Sir Thomas Henage, &c. and after it was found by office that the rent was arrear, ut supra: Sir Thomas Henage entred, and leased for years to Sir Moil Finch, who being ejected, brought a quo minus in the nature of an ejectione firmæ, &c. It was argued by Coke, that this lease upon the matter aforesaid is avoidable by the patentee, and that without office; for the conclusion of the proviso is not, that the Queen shall re-enter, but that the lease shall cease and be void: and the Queen is not driven to demand her rent, as in such case a subject is tied. And he compared it to the case of a common person; if a common person leaseth for years, upon condition, that if the lessee doth not build upon the land demised a house within a year after, that the lease shall be void, and afterwards grants the reversion to a stranger: the grantee shall have advantage of this condition, be it broken before or after the grant; for the lease in such case is void, not onely voidable; and the reason is, because the condition is collateral: which see 11 H. 7. 17. A lease for years is made upon condition, that if the lessee doth not go to Rome before such a day, that the lease shall be void; the lessor grants the reversion over, the lessee attorns, and doth not go to Rome within the time appointed, the grantee may re-enter; contrary, if the conclusion of the condition had been by way of re-entry, for then it should run in privity by the common law: but where a lease with such condition was made for life, with this conclusion of the condition, that the lease shall be void, the grantee shall not take advantage of that by the common law, for there the estate is not void untill re-entry, for there is a freehold which ought to be avoided by entry: but in our case the condition is upon the matter collateral, for no demand is requisite to take advantage of the condition. And he said it is a general rule, where in the case of a common person an estate may be devested without entry, there in the case of the Queen there needs not any office: but here in our case, if it had been a case of a common person, the estate should be devested without entry, therefore in the case of the Queen without office: see Stamford for the Major Proposition 55. but it doth not vest to have trespass before entry: and he vouched the case of Browning and Beston, Plow. 136. where such lease after such condition broken, is merely void and dissolved. And he said, that it was the opinion of the Justices of the Common Pleas, now late, **[135]** that by a release to such lessee, after the condition broken, nihil operatur; for after the condition broken he is but tenant at sufferance; and a lease for years, being but a cattel, may begin without ceremony, and end without ceremony: 2 H. 7. 8. If the King make a lease for years, with clause of re-entry for not payment of the rent, although the rent be behind, yet the King shall not re-enter before office found; and there ought to be a seisure, for the lease is not void by the non-payment of the rent, but onely voidable: but if the lease be void for not payment, as in our case it is, to what purpose shall an office be: for by the mere contract the lease ceaseth, without re-entry, or without office: but admit that the lease shall not cease without office, and before office the Queen grants the reversion over, yet an office found after the grant shall avoid the lease as well as if it had been found before the grant. A lease is made upon condition, that if the lessor build a house upon the land leased, and pay to the lessee 20l. that then the lease shall be void; the lessor builds the house, and afterwards grants the reversion, the grantee pays the 20l. now the lease is void, although the condition be partly performed in the time of the lessor, and partly in the time of the grantee. So here, although the grant of the Queen be mesn between the non-payment of the rent, and the office; for the Queen is not entitled by the office to the land, but by the condition broken, and the office is onely to inform the Queen of her title; and when the office is once found, it shall relate unto the time of the condition broken, and shall be of such force as if then it had been found: and here in our case an office was necessary for to entitle the Queen to the mean profits due betwixt the rent arrear, and the grant of the Queen, with which the Queen by her grant hath not dispensed; and without office he could not have them; for the arrearages of the rent do not pass to the patentee, no more than if the Queen be seised of an advowson, and the church become void, if the Queen grant the advowson unto another, the avoidance shall not pass. The King seised of a rent

which is arrear, grants the said rent, the arrearages shall not pass: so here of the mean profits, for they are flowers faln from the stalk, &c.

Godfrey contrary; and he said, that the lease is in being not impeached by the condition, or the office: and he said, that notwithstanding that the words of the lease are, that the lease shall be void, yet before that an office be found, the lease shall not be avoided: in all cases where the Queen is entitled to any thing, or to defeat the estate of another, an office is necessary; and that ground is taken in the case of Lord Berkley, Plow. Com. 229. by Brown, therefore here, it ought to be found by office: see also the case of the Bishop of Chichester, Fitz. Abridg. Forfeiture 18. 46. E. 3. The bishop leased for life certain lands given by the progenitors of the King, as parcel of the barony of the bishoprick, rendring 30l. rent; and afterwards, by assent of the dean and chapter, released a great part of the said rent; the lease and the rent ought to be found by office. So an alienation in mortmain ought to be found by office, because the interest of another is to be defeated: so where the King's tenant ceaseth, &c. the villein of the King purchaseth lands, or but a lease for years: so where the King is but to have annum, diem & vastum, waste committed by the committee of the King: lessee of the King for years makes a feoffment in fee; in all these cases the King, without office, shall not be entitled. The same law is in case of a condition broken; which see 2 H. 7. 8. Plow. 213. Frowick in his reading puts this case: A subject leaseth for years upon condition, which is afterwards broken, and afterwards the lessor becomes King, here needs no office, for at the time of the breach of the condition the lessor was not King. The case betwixt Sir Martin Forbisher and one Bunny was, that the Queen made a lease **[136]** of dutchy land upon condition, which was broken: it was holden, that here there needs not any office, for the Queen had those lands severed from the Crown by Parliament, and they passed by the dutchy seal by livery and attornment of the tenants: the Queen leaseth for years, proviso, that the lessee shall not alien; such alienation against such a condition ought to be found by office: and therefore at this day, where a forfeiture is given to the King, &c. by statute, the words are, that the King shall be seised without office; and as to the relation of an office, he said, that an office may have a relation as to mean profits, but not as to vest the interest from the time of the title accrued. And although that in the grant of the Queen to Sir Thomas Henage there be these words, non obstante, the not finding any office, yet in this case an office is necessary, for the Queen cannot dispense with the law, so to alter or change the law, as to make lands in borough-English descendable at the common law: so if the King make a lease for years, with clause of re-entry, and afterwards grants the reversion over to a subject; and farther grants, that if the rent be behind, that the lessor may re-enter without demand; yet the grantee ought to demand the rent. And, as our case is here, there needs not any office to entitle the Queen to the mean profits; for although that the rent was not paid at the day, yet it was paid after, and all rent due afterwards, and acquittances given for the same; which matter we have specially pleaded to the intent aforesaid, upon which the other side have demurred, and thereby have confessed it, &c. But this office doth not give any interest to the Queen in the thing leased, for she hath granted them over before, by which she hath disabled herself to take advantage of the condition aforesaid, for she hath surceased her time: 8 H. 5. Traverse 47. Tenant for life forfeits his estate, and before the King seiseth, the tenant for life dieth, he in the reversion may enter, and the King shall not seise, for the King hath surceased his time. And if the Queen should have advantage of this condition, she should avoid her own grant, which should be a great inconvenience; the Queen leaseth for years, proviso, that the lessee shall not do waste; the Queen grants over the reversion after waste done, office is found, the Queen gains nothing by it. It was agreed in the case betwixt Knight and Beech, 28 Eliz. that the grant of the Queen mesn between the award of the commission, and the return of it was good; for the title of the Queen appeareth of record, although that the commission was not returned before the grant made: and if an office should relate unto the time of the condition broken, it should be in vain to argue that point: for in the said case it was holden a record, when the jurors had put their seals to it, before that it be enrolled: the acceptance of the rent, and the acquittances thereof are pleaded, 1. To prove, that there is no cause to find an office in this case, for the Queen is answered the mean profits: 2. To prove, that

the Queen hath waved and refused to take the benefit of the condition, but not to conclude the Queen, and then you cannot force her to take the benefit of the condition: as the King, lord, and tenant, the tenant dieth, his heir within age, the King accepteth of the services of the heir, and afterwards grants over the seignory, after office is found, the King shall not have the wardship, &c.

At another day it was argued by Popham, Attorny General, for the plaintiff; and he said, that upon not payment of the rent, the lease is ipso facto void, without any office found thereof, and that by reason of these words, [shall not be void;] for he said, it is not a condition, but rather a limitation: as if the King make a lease to three for eighty years, si tam diu vixerint, one of them dieth, the lease is determined without office: so a lease made by the **[137]** Queen for years, so long as the lessee shall pay the rent reserved, or so long as the lessee shall there inhabit: in these cases upon a lease made by a common person, the lessor before entry might grant over, and the grantee shall have advantage of it, for it is a limitation, and by the limitation the lease is determined before the grant; contrary, if it had been by words of re-entry. A lease for sixty years, proviso, that if the lessee shall die within the term, that the lease shall cease; the lessor grants the reversion over, the grantee shall take advantage thereof by the common law: see the case 11 H. 7. 17. it is a limitation, and not a condition. And he said, in this case an office is necessary, not to avoid the lease, for that was void before; nor to punish the lessee as a trespassor, or to fine him for the continuance of his wrongfull possession; but to make him responsable as an accountant. In the lease of a common person, where the clause is, that the lease shall cease; if after the rent behind, the lessee continueth his possession, yet the lessor shall not punish the lessee as a trespassor before his entry, for the lessee by his continuance is but tenant at sufferance, for his first entry was lawfull; and he agreed the books, 14 H. 8. and 2 H. 7. that such advantages that a common person cannot have without entry, the Queen cannot have without office: but a common person before entry cannot punish another by way of trespass, therefore neither the Queen, without office, shall punish one as an intruder: and as to the case, now lately adjudged betwixt Knight and Beech, the same doth not extend to our case; for there an office was requisite before the grant of the Queen, because the per-close of the condition was, that the prior should re-enter: and it is very clear, that chattels vest in the Queen without office. And in this case an office is necessary for two purposes: 1. To make the grant good: 2. To make the occupier accountable for the mean profits, and to give recompence, which the Queen is not enabled unto without office. And here the patentee shall have advantage of the cesser of this lease: for, 1. He hath the inheritance lawfully: and 2. The lease is determined. If there were no non obstante in the letters patents, the said lease ought to have been recited, if it had not been determined; and if it be determined (as this case is) it ought to be recited, if there were not a non obstante; for non constat to the Queen, if it be determined or not: and he said, that leases which are of record, are to be recited in patents of the King, but not those which are not of record, for leases on record may be easily found, but contrary of leases in fait: but in our case all is helped by the non obstante; for the words of the letters patents are, non obstante, that no office be thereof found, misrecital or non-recital of the former leases, &c. It hath been objected, that because that the law of the land is, that in grants of the King, all former estates ought to be recited, the non obstante of the Queen shall not help it: to that he said, that where the law makes for the Queen, there the Queen, for a particular respect may dispense with the law. If the Queen be deceived by the not recital, that makes the letters patents naught; but if the Queen be not deceived by the not-recital, the same shall not hurt. And it is clear that the Queen may dispense with a statute law, although perhaps not with the common law; the Queen grants upon suggestion, if the suggestion be false, the patent is void because the Queen is deceived in her grant: and if the suggestion rest in articles, and some of the articles be false, the patent for that is void: but if in the patent such clause be, that be the suggestion true or false, the patent shall be good: if the King seised of a manor, to which an advowson is appendant, grant the manor, cum pertinentiio, the advowson shall not pass: but if the grant be in tam amplis modo & forma, &c. prout ipse Rex tenuit, the advowson shall pass. And he **[138]** said, that the office here is not necessary to determine the lease, but to

enable the Queen to punish the lessee for the continuance of his possession: and if the conclusion of the condition had been by way of re-entry for non-payment of the rent, and after the rent is behind, and afterwards the Queen accepts the rent due after, the Queen is not bounden by that, but upon an office found she shall avoid the lease.

Drew, Serjeant, contrary; and he said, that here is a condition, but not a limitation; for here is the natural word of a condition, (scil.) proviso. Some cases put by Popham are conditions, and not limitations: as a lease for years, proviso, that if the lessee die within the term, that then the lease shall be void, the same is a condition: and in many cases many words (less apt than these in our case) shall make a condition: as a feoffment, dummodo solvat, &c. And he said, that without an office the lease is not void: see 35 H. 6. 57. The King giveth to religious use certain lands, ad effectum, to find a certain number of monks, to hold in frankalmoign: the King in that case cannot have cessavit, for the services are not certain; but if it be found by office, that they have not their number, or do not make their prayers, the King shall cease; by Br. Tit. Offic. 4. And he said, that this was often done in the time of King Henry the Eighth; lands given, habend. pro erectione Collegii Cardinalis Eborum, &c. Where the King is to have lands but as a pledge, as for an alienation without licence, office ought to be found of such alienation: so of a feoffment made to an alien; otherwise it is in case of necessity, because the freehold cannot be in abeyance: tenant of the King is attainted of treason before 33 H. 8. the King shall have the land in point of common escheat untill office be found, and afterwards by force of the attainder. So if the tenant of a subject be attainted of treason before office found, the land shall be in the lord, but after office it shall be in the King: 7 H. 4. If the King's tenant dieth, his heir within age, the King may seise the body, and grant it over without office, but not the lands: see for the same, 5 E. 6. Br. Office 55. in the case of Charles Brandon, 35 E. 3. Villainage 22. The villein of the King purchaseth goods and chattels, the property of them is in the King before office or seisure, but in the case of lands he ought to seise: if this had been the case of a common person, the lease should not be avoided without demand, therefore neither in the case of the King without office: for as the lease it self was made by matter of record, so it ought to be avoided by matter of record, otherwise it shall not be taken void in law, notwithstanding that the words are, that the lease shall be void. By the statute of 11 H. 7. alienations and discontinuances by women are made void, the same ought not to be holden altogether void as betwixt such women and the alienee, but onely betwixt the women and the heir, the statute of 1 Eliz. enacts, that all leases made by a bishop above the term of twenty-one years, shall be void; the same shall not be construed to be void, but onely as to the successor, for it shall bind the lessor himself, as it was adjudged 5 Eliz. in the case of the Bishop of Bath. As unto the office here in our case, the same shall not enure to avoid the lease, but onely to enable the Queen to punish the party for the mean profits after the breaking of the condition: but in our case, nothing is due to the Queen for the mean profits, for we have shewed the payment of all the rents and the arrearages thereof, after the breach of the condition, and before the grant of the King; and therefore this office, being for no use, shall be void, unless it had been found, that the land was of more yearly value than the rent, &c. As in the case of common experience of chantries, the lands shall not be intended to be of greater value than the rent to be paid out of it, if not that it **[139]** be found by office: when the Queen hath after received the rent, and granted over the reversion, now the forfeiture is purged, not by way of conclusion, but it amounts to as much as if the Queen had said, that she would not take benefit of it: 4 H. 6. Champernoun's case: the King, by taking in ward of the heir of the donee, hath waved the heir of the donor: see Plow. in the Lord Barkley's case, 3 Eliz. 237. and F. N. B. 143. And here in our case, when the Queen grants over the reversion, here the whole use of an office is gone; for no office shall be found for the benefit of a subject: and as to the Queen, no benefit shall accrue unto her by such office, for if she by such office shall be entituled to the possession, she should avoid her own grant of the reversion; for she ought to have as great an estate by the breach of the condition, as she had at the time of the condition: and in this case the office comes too late for the Queen, &c. as in the Lord Lovel's case, Plow. 18 Eliz. 482. A lease for years is made unto an alien, upon condition, that if the alien

pay such a sum of money to the lessor at any time during the lease, that he shall have fee; the alien is made a denizen, the money is paid, and all that is found by office: the Queen shall not have the fee, for at the time of the vesting of the fee the lessee was denizen; and the office shall not relate to the time when the fee vests, and no farther, but to avoid incumbrances: and so in such case the office comes too late. And if the King's villain purchaseth lands, and the King make him free, and afterwards office is found, the same shall not entitle the King, but the villain manumitted shall hold the land: so in our case, the Queen after this grant shall not take the benefit, of this office, or breach of the condition found by it.

And afterwards, Manwood, Chief Baron, gave order, that those who do argue after shall speak but to two points:

1. Where the queen leases for years, rendring rent payable at the receipt at West. in which lease there is a proviso, that if the rent be behind, the lease shall be void, if now the rent not being paid, the lease shall be void without any office?

2. To what effect an office now shall be, being found after the Queen hath granted the inheritance over.

At another day, Owen, Serjeant, argued to the contrary; and he said, the lease is void without any office: for as a lease for years may be made by contract, so it may be avoided by words of contract, otherwise it is of freehold; so that a lease shall be avoided without entry, 6 E. 6. 137, 138. Plow. Browning and Beston's case; offices are of two sorts: first, entituling the Queen, as purchase of an alien, purchase of villain, alienation in mortmain; and offices informing the Queen, where she hath interest in the land before, as in our case here: admit that the office was necessary to find the breach of the condition; the patentee shall take the benefit of it: for being found by office, that the Queen hath made such a lease with condition to be void for non-payment of rent, and that at such a day the rent was behind, now, being of record, every subject shall take advantage of it: as where a husband makes a feoffment in fee upon condition, of the land of his wife, and dieth; if the heir enter for the condition broken, now may the wife enter upon him; for now the discontinuance is avoided: see 11 H. 7. 17. Where the grantee of the reversion shall take advantage of a condition, ut supra, concluding, that the lease shall be void: and see 136. Plowd. Browning and Beston's case. And although after the default of payment, the rent due afterwards was accepted, yet that shall not conclude the Queen; for this acceptance is not under the Great Seal, but onely done by the office: also the lease being void, for the non-payment, cannot be made good by acceptance afterwards.

[140] Atkinson, contrary, Although that the lease be void, de facto, yet until it appeareth to the Court, the Court cannot say it is void, or not void: therefore office is necessary to ascertain the Court: the Queen is a body politick, and the chief body politick above others, because she is the maker, authour and creatour of all other corporations; and that is the reason, that the King cannot speak without writing; and this is the most solemn writing: i. writing of record; so she cannot take but by record: and in our case, it doth not appear by any writing of record, the rent was behind; and it is agreeable to the majesty of a King to do nothing without matter of record; which see 4 Eliz. in the case of the dutchy: and he said there is no difference betwixt the case in 2 H. 7. and our case: in each case it is a lease for years, rent reserved, in this onely differing, that there is a clause of re-entry; and here the conclusion of the condition is that the lease shall be void; but in both cases, none can say that the rent is behind, untill it be found by office, therefore none can say, that the lease is void, untill office found: see by Thorp, 35 E. 3. chattels personals of the King's villains, are in the King without office, for such things may be lost or worn, contrary of chattels reals, as a lease for years; for land cannot but continue: and such things which may be in the King without writing, he may grant without writing, as a chain of gold, or a horse, deodands, felons goods, wreck, &c. vest without office, because chattels personals: see 20 E. 4. 11. contrary, when they are chattels reals, and permanent; for there an office is necessary: in the case of year, day and waste, an office ought to be found, ergo, à multo fortiori, in case of a lease for years, which is a greater interest, &c. 49 E. 3. 11. There is a general rule, quo modo quodque ligatur, eo modo dissolvitur: that which passeth by livery ought to be reduced by re-entry, that which begins by record, ought to be determined by record; and here in

our case, the land cannot depart from the King without record, therefore it shall not revert without record; although that the breach of the condition be but matter of fact, yet the proof of that ought to be of record: and here in our case, is a condition, and not a limitation. And he said, that in the case often cited before of 11 H. 7. 17. it is a limitation, and not a condition; for if it were a condition, the grantee by the law could not take advantage of it, because not privy: and he was clear of opinion, that where the words are, that the lease shall cease, or shall be void; yet in such cases there ought to be an office, for in leases of the King there needs no re-entry, because the King (to speak properly) cannot re-enter. And the words, [that the lease shall be void] do amount to words of re-entry, and he said, that in the case of a common person upon such a condition broken, the land shall not be in the lessor, without re-entry, no more shall they be here in the case of the Queen without an office: also the rent reserved upon this lease was behind, and the lessee continuing the possession, the Queen by acceptance of the rent, hath affirmed the party tenant, and afterwards granted the reversion over before any office found of that matter; now the lessee is discharged, and shall never be impeached for the said rent behind; and the grant, ex certa scientia, &c. after found, shall not defeat this grant by any relation. And the Queen by her grant hath included all the advantage which accrued unto her by the breach of the condition, and as to that which hath been objected, that in the letters patents there are these words, Notwithstanding the not finding of any office, &c. truly the same makes the matter more clear for us; for by these words, it is apparent, that the Queen would not have an office found; & if so, then the land passeth as in reversion, and the Queen may dispense with a thing concerning her self: as of late it was adjudged in the case of one Michel. The Queen makes a lease for years, rendring rent, si petatur, it was holden in such case, that the rent in such case, **[141]** ought to be demanded by the Queen's officer; and in such case the Queen may well enough dispense with her prerogative; and here the Queen conceived, that she should not have an office, nor have her title found by it. Manwood, Chief Baron, The Queen leaseth for years upon condition, that if the lessee doth not marry within two years, that the lease shall be void, whether here there ought to be an office or not. Atkinson said, that here ought to be an office.

At another day, it was argued again by Godfrey, This lease is not void, ipso facto, for the non-payment of the rent, which is but matter in fact: and as this lease hath his beginning by matter of record, so also his end shall be by matter of record: in cases of a common person there ought to be a demand, therefore in case of the King an office, as in the case of a common person demand ought to be as well where the condition is by way of re-entry, as that the lease shall be void; therefore in both cases, in the case of the King there shall be an office: and he said, that if the lease and the condition be in the case of a common person, that the lease shall be void, without any demand of that rent, then there needs no demand; for demand is a part of contract: and here, before office found, the lease is not merely void, for a release unto the lessee before office, is good; and the Queen is not entituled to the profits before office found; it was argued by Coke to the contrary, The lease is void without any demand, without any office, for it is parcel of the contract to be so void, and he said, that this lease before office is void in interest and property, but not in possession: where a common person shall not have the land without action, the King shall not have it without office, and scire facias; as cessavit, wast. contra formam donationis, &c. and where a common person shall not have before entry, the King shall not have before office, for office is in the place of entry, wardship, mortmain. It is clear, in the case of a common person, that if the condition be, that the lease shall be void without any demand, that there demand is not requisite, therefore nor in the case of the King: see Browning and Beston's case, that such a lease with such a condition, after the rent behind, cannot be made good: and it is a general rule, that where the certainty of the term appears by record, and the King is to have but a chattel in it, there the King upon matter in fait shall have it without office; as the temporalties of the bishop upon his death, which is matter in fait: see F. N. B. 174. The widow of the King marries her self without licence of the King, the King shall seize the lands, and that without office, and there the marriage is matter in fait: the King leaseth for years upon condition, that if the lessee marry, that then the lease shall be void, if the lessee marry her self, the lease is

void without any office; and if so, then every stranger in the world shall have advantage of it, as the case is, 11 H. 7. as was the case of Ralph Thomas; the husband seised of land in the right of his wife, leaseth for years, and afterwards he and his wife levied a fine to a stranger, the husband dieth, the conusee shall avoid the lease, because it was merely void by the death of the husband: so of a rent charge granted by the husband, &c. But although this lease be merely void, yet a bill of intrusion doth not lie against the lessee before office, for in such case, a common person shall not have trespass before entry; but yet if the lessee dieth after the rent behind, ut supra, the lease shall not be said assets to the executors, for the not payment of the rent is a nullity of the lease by the intent of the original contract: and also the lessee is not become tenant at sufferance after the condition broken, for tenant at sufferance takes the profits to his own use; also none can be tenant at sufferance to the Queen, for then he should have the profits of the lands by laches, which shall never be imputed to the Queen: now it is to see, to what purpose this office is? A common person makes a **[142]** lease upon condition, that if the lessee alien part, and that be found by verdict, that the lease shall be void, the lessee alieneth part, the lessor grants the reversion over; after the alienation is found by verdict, the grantee shall have advantage of it; if the case had been, that if the rent be behind, and office found of it, that the lease should be void, the rent is arrear, and the King grants the reversion, and afterwards office is found, now the lease shall be void against the grantee: also this office shall have relation, and comes in as good time, as if it were found before the grant; tenant of the King alieneth in mortmain, the King grants over the seignory, office is found; now by this office, the King is entituled, not unto the land, but unto the profits before the office: and although the Queen hath granted the reversion over, yet she hath not granted inclusive the mean profits: a common person hath a rent which is arrear, he grants the rent, the arrearages do not pass: as where the King is seised of an advowson which becomes void, and afterwards grants the advowson to another, the avoidance shall not pass thereby; and that was Giles's case: see 16 H. 7. 7, 8. and in our case, this office doth not entitle the grantee, for how can an office entitle a common person? If the lease were but voidable, perhaps, so long as the lease should continue unavoided the Queen should not be answered the profits, contrary, where it is void. And a common person shall have advantage of it.

Egerton, Solicitor General, To the same intent; and be said, that this lease is altogether void, in privity, property, right and term: in the case of a common person, after the rent behind, in such case the lessee should be tenant at sufferance, which cannot be in the King's case; and if tenant at sufferance, then no privity; for a release by the lessor to the lessee cannot enure, and that for want of privity; Lit. 109. and such lessee cannot attorn, and if the lessor after that accepts of the rent, the same doth not make the lease good, and all for want of privity; therefore here is no privity: as to property, such a lease shall not be said assets in the hands of an executor, nor shall be sold upon an extent, nor forfeited by outlawry; and here in this case, the Queen cannot be said to take any thing by the breach of the condition, but hath her reversion discharged of the lease; and he said, that the office is found well enough for time, and it shall relate to the time when the title accrued, that is, when the rent was behind, and the arrearages of the rent do not pass by the grant of the land, or the reversion: the Queen hath a rent-charge out of lands which is behind, the lands come to the Queen, and she grants the same over, yet she shall charge the lands with the said arrearages; but contrary, in case of an injury done upon the land of the Queen: as the tenant of the King aliens without licence, and afterwards the lands so aliened came to the King's hands who grants them over; the grantee, nor the land shall be charged, but onely he who was party to the alienation, his lands, and his executors; so of an intrusion: tenant for life of the King makes a feoffment in fee, the King grants over the reversion, and afterwards the tortious feoffment is found by office; this office is soon enough for time, and the grantee of the reversion shall have advantage of it, and the King the mean profits from the time of the alienation: and afterward in Mich. Term, 33 Eliz. the case was argued by the barons.

Clark, Puisne Baron, The lease is conditional, and with a limitation also; so conditional and limitation mixt together, 3 Ass. 10. Land given to one untill he come from foreign parts; lands given to one so long as he shall continue sole, is an estate for life

with limitation upon her marriage; so during the coverture, &c. and these limitations are not collateral, but begin with the estates, when the estates are limited; but conditions always come when the estate is settled, as it is in our **[143]** case, yet if the intent and substance of the contract betwixt the King and the subject be well considered, there shall not be any difference, &c. Lands devised to one, proviso, that if the devisee shall disturb the executors of the devisor, his estate shall be void, and the land remain over, &c. the same is a good remainder, for it is a limitation conditional: see Scholastica's case, Plowd. Com. 14 Eliz. 413. concerning an estate tail with a limitation: and Fitz. James case there put by Dyer: see Browning and Beston's case before cited, and Martin Dockra's case where a condition is conceived in words of covenant, &c. Gent, Baron, argued to the same intent: Manwood, Chief Baron, to the same intent. The rents reserved upon the leases of the Queen, are to be paid to receivors, baileys, or at the receipt of the Exchequer: the Queen shall not make any demand of her rent, for she hath an infinite number of farmors, and if demand be necessary, she were to send an army of receivors, or baileys to receive and demand her rents. If the rent of the King be to be paid at the Exchequer, if the King's fermor be there, and tender the rent at due time, and none be there to receive it, he hath saved his lease, for he hath done his possible endeavor, although the words of the condition in the lease be behind and unpaid, yet not tendred, shall be understood: as in the common case of mortgages and obligations. But in all the record before us, there is no words of any tender, therefore, according to the words of the condition, the lease is meerly void, and determined in right, in privity, and in tenure; for so is the pleasure of the prince expressed in her letters patents under the Great Seal of England, that it shall be then void, and of no effect: Then, i. whensoever the rent shall happen to be behind; and therefore as soon as the rent was behind the lease was determined: so that if after the non-payment a stranger had entred upon him (scil.) the lessee, upon which he brings ejectione firmæ, the defendant might have pleaded the special matter against him, judgment if action: so as the lease is void in right: it is also void in privity and tenure; for a release to such lessee, after the rent is behind, is altogether void; for he was not then lessee, and so the privity is gone, and no acceptance can make such lease good. And if such a lessee after his rent would surrender, and in consideration of such surrender obtain a new lease from the Queen, this new lease is also void, for here upon the matter is no surrender: also such a lease is void in property; for if the lessee in such case dieth, his interest, such as it is, shall not be accounted assets in the hands of his executor: upon the breach of this condition for the rent, although that the lease be become void, yet the possession of the land is not resetled in the Queen without office: and although the office doth not make the lease void, which was void before for non-payment of the rent, yet before office found the possession is not vested in the Queen; for before office found we cannot award process against such a lessee for his continuing the possession after the rent behind, and untill office found the lessee cannot be found an intruder; and tenant at will he cannot be, for no other will appears of the Queen, but that in the letters patents, and that is to have the lease void, whensoever the rent shall be behind, and that estate is gone because the rent is behind; tenant at sufferance he cannot be in this case. In case of a common person, when lessee for years holds over his term, he is become tenant at sufferance, and such a tenant shall not pay rent, for it is the folly of his lessor to suffer his lessee at sufferance to continue possession of the land after his term, so as every tenancy at sufferance is made by the laches of the lessor, which laches cannot be imputed to the Queen: therefore here, this lessee, when the condition is broken, is not a tenant at sufferance, nor shall have the profits of the lands to his own use, but the law shall account him to be a bailiff of his own wrong, and so be ac-**[144]**-countable to the Queen, but no intruder till office be found: and that appears in our books, 1 H. 7. 17. *The King's tenant dieth, his heir within age, if any* entreth into the land of the heir, he shall not be an intruder untill office found, but the heir or a stranger who entreth before office, and takes the profits, shall be brought by process into the Exchequer to make their accounts, and to answer the issues and profits; but if he intermeddle after office, he shall be an intruder. Tenant of the King alieneth without licence, by that the King is to have the profits, untill he compound with the King, and purchaseth his pardon; and if the feoffee taketh the profits after

the alienation, he is a pernor of the profits, and shall answer for them; but he is not an intruder untill office found. Tenant of the King is attainted of felony, the King is entitled to the land from the time of the felony committed, yet if he take the profits untill attainder, he is not an intruder, but he taketh the profits without title, therefore he is bailiff of his own wrong, and so accountable to the King. And it is not a new thing, that a conveyance or an estate shall be void as to the right onely, and not as unto the possession. The Statute of Doms. West. 2. finis ipso jure sit nullus: i. as to the right of the entail; yet, as unto the possession, the issue in tail is bound untill he hath recovered it by a formedon: upon the statute of 21 H. 8. cap. 13. by acceptance of another benefice against the said statute, the first benefice shall be void, &c. yet the same shall not be construed so as to possession, but that the same shall remain with him untill it be taken away from him: the Queen leaseth for years, proviso, that if the lessee commit waste, the lease shall be void; when first waste is done the lease is determined in right, but not as to the possession before office finding the waste: so if the condition be for the building of a house, for by the breach of the condition, the lease, as unto the right and interest, is determined, and after office found it shall revest the possession also: and if a lease of the King expire by effluction of time, and such effluction appeareth here of record, if the lessee in such case continueth his possession, he shall be an intruder. Sir Robert Chester's case, Dyer 4. Eliz. 211. Sir Robert Chester was receivor of the King by patent, upon condition to render account yearly at such a day, and before such a day to pay the arrearages; the condition is broken, the patent was void without office thereof found, but yet it is not altogether void, for a scire facias shall be brought against the patentee. The King leaseth unto A. his manor of D. and after he leaseth also to the said A. his manor of S. proviso, that if the lessee doth not surrender his first lease of the manor of D. at such a day, that then the latter lease of the manor of S. shall be void: the surrender is not made, now the lessee, if he continue his possession in the manor of S. after, he is an intruder. Now is to see of what effect the office is, not to make the lease void, but to vest the possession in the King again: it hath been objected, that, as the case is, the office is not to any purpose, for the Queen hath granted the inheritance over, so as the possession cannot be revested in the Queen by that office against her own grant, nor can the Queen punish the lessee as an intruder for his continuance of the possession after the office, nor can seise the land by such office, and there is not any such office for the benefit of a subject, therefore the office is meerly void. Let us compare our case unto the case of cessavit; the tenant of the King ceaseth for two years, the King grants the seignory over in fee, the cesser is found by office, the grantee of the seignory gains nothing by it; but that is not like unto the case in question, for there when the office is found, the tenant may tender the arrearages, for the King is not absolutely entitled by the cesser, because by tender of the arrearages the tenant may save his tenancy: but in this case, after the condition is once broken, **[145]** there is not any means for the tenant to save the forfeiture: also the King by his grant, after the cesser, hath not granted the thing which accrued unto him by the cesser, (scil.) the tenancy, but onely the seignory: but in our case the King hath granted the thing forfeited, i. the land demised: and here is a full forfeiture, contrary in the case of cesser: and in our case the King hath granted onely the land demised, and not the profits encurred mean between the breach of the condition, and the grant of the King, but these remain to the Queen, and to that purpose the office is good, (scil.) to entitle the Queen to these profits. And as to that which hath been objected, that the lessee hath always paid the rent unto the Queen after the condition broken, and hath an acquittance of the receipt of it, therefore no profits due to the Queen, for she hath the rent in lieu of the profits; and it is not reason, that the lessee shall pay an annual rent, and also shall be accountable for the mean profits, and so the office, as unto the mean profits (which in truth upon the matter aforesaid are not due unto the Queen) is void, and then altogether void, quia nihil operatur, to that he answered, that the King shall not be bound off the mean profits in that case by the payment of the said rent, for by intendment the true annual value of the land is more than the rent reserved; and it is not reason but that the Queen shall be answered of the surplusage or overplus above the rent, and therefore the office entituling the Queen to part of the profits is good enough: tenant of the King for life, or for years, makes a

feoffment in fee, although that by this Act he cannot pluck any thing out of the King, yet because he hath attempted to do such a wrong, it is a forfeiture, and the lease for years utterly extinct by it; for it cannot be in the feoffor against his own act, by which he hath departed with all his interest, &c. And the feoffee cannot have it, for if he hath any thing, it ought to be a fee-simple, or nothing at all; and a fee-simple he cannot have, for that remains in the King, and so neither have estate, then is all in the King, and the King hath title to have the profits, &c. But put case, that after the feoffment the King grant over the land in fee, and after that tortious feoffment is found by office, he who occupieth the land after the forfeiture, untill office be found, shall be accountable to the King for the issues and profits, &c. as pernor of the profits, or baily of his own wrong, and he who occupieth the land after the office shall be punished as an intruder. There was a case very late in this Court betwixt Sir Tho. Henage and one Hungate, which was thus; the Queen leased for years unto Hungate, provided that he should not do waste; waste is done, the Queen granted the reversion to Sir Tho. Henage, office is found, the grantee entred, and his entry was adjudged lawfull, and that the Queen should have the mean profits from the time of the waste done untill the time of the grant. Some say, that that case was not adjudged, but compounded: and he vouched Sir Walter Midmay's case: the Lord Sturton held lands of the Queen in knights-service, and was attainted of felony, by which the lands escheated to the Queen, who granted those lands; and it was holden, that the Queen should have the mean profits betwixt the time of the felony committed, and the grant. And after in the principal case judgment was given for the plaintiff, (scil.) the patentee of the Queen against the lessee; who cast in a writ of error, and by his council prayed, that the writ of error be not broken open untill the judgment be entered. Manwood, The judgment hath reference and relation unto the first day of this term, and therefore do not doubt of that.

2 Roll 184. 1 Cro. 220. Poph. 25. 1 Roll 215. H. 3. H. 7. f. 3. Cro. 221.

[146] MICH. 32 ELIZ. IN THE EXCHEQUER.

CLXXIX. STED'S CASE.

Sted, of Great Melton in the county of Oxford, was assessed to 7s. for fifteens, and upon refusal to pay it, the collectors distrained the beasts of Sted, and sold them: Sted brought trespass thereupon in the King's-Bench; and the collector exhibited his bill into this Court against Sted, who shewed by his council, that the statute of 29 Eliz. which enacted this fifteen, provideth, that the said fifteen shall be levyed of the movable goods and chattels, and other things usual to such fifteens and tenths, to be contributary and chargeable; and shewed farther, that the cattel distrained were tempore districtionis upon the gleab land of a parsonage presentative, which he had in lease, which gleab land is not chargeable usually to fifteens granted by the temporalty, nor the chattels upon it. But it was the opinion of the whole Court, although that the parson himself payeth tenths to the King, yet the lay-farmor shall pay fifteens, and his cattel are distrainable for it, even upon the gleab land of the parsonage; and therefore it was adjudged, that in the principal case the distress and sale were good and lawfull.

3 Len. 259.

MICH. 32 ELIZ. IN THE EXCHEQUER.

CLXXX. THE DEAN AND CHAPTER OF WINSORS CASE.

In this case it was moved, if one hath a rectory impropriate, and by the statute of 26 H. 8. cap. 3. is to pay an annual rent for the same in the name of a tenth, and by that is discharged of tenths and first fruits; if he shall have the privilege of the

Exchequer? for he is to pay the same sum yearly: and the Barons were of opinion, that he should not; for so every one, who is to pay any tenths or first fruits, should draw another who sueth him into the Exchequer, and so all controversies concerning tithes and parsonages should be drawn hither, which should be a great prejudice to the Spiritual Courts. But Egerton, Solicitor, vouched a case, (scil.) Conier's case, where the King gave a parsonage to a priory in frankalmoign, and the tithes thereof being withdrawn, the prior impleaded him who withdrew his tithes in the Exchequer; and in that case it was holden, that the prior should have the privilege, for the King is in danger to lose his patronage, or rather his foundership, if the rectory be evicted. Gent, Baron, The tenant of the King in chief, or he who pays first fruits, or he who holds of the Queen in fee-farm, shall not have in such respect the privilege here. Quære.

3 Len. 258.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CLXXXI. CONY AND BEVERIDGE'S CASE.

In debt upon a bond, the case was, that the plaintiff leased unto the defendant certain lands lying in the county of Cambridge, rendring rent; and afterwards the defendant became bounden to the plaintiff in a bond for payment of the said rent: upon which bond the plaintiff brought an action of debt in the county of **[147]** Northampton, to which the defendant pleaded payment of the rent, without shewing the place of payment: and upon payment they were at issue, and found for the plaintiff by nisi prius in the county of Northampton: in arrest of judgment it was moved, that the issue was mis-tryed; for here the payment of the rent being pleaded, without shewing the place of payment, it shall be intended that the rent was paid upon the land, which is in the county of Cambridge: see 44 E. 3. 42. Anderson was of opinion, that no judgment should be given for the cause aforesaid: Rhodes and Windham contrary; for it doth not appear that the issue is mis-tried, because that no place of payment is pleaded; and it might be, for any thing is shewed, that the rent was paid in the county of Northampton.

3 Len. 216.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

CLXXXII. BERRY AND GOODMAN'S CASE.

In an ejectione firmæ, upon a special verdict, the point was, one intruded upon the possession of the Queen into lands in Kisgrave in Suffolk; and during this intrusion, the Queen granted these lands to A. B. by her letters patents; and the patentee, before any entry made in the said land, granted the same over. Some held, that the grant was good, for the intruder had gained nothing against the Queen, and by the grant of the Queen, and the assignment over, nothing accrued to him: and where a man hath possession of lands, his continuance therein cannot gain to him any interest, or increase his estate, without some other act done of later time. If the guardian do continue in possession after the full age of the heir, he is not a disseisor, nor hath any greater estate in the lands: and upon the book of 21 E. 3. 2. this case was collected; the tenant of the King dieth, his heir within age, a stranger intrudes, the heir at full age sueth his livery out of the King's hands, the intruder dieth in possession; the same descent shall not take away entry.

Coke, contrary, The intruder cannot be tenant at sufferance, for at first he enters by wrong, and none can be tenant at sufferance but he who comes in by title: and it is clear, that the intruder by his first entry doth not gain any estate in possession, upon which he can have an action of trespass, but after the grant of the Queen he hath presently fee by wrong: 8 H. 4. 129. A stranger enters upon the King to which he hath right in the right of the ward, yet the freehold doth remain in the heir. And he

said, that if A. levyeth a fine to B. sur conusans de droit, &c. now the conusee hath possession in law, but not in fact; and if before the entry of the conusee W. entreth, and dieth seised, he hath no remedy, for he hath not possession in fact, so as he might have an assise, or an action of trespass: so the law is now taken; A. deviseth his lands to B. and dieth, and a stranger entreth and dieth seised before any entry by the devisee, now is the devisee without remedy: and here in our case, the intruder hath not gained any possession in the lands by his intrusion, no more than if the King gives lands to one in fee, and before the patentee enters, a stranger enters, now cannot the patentee grant it over, if he doth not reduce the estate by entry: see Dyer 9 and 10 Eliz. 266. The Queen seised of the manor of Beverley, a stranger erected a shop in a vacant plat of the manor, and afterwards took the profits of it, without paying any rent for the same to the Queen, and afterwards the Queen granted the manor to the Earl of Leicester, and he never entred into the said shop, nor took any rent for the same, and afterwards the occupier of the **[148]** shop, died in possession, and his son and heir entred; and the better opinion was, that the same was not a descent against the patentee, because at the first it was not a disseisin against the Queen: another question was moved, as to a path-way then in question: and the jury found that one side of the path-way was the land of the parson of the church, and the other side the church-yard, and prayed the opinion of the Court therein, to whom the interest of the path-way did belong; to which it was said by the Court, that that ought to be found by the verdict; for although that both be the freehold of the parson, yet the soil of the path-way might be conveyed by an express grant unto another. But the Court seemed to incline, that the soil of the path-way did belong to him who had the lands on both sides, and that is the case, as well of a high-way as of a path-way; and it is also good evidence to prove such matter, who hath used to cut down the trees, or to cleanse the way.

Ow. 95, 96. Antea 210. 1 Cro. 920. Ow. 96. P. 20 Eliz. in Curia Ward. Garbery's case, acc.

24 Eliz. In the Court of Wards.

CLXXXIII. Wiseman's Case.

In the Court of Wards, before the Lord Treasurer, Master of the Wards, Wray, Chief Justice, Anderson and Periam assistants to him; the case was, that Wiseman was seised of certain lands holden by knight's-service in capite, had issue by a former wife who died; and made a feoffment in fee to the use, of her who should be his wife, for life, and afterwards to the use of himself and of his issue of the body of such wife to be begotten, the remainder over; Wiseman took a wife, and had issue, and died; if now, living the wife, the issue shall be in ward, was the question? it was argued by Coke, that he shall not be in ward: and first, it was agreed of both sides, and also by the justices, that it was a remainder and not a reversion; and that at the common law, the descent of a remainder, during the estate for life, doth not entitle the King unto wardship; and there we are to see, if upon the statute of 32 H. 8. the last branch of it; where two or more persons hold any lands of the King by knights-service, jointly to them and the heirs of one of them, and he that hath the inheritance thereof dieth, his heir being within age, in every such case, the King shall have the ward, and marriage of the body of such heir, so being within age, the life of the freeholder, or freeholders of such lands notwithstanding: see 33 H. 6. 14. That the father, to prevent wardship, may alien, and take to him and his son, and the heirs of the father, which mischief was intended to be remedied by the said statute: but these words shall not in construction thereof extend farther than the words especially, because they cross the common law, and go to charge the inheritance of others; and therefore they shall be taken strictly, and not by equity: as the statute of West. 2. cap. 40. Cum quis alienat jus uxoris suæ, concordat. est, quod de cetero secta mulieris aut ejus hæredis non differatur propter minorem ætatem hæredis, qui warrantizare debuit, that statute is taken strictly; for if the vouchee voucheth over, the second vouchee shall have his age, quod vide 18 E. 4. 16. Also the stat. of

West. 1. enacts, that where the disseisor dieth seised, the disseisee shall have his writ upon the disseisin against the heir of the disseisor of what age soever he be: so the heirs of the disseisee, yet it is holden, 9 E. 3. If the disseisor leaseth for life, and dieth, and the lessee be impleaded, and makes default after default, upon which the heir of the disseisor prayeth to be received, being within age, he shall have his age, notwithstanding the said statute, which shall be taken strictly, because it controlls the common law, and chargeth the inheritance of the subject: so **[149]** upon the statute of West. 1. cap. 39. That none shall vouch out of the line upon that statute, although the tenant to the action against whom the præcipe is brought, is bound by the statute, yet tenant by receit is at large, and he may vouch at the common law: 2 H. 7. 2. 16 H. 7. 1. for these statutes go in abridgment of the common law, and therefore shall be taken strictly: now, according to this statute, it is of the same nature as the other before remembred, and therefore shall not be extended in construction beyond the letter. As Sir Rowland Hill's case, grandfather, father and son, the grandfather seised of land, ut supra, makes a feoffment in fee to the use of himself for life, and afterwards to the use of the son in fee, the grandfather dieth, the father dieth, the son shall not be in ward, causa qua supra, for this statute shall not be construed by equity, and by it the words thereof [preferment of children] shall not extend unto the childrens children, but to the children onely of the King's tenant, who makes the conveyance: and the words in this statute [or otherwise] shall not be intended to other persons than are remembred in the statute. There was a case late, where the statute was construed in such a manner, quod vide 18 Eliz. 345. Thornton's case; A lady, seised of lands in chief, made conveyance of her lands, for the advancement of her bastard-daughter, the same conveyance is not within the statute: see also the Lord Powes's case, 14 Eliz. Dyer 313. So in the case of Sir Hugh Calverley, the law was taken, that where the husband dieth seised in the right of his wife, and they levy a fine unto the use of the husband and wife, for the advancement of the husband; such conveyance and disposition is not within the statute of 32 H. 8. Popham, contrary, And as to the case of making this statute, it was not to overthrow a foundation, as it hath been said; but it was rather a gratuity of the subjects to the King for his bounty towards them; for whereas by the Statute of Uses, uses were executed in possession, so as the subjects could not dispose of their lands, by their wills, as before the uses: now, by this statute, the King was pleased to give his Royal assent to an Act, by which lands might become devisable, in respect of which, the subjects added to this Act, the last clause, to give him wardship, where it did not lie before by the common law, and that as a recompence from the subjects for the King's bounty, and therefore it ought to be construed beneficially for the King. And to prevent covin and fraud, was not the scope of this statute; for if three purchase lands unto them, and to the heirs of two of them; now it is uncertain whose heirs shall inherit, for non constat, which of them shall survive, and therefore no covin is averrable in such case; and yet if the survivor of two to whom the fee is limited dieth, his heir within age, such heir shall be in ward: so if such lands be given to two, and to the heirs of him of those two who shall first come to the Church of Paul; now it is uncertain which of them shall first come to the Church of Paul, yet if he who first cometh to the Church of Paul dieth, his heir within age, he shall be in ward; which cases prove, that covin and fraud were not the cause of making this statute, but onely the thankfulness of the subjects unto the King for his bounty, as abovesaid; for if this Act had not been made, the subjects should not have power to dispose of their lands for the advancement of their children, but all should descend: so as now the King hath lost the wardship and primer seisin of two parts of the lands of his tenant, and hath also lost the averment of covin, which he had by the common law, where estates were made by the King's tenant for advancement of their children. In respect of which losses, the subjects gave unto the King wardship in case where the lands continue in jointure: as to that which hath been said; that this statute shall not be taken by equity, I conceive the contrary; the words of the statute are, in every such case, i.e. in every like case, not **[150]** onely where two, or more persons hold jointly to them and the heirs of one of them, but also in every the like case; as the case now in question, and in every case where the life of him who hath the freehold, is the sole impediment, quo minus, the heir hath not the land by descent in demesne: and it

may be resembled unto the Statute of Marlbridge of Collusion, which speaks of leases for years, quas tradere voluerint ad terminum annorum; and yet a lease for life, or lease for years is within the said statute; for the statute was made in restraint of an ill liberty, that the tenants had by the common law in prejudice of their lords, which see 4 E. 6. 53. & Plow. 59. And as to the word [otherwise] that may be construed, for payment of his legacies: and as to equity enlarging, the statute speaks [where many hold, and to the heirs of one;] yet, if two hold, to them and the heirs of one of them, the same is within the statute: and as to equity restraining, he puts this case; Land is given to the husband and wife, and the heirs of the body of the wife, who have issue, the wife dieth, the issue within age, he shall not be in ward; and yet he is within the letter of the statute, but because that other matter, that the estate for life, in the husband is an impediment, quo minus, he shall be in ward: it is a maxim of the common law, that the father shall have the wardship of the son and heir apparent, therefore he shall not be within the meaning, although he be within the letter of the statute: so, if lands be given to my villain, and to another, and to the heirs of my villain, who dieth seised, his heir within age, I seise the villain, and claim the remainder, he shall not be in ward; and yet he is within the letter of the statute: but I conceive, in our case, the King shall have two wards, simul & semel, the heir general of Wiseman, and the issue in tail; the heir general by the common law, by reason that his father was the King's tenant, who disposed of his lands for the advancement of his children: and therefore the Queen shall have the third part in ward: and also the heir special shall be in ward, for that part of the statute. And it is no new thing to have two wardships for one and the same lands: as 14 H. 8. of the heir of cestuy quæ use, and also of the feoffee; and if the tenant dieth seised, having issue a daughter, who is his heir, the lord seiseth the daughter, and marrieth her, and afterwards a son is born; he shall have the wardship also of him: so of the heirs of the disseisor and disseisee; and he said, if lands holden in chief be leased for life, the remainder to A. in fee, A. dieth, his heir within age, he shall be in ward, and that by reason of these words in the statute, [in every such case] it is not the same case, but the like case; for if he who hath the fee dieth, so as the freehold survives to the other; now the estate becomes as an estate for life, the remainder over. It was adjourned.

6 Co. Weeden & Baldwin's case.

24 ELIZ. IN THE EXCHEQUER.

CLXXXIV. THE LORD HOWARD AND THE TOWN OF WALDEN'S CASE.

Betwixt the Lord Howard and the town of Walden, the case was, that the King made a feoffment in fee of lands, parcel of his Dutchy of Lancaster, tenend. in feodi firma reddend. inde sibi, & hæredibus suis, aut illi cui de jure reddi debet, 10l. The question was, how, and of whom the tenure should be? it was argued by Plowden, that it should be holden of the King, as of his dutchy; he said, the King is not bounden by the Statute of Quia Emptores Terrarum; but here, upon this feoffment, the feoffee shall hold of the King, as of his dutchy: all grants of the King, notwithstanding that they be of lands, yet they savour of the person of the King and his prerogative being wrapt **[151]** up in his person; shall guide the disposition of the land: and he said, that this tenure shall be implyed by reason, and in respect of his person: and the Statute of Quia Emptores Terrarum, extends to tenants onely, libere tenentes magnatum & aliorum; but the King is not libere tenens alicujus magnat. 32 H. 6, 21, 22. The King hath an advowson in the right of his dutchy, to which being void, he presents; he may repeal his presentment: and he vouched divers presidents of grants of the King of such lands to hold of him, as of his dutchy, and sometimes of others: and the King by his dutchy seal may give lands in mortmain; and the King under his dutchy-seal, hath made divers corporations within his dutchy, and although this rent be a new thing, never parcel of the dutchy, yet, because it is issuing out of the dutchy lands, and reserved thereout, shall be of the same nature, and accounted parcel of the possessions of the dutchy: if before the statute of West. 3. one seised of lands on the part of his mother, made a feoffment in fee, tenend. by such

services, and died, the seignory should go to the heir on the part of his mother, and should be descendable as the land it self, in lieu of which it came: and if tenant in tail: now after the statute of 32 H. 8. makes a lease for years according to the statute, rendring rent to him and his heirs, it shall be expounded such heirs which are inheritable to the land, according to the entail. Manwood, Chief Baron, demanded of Plowden, this question; the King makes a feoffment in fee of lands of his dutchy, is the same a matter of record? who answered, yes, Manwood, truely no, for then there needed not any livery. Egerton, Solicitor, argued to the contrary, and he argued much upon the statute of 1 H. 4. and 1 H. 7. of the separation of the Dutchy of Lancaster from the Crown, which see in the Comment. 215. in the case of the Dutchy of Lancaster; by which Acts, the possessions of the dutchy were devested out of the body politick of the King, and vested in his body natural, and are as their corporal holding in the King, as they were in the Duke of Lancaster, being a subject; who if he had made a feoffment, the feoffee should not hold of him, but of the King; ergo, so shall it be in the case where the King himself makes a feoffment: and he cited a case, put in the end of the Dutchy case, 4 Eliz. 223. The Queen made a feoffment of lands of the dutchy out of the County Palatine, to hold of her in capite; the feoffee shall hold of her in capite as of her Crown of England. The case went farther; the King after this feoffment, granteth the fee-farm, the question is, if the rent reserved upon this feoffment shall pass by such grant or not: and he said, that this rent is not parcel of the fee-farm, but rather a collateral charge upon the land; for in all cases where there is a tenure expressed in fait, or implyed in law, there the rent reserved after, shall not be parcel of the tenure, but a rent in gross by it self: as in our case, tenend. in feod. firm. makes a tenure; therefore the reddend. after shall not make the sum reserved parcel of it: 33 E. 3. Annuity 52. before the Statute of Quia Emptores Terrarum; a man makes a feoffment in fee, tenend. de dominus capital. rendring the rent of 20l. that rent is a rent in gross and not parcel of the tenure. King E. 6. granted to Cranmer Archbishop, and his heirs, tenend. by the fifth part of a knight's fee, reddend. 6l. per ann. Cranmer made feoffment in fee to the use of himself for life, the remainder to the use of his son in tail, the remainder to the use of the right heirs of Cranmer made a fee, who is attainted of treason, by which the remainder to his right heirs escheats to the King, and so the seignory is extinct; but it was adjudged, that the rent was in esse, and not extinct by the escheat of the remainder, for it was not parcel of the seignory: so here in our case. Another matter was moved; if this rent, being a new thing created, de novo, and not parcels of the possessions of the dutchy, 1 H. 4. nor **[152]** 1 H. 7. shall be accounted in law in the right of the Crown, or of the dutchy; and if of the Crown, then it cannot pass by the dutchy seal: and the statute of 1 H. 4. speaks of such lands and tenements which were to his ancestors, Dukes of Lancaster; but this rent never was in them, &c. and the Queen cannot enlarge the possessions of her dutchy by her own act; and therefore, if J. S. being tenant in fee-simple, be impleaded in a præcipe quod reddat, and saith that he holdeth for life, the remainder to the King in fee in the right of his dutchy; now this remainder is vested in the King in the right of his Crown, and not in the right of his dutchy; for it is onely an estoppel: so the villein of the King, in the right of his dutchy, purchaseth lands, the King seiseth, he shall have the lands in the right of his Crown, and not in the right of the dutchy: if the King giveth common out of his lands, parcel of his dutchy, and afterwards makes a feoffment in fee of the lands out of which the common is granted, and afterwards the commoner dieth without heir, the King shall have the same in the right of his Crown, and not in the right of the dutchy: so, although the rent doth follow the nature of the lands out of which it is issuing, yet it is not so to all intents; and he said, that by the statute of 2 & 3. Phil. & Ma. the King could not enlarge the possessions of the dutchy; and therefore by the said Act, authority is given for to annex possession unto the dutchy by letters patents; and there is another clause in the said statute, that if any part of the possessions of the dutchy have been aliened, or granted unto any subject, and are reverted to the Crown by escheat, attainder, forfeiture, purchase, &c. they shall be deemed and accepted parcel of the dutchy; which case proves, that if the King makes a feoffment of such lands, the same is a tenure in chief; for if it were a tenure of the dutchy, then upon escheat, it should be

parcel of the dutchy again, without the help of that statute. Now, this rent being a rent in gross, and not parcel of the seignory, reddendo Domino Regi, hæredibus & successoribus suis, aut domino, aut dominis feodi, when the King grants the seignory to the Lord Audley, it hath been moved, that it was in the election of the feoffee, to pay the rent to the King, or to the Lord Audley; but that is not so, for although the law be so betwixt subjects, yet in case of the King it is otherwise; for the King shall never be over-reached by an election: and therefore he shall pay the rent to the King. It was adjourned.

More. Rep. 159. Post 162, 163.

Hill. 18 Eliz. In the Common Pleas.

CLXXXV. The Executors of Sir William Cordel and Clifton's Case.

The case was, The Earl of Westmerland, seised of a manor, whereof the demeans were usually let for three lives, by copy, according to the custome of the manor, granted a rent-charge to Sir William Cordel, pro concilio impendendo, for the term of his life; and afterwards conveyed the manor to Sir William Clifton in tail; the rent is behind, Sir William Cordel dieth, Sir William Clifton dieth, the manor descends to John Clifton, who grants a copyhold to Hempston: the executors of Sir William Cordel distrain for the rent; it was agreed by the whole Court, that the copyholder should hold the land charged. Windham, Justice, It hath been adjudged, that the wife of the lord shall not be endowed against the copyholder, which Periam granted, but gave the reason of it; for the title of the dower is not consummated before the death of the husband; so as the title of the copyholder is compleated before the title of dower; but the title of the grantee of the rent is consummated before the dower, **[153]** Fenner conceived, that the executors could not distrain upon the possession of the copyholder, and he argued, that this case is not within the statute of 32 H. 8. of Wills; for by the preface of the said statute, he conceived, that the said statute did extend but to those cases for which by the common law no remedy was provided; but in this case, the executors by the common law, might have an action of debt, ergo: but Periam and Windham, contrary; for this statute doth intend a farther remedy for that mischief, (scil.) not onely an action of debt, but also distress and avowry: see the words of the statute, distrain for the arrearages, &c. upon the lands, &c. which were charged with the payment of such rents, and chargeable to the distress of the testator; or in the seisin or possession of any other person or persons claiming the said lands, onely by and from the same tenant by purchase, gift, or descent, in like manner and form as their testator might or ought to have done in his lifetime: and it was moved by Fenner, that here the said land charged, doth not continue in the seisin or possession of the tenant; and here Sir John Clifton was issue in tail, and therefore he doth not claim onely by the father, but per formam doni; and therefore he is not liable; therefore neither his copyholder.

Shuttleworth, Serjeant, contrary, that Sir John Clifton was chargeable; and he claims onely from them who immediately ought to have paid the rent, and the copyholder claims by purchase from Sir John Clifton, so he claims from Sir William Clifton the tenant, &c. although he doth not claim immediately from him: for if the tenant ought to have paid it, and dieth, and the land descendeth to his heir, and the heir maketh a feoffment in fee, the feoffee shall be charged within this statute, although he doth not claim immediately: so where land descends from the tenant which ought to have paid it, and so from heir to heir. The statute of 1 R. 3. wills, that all grants, &c. shall be good against the donor, his heirs, &c. claiming onely as heirs to cestuy que use, &c. Yet if cestuy que use granteth a rent-charge, and the feoffees are disseised, the grant shall be good against the disseisor; and yet he doth not claim onely by cestuy que use: and although Sir John Clifton be tenant in tail, and claims per formam doni; yet, because the estate tail cometh under the estate of him who grants the rent, he shall be subject to the charge. And this statute extends not onely to him who claims by the tenant, but also to the heir of him who grants, &c.

And by Windham and Rhodes, the copyholder doth not claim onely by the lord, but he claims also by the custome; but the custome is not any part of his title, but onely appoints the manner how he shall hold, &c. The possession continues here in Sir John Clifton, for the possession of his copyholder is his possession; so as if the copyholder be ousted, Sir John Clifton shall have an assise: and so the strict words of the statute are observed, for the seisin and possession continues in Sir John Clifton who claims onely by Sir William Clifton who was the tenant in demean who ought to pay the rent. But Fenner said to that; that the seisin and possession intended in the statute, is the very actual possession, (scil.) pedis dispositio, and such a possession in which the distress may be taken and that cannot be taken in a freehold without an actual possession.

3 Len. 59. 2 Roll, 157. 12 Brownl. 208. Antea 109. Dyer 270. More 94.

[154] CLXXXVI. 19 Eliz. In the Common Pleas.

A. seised of land in fee, by his will in writing, granted a rent-charge of 5l. per an. out of it to his younger son, towards his education and bringing up in learning, and if in pleading, the devisee ought to aver that he was brought up in learning was the question: and it was holden by Dyer, Manwood and Mounson, that such averment needs not; for the devise is not conditional; and therefore, although he be not brought up in learning, yet he shall have the rent: and the words of the devise, are towards his bringing up; and he well knew, that 5l. per an. would not, nor could extend to maintain a scholar in learning, in diet, apparel, books, &c. and this rent, although it be not sufficient to such purpose, yet he shall have it; and Dyer said, that such a case was here: two were bound to stand to the award of certain persons, who awarded that the one of them should pay unto the other 20s. per an. during the term of six years, towards the education and bringing up of such a one an infant, and within the two first years of the said term the infant died, so as now there needed not any supply towards his education; yet it was adjudged, that the yearly sum ought to be paid for the whole term after; for the words [toward his education] are but to shew the intent and consideration of the payment of that sum, and no word of condition, &c.

3 Len. 65. Dy. 329. a.

Mich. 20 Eliz. In the Common Pleas.

CLXXXVII. West and Stowel's Case.

In an action upon the case, by Thomas West against Sir John Stowell, the plaintiff declared, that the defendant, in consideration that the plaintiff promised to the defendant, that if the defendant shall win a certain match at shooting, made between the Lord of Effingham and the defendant, then the plaintiff should pay to the defendant 10l. and promised to the plaintiff, that if the said L. Effingham shall win the same match of the defendant, that then the defendant would pay to the plaintiff 10l. and farther declared that the Lord Effingham won the match, for which the action is brought. It was moved, that here is not any sufficient consideration; for the promise of the plaintiff to the defendant, non parit actionem, for there is not any consideration upon which it is conceived, but is onely, nudum pactum, upon which the defendant could not have an action against the plaintiff. And then here is not any sufficient consideration for the promise of the defendant. Mounson, Justice conceived, that here the consideration is sufficient, for here this counter promise is a reciprocal promise, and so a good consideration, for all the communication ought to be taken together, Manwood, Such a reciprocal promise betwixt the parties themselves at the match is sufficient; for there is consideration good enough to each, as the preparing of the bows and arrows, the riding or coming to the place appointed to shoot, the labour in shooting, the travel in going up and down between the marks: but for the bettors by,

there is not any consideration, if the bettor doth not give aim: Mounson, A cast at dice alters the property, if the dice be not false; wherefore then is there not here a reciprocal action? Manwood, At dice the parties set down their monies, and speak words which do amount to a conditional gift; (scil.) if that the other party cast such a cast he shall have the money.

1 Cro. 870. Townsend. 17. 1 Roll 28. More 549. Sty. 353. a.

[155] 19 Eliz. In the King's Bench.

CLXXXVIII. Dunne's Case.

Dunne possessed of divers goods in divers dioceses died intestate at Bristow; the Bishop of Bristow committed administration to Jones and his wife, who administred; and afterwards the Bishop of Canterbury, by reason of his prerogative, committed administration to Austen and Dunne, and they brought an action of trespass against Jones and his wife, for taking of the goods of the intestate; it was holden by Wray and Southcote, that the letters of administration granted by the Bishop of Bristow, were void: Gawdy and Jeofreys, contrary; for the granting of letters of administration, de mero jure, doth belong to the ordinary; and it might be that neither the Ordinary, nor the parties to whom he granted the letters of administration had notice that the intestate had bona notabilia in another diocese, and therefore it should be hard to make the defendants trespassors; exception was taken to the declaration, because it is shewed that the Archbishop of Canterbury, by reason of his prerogative, committed administration, &c. without shewing that the intestate had bona notabilia, &c. but the exception was not allowed, for so are all the precedents, as the declaration is here, which all the clerks in Court did affirm; and afterwards exception was taken to the bar, because it is there pleaded, that the defendant had paid a certain sum of money to one A. to whom the intestate was indebted by bond, and did not shew how the bond was discharged, as by release, acquittance, cancelling of the bond, &c. And that was holden to be a material exception: for the defendants in such case, ought to shew such discharge, which is sufficient, and by which the plaintiffs may be discharged; and for that cause the plaintiff had judgment to recover.

5 Co. 2, 30. 1 Cro. 283. 457.

19 Eliz. In the King's Bench.

CLXXXIX. Kingwell and Chapman's Case.

In an action of debt upon a bond, by Kingwell against Chapman; the defendant pleaded, that it was endorsed upon condition, that where divers debates were betwixt the plaintiff and one J. brother of the defendant, the said plaintiff and J. put themselves to the award of one Copston, and the defendant was bound by bond to the plaintiff, that his brother should perform the award of the said Copston: and the award was, that the said J. should pay to the plaintiff 30l. viz. at the Feast of the Annunciation 20l. and at Michaelmas after 10l. and shewed, that the said J. had paid the said 20l. at the Annunciation; and as to the 10l. he pleaded, that the said J. died before the said Feast of Michaelmas, upon which there was a demurrer: and by Wray, Southcote and Gawdy, Justices, the bond is forfeit. First, because the sum awarded by the arbitrament, is now become a duty; as if the condition of the bond had been for the payment of it: secondly, day is appointed for the payment of it, 10 H. 7. 18. Thirdly, the executors cannot perform the condition. But if I be bound by bond to enfeoff the obligee at such a day, and before the said day I die, my executors shall not be charged with it; for the condition is become impossible by the act of God, for the land is descended to the heir.

1 Cro. 10.

[156] 20 ELIZ. IN THE COMMON PLEAS.

CXC. LODGE'S CASE.

Lodge, an Attorney of the Common Pleas, was indebted unto Booth in 34l. payable at a day to come, and Booth was indebted to Diggs in 40l. Diggs, according to the custome of London, attached in the hands of Lodge 34l. to be paid to him at the day, as part of his debt of 40l. Lodge brought a bill of privilege, directed to the Mayor and Sheriff of London, and that every person, who had cause of action against Lodge, sequatur ad com. legem, &c. si sibi videbitur expedire, &c. At the retorn of which writ, Bendloes prayed a procedendo. And by Harper, Justice, The privilege shall not be allowed, because that this attachment is by custome, and not allowable here; and if Lodge should have the privilege, then is the other party without remedy: and if an attorney of this place be impleaded in London upon a concessit solvere debit. alterius, he shall not have the privilege Manwood contrary; For according to the common law, Lodge owed nothing to Diggs, but is his debtor by a custome: and as to the case of concessit solvere, there the promise was to the party himself, who brought the action; and he hath no other remedy; but in the case at bar, Diggs, who is a stranger, veres Lodge, who ows him nothing, having remedy against his proper debtor, which Dyer granted, and farther said, that the privilege of this Court ought not to be impeached by any custome: and the prothonotaries cited a case adjudged in the point; that such a privilege was allowed in the case of one Underhil, and afterwards in the principal case the privilege was allowed.

Syderf. Rep. 362.

21 ELIZ. IN THE COMMON PLEAS.

CXCI. SEGAR AND BAINTON'S CASE.

In an action of trespass, the case was, that King Hen. 8. an. 27 of his reign, gave the manor of D. to Sir Edw. Bainton knight, and to the heirs males of his body; Sir Edw. Bainton had issue, Andrew his eldest son; and the now defendant his younger son, and died; Andrew Bainton covenanted by indenture with the Lord Seymore, that the said Andrew Bainton would assure the said manor to the use of himself for life, the remainder to the use of the said lord and his heirs; and the said lord in recompense thereof, should assure other lands to the use of himself for life, the remainder to the use of the said Andrew Bainton in tail, who, 37 H. 8 levied a fine of the said manor without proclamations to two strangers, to the uses according to the said agreement, and before any assurance made by the said lord, the said lord was attainted of treason, by which all his lands were forfeited to the King: and afterwards the said Andrew Bainton made a suggestion to Queen Mary of all this matter; and upon his humble petition, the said Queen by her letters patents, reciting the said mischief, &c. Et præmissa considerans, & annuens petitioni illius, granted to him the manor aforesaid, and farther, de ampliori gratia sua, did release to the said Andrew Bainton, all her right, possession, &c. which came to her, ratione attincturæ præd. vel in manibus nostris existant, vel existere deberent; after which, 5 Eliz. Andrew Bainton levied a fine to the plaintiff, with proclamations, and died without issue, and the defendant, as issue in tail, entred.

Puckering, Serjeant: First, it is to see, if by the words of the patent of Queen Mary; viz. de ampliori gratia, &c. the reversion in fee which the Queen had, shall pass or not? Secondly, admitting that **[157]** the reversion doth not pass, then if the fine levied by Andrew Bainton, 5 Eliz. to the plaintiff, the reversion being in the Queen, be a bar unto the issue in tail? for as unto the first fine levied, 37 H. 8. which was without proclamations, the same shall not bind the issue in tail, neither as to the right, nor as to the entry, for it is not any discontinuance, because the reversion is in the King; as of things which do not lie in discontinuance, as rent, common, &c. for such a fine is a fine at the common law, and not within the statute of 4 H. 7. and such fine is void against the issue: but if such a fine without proclamation be levied of a

thing which lieth in discontinuance, then such a fine is not void, but voidable by formedon: and therefore this fine in the case at Bar being levied without proclamation of lands entailed, whereof the reversion is in the King at the time of the fine levied, shall not bind the issue: and by such fine the conusee hath nothing but a fee determinable upon the life of tenant in tail, which fee was forfeited to the Queen by the attainder of the Lord Seymore, and that the Queen moved of pity, did restore the same to A. B. in recompense; for the indentures of themselves were not sufficient to raise any use: see 1 Mariæ, Dyer 96. As to the first point, it seems that nothing passed of the reversion, for the grant hath reference to the words, All her right, possession, &c. which came to her ratione attincturæ, and all the residue of the grant ought to have reference to that, to the ratione attincturæ, which was the foundation of the whole grant: and here the intent of the Queen was not to any other intent but onely to restore A. B. to the said manor, or to his former estate in it; and nothing appears in the letters patents, by which it may appear, that the Queen was knowing of her reversion which she had by descent, and therefore the same cannot pass by general words. If the Queen grants the goods and chattels of all those which have done any trespass, for which vitam amittere debent, the goods of him who is attainted of treason shall not be forfeited to the grantee by such general words: 8 H. 4. 2. The King grants omnia catalla tenentium suorum, qualitercunque damnatorum, the same shall not extend to the goods of him who is condemned of treason: see 22 Ass. 49. So in our case the patent shall not serve to two intents, but to a restitution of the manor, and then nothing passed by this patent but the fee determinable, which was conveyed to the Lord Seymore, and forfeited by his attainder. Then we are to see, how after this grant the said A. B. is seised. And he said, that he shall be in of the said fee determinable, and not of the estate tail against his own fine; and then if he be not seised by force of the entail at the time of the fine levied, 5 Eliz. the same fine cannot bind the tail: but admit that at the time of the second fine levied he was in of an estate in tail, yet the same fine shall not bar his issue: for first, this fine cannot make any discontinuance, because that the reversion in fee is in the King, which is not touched by the fine: see the case of Sanders, where A. makes a lease to begin at a day to come, and afterwards levies a fine to a stranger with proclamations; the five years pass, and afterwards at the day of the commencement of the lease the lessee enters, his entry is lawfull, and he shall not be bound by the non-claim. And so it was adjudged 21 Eliz. between Sanders and Starky. After the making of the Statute of 4 H. 7 of Fines, it was much doubted, if the issues of common tenants in tail should be bound by a fine with proclamation, forasmuch as upon the death of their ancestours they were as new purchasors per formam doni: and therefore it was provided by the statute of 32 H. 8. that the said statute of 4 H. 7. should extend to such common entails; but there was no doubt of the estate tail of the gift of the King: and see betwixt Jackson and Darcy, Mich. 15 and 16 Elizab. Rot. 1747. in a partitione **[158]** facienda, the case was, tenant in tail, the remainder to the King after the statute of 32 H. 8. levied a fine with proclamations, and adjudged, that that should bind the issues: and the Act of 32 H. 8 doth not extend, but where the reversion is in the King, but no mention is there of a remainder, because the words of the said Act are general, of all tenants in tail, the makers of the said Act perceiving that it might be a doubt, that the generality of the said words might exclude estates tail of the gift of the King, they have restrained the words in a special manner, as appeareth by the last words of the same Act: nor to any fines heretofore levied, or hereafter to be levied by any person or persons of any manors, &c. before the levying of the said fine to any of his or their ancestors in tail by letters patents, or Act of Parliament, the reversion whereof, at the time of the levying of such fine, was in the King: and so such estates are excepted, and that in such cases where such fines are levied, they shall be of such force as they should have been if the said Act had not been made; and therefore he conceived, it appeared at the said Parliament, that such estate tails of the gift of the King were not bound by 4 H. 7. for otherwise that proviso or exception had been frivolous.

Walmsley, Serjeant, to the contrary; and he agreed, that the first fine doth not make any discontinuance; and yet he conceived, it is not altogether void against the issues before that they enter, for no right remains in the conusor against his fine:

and he conceived also that this clause, ex uberiori gratia nostra, did extend to pass more than passed before, for he conceived that the Queen intended more liberally, viz. the reversion, for this same is not any matter of prerogative, but this is a matter of interest which might even in the case of the King pass out of the King by general words: and see 3 H. 6. 6 and 7 Br. Patents; a grant of the King ex insinuatione shall not hinder the force of the words ex mero motu. And the opinion of the Court was, that the reversion which was in the King did not pass by this grant: for the scope of the whole patent was, as was conceived, to grant the same onely which the Queen had ratione attincturæ.

Anderson held the patent insufficient, because that the prohibition was not full and certain: also he said, that ex speciali gratia, &c. would not help this case, if it were well argued, for the estate tail is not well recited, but onely that he was seised de statu hæreditario, &c. so as the Queen was deceived. Periam, contrary; The Queen was apprised well of the mischief and grant aforesaid, viz. of such estate, with which he departed by the fine. And as to the other point, it was the opinion of Walmsley, that the fine with proclamation did bind the entail. And as to the objection which hath been made, that the conusor, at the time of the fine levied, was not seised by force of the entail, the same had been good matter to avoid a common recovery, to alledge such matter in the tenant to the præcipe, but not to this purpose: for if tenant in tail levieth a fine, although he was not seised at the time of the fine levied by force of the entail, yet such a fine shall bind the issues: so if the tenant in tail doth discontinue, and disseiseth the discontinuee, and so levieth a fine. And he conceived, that the issue in tail is bound by the statute of 4 H. 7. even of the gift of the King. And see 19 H. 8. 6. and 7. where it is holden, that the issue in tail is bound by the Act of 4 H. 7. And whereas it hath been objected, that it doth not extend, but to such fines which make a discontinuance at the common law: the same is not so: for if tenant in tail of a rent or common levieth a fine with proclamation, it is very clear, that the issues shall be barred thereby: and he relied much upon the book of 29 H. 8. Dyer, 32. Tenant in tail of the **[159]** gift of the King levyeth a fine, or suffereth a common recovery, although it be not a discontinuance, because the reversion is in the King, yet it is a bar unto the issue. But note, that that was before the statute of 34 H. 8. And see now Wiseman's case, 27 Eliz. Co. 2. part. and see the Lord Stafford's case, 7 Jacob. Co. 8 Reports, fo. 78.

3 Len. 74.

21 Eliz. In the King's Bench.

CXCII. Pleadal's Case.

The case was, that a man seised of lands in fee, took a lease by indenture of the herbage and pawnage of the same land: it was the opinion of the whole Court, that the same was no estoppel to him to claim the soil or the freehold: and it was said by Plowden, and agreed by the Court, that if the father and son be joint-tenants for an hundred years, and the son takes a lease of his father of the lands for fifteen years, to begin, &c. the same shall conclude the son to claim the whole term or parcel of it by survivor.

CXCIII. 21 Eliz. In the Star Chamber.

Note, that in the Star Chamber it was resolved, by the advice of many of the justices, that an infant having levyed a fine, may declare the uses upon it, and such declaration is good, notwithstanding his nonage: and Mr. Plowden affirmed, that so it was adjudged in his own case, by which he lost lands of the yearly value of 40l. So a declaration by a man in duresse is good, which Anderson denyed.

2 Co. 10, 42, 57.

21 Eliz. In the Court of Chancery.

CXCIV. The Lord Awdley's Case.

The Lord Awdley, 12 H. 7. enfeoffed Hoddy and others of certain lands in the county of Sommerset, and afterwards by indenture reciting the said feoffment, and the date of it, and also that it was to the intent that his feoffees should perform his will, as follows in effect; viz. My will is, that my said feoffees shall stand seised to the use, that the said Hoddy shall receive of the yearly profits of the said lands one hundred pounds, which he had lent to the said Lord Awdley: and also stand seised to pay all his debts upon bills signed with his hand; and after the debts paid, that the said feoffees shall make estate of the said lands unto him the said Lord Awdley, and Joan his wife, and to the heirs of their bodies, &c. with divers remainders over. The said lord had issue by the said Joan; and also had issue by a former wife a daughter: the feoffees never made any estate to the said lord and his wife. And it was the opinion of divers of the justices and sages of the law, that upon this matter no use was changed, for it is not a last will but an intent. And although that the feoffees shall be seised unto the use of the feoffor and his heirs, because that no consideration was, for which they should be seised to their own use; yet the same cannot make a new use unto the said lord and his wife in tail, without conveying an estate; for the wife is a stranger [160] unto the land, and also to the other use. And it cannot be a testament or last will; for the estate mentioned in the said writing, ought to be made to the said lord and his wife, who cannot take by his own will. And this matter was depending in the Chancery; and the advice of the justices being there required, they did deliver their opinions, that by this writing, no use was changed, nor any estate vested in the said lord and his wife; and a decree was made accordingly, until proof might be made of such an estate made.

Dy. 166, 324, 325. 6 Co. Sir Ed. Cleer's case.

21. Eliz. In the King's Bench.

CXCV. Borough and Holcroft's Case.

In an appeal of murther, by the son of the Lord Borough, of the death of his elder brother, Henry Borough, against Thomas Holcroft, who pleaded, that heretofore he had been indicted of the murther of the said Henry Holcroft before J. S. coroner of the verge, and also coroner of the county of Middlesex, within which county the verge was; and upon that indictment he was arraigned, and confessed the indictment, and prayed his clergy, &c. and demanded judgment; if the plaintiff should have this appeal? The plaintiff, replicando, said, by protestation, nul tiel record, and for plea did demur in law. Dalton, for the plaintiff, took exception to the plea, for the conclusion of it, viz. judgment if appeal; where it ought to be, judgment, if he shall be again put to answer: and he took a difference, where a matter is pleaded against the plaintiff, to which the plaintiff is party: as where a man pleads a fine levied by the plaintiff himself, there he shall conclude judgment if action: but where the fine is pleaded levied by the ancestors of the plaintiff, there he shall plead, judgment, if against such fine, &c. vide, 9 H. 7. 19. At the common law before the statute of 3. H. 7. such conviction at the suit of the King did discharge the party convicted from farther trouble; but if the indictment upon which he was arraigned be insufficient, then it is not any plea. And here the indictment is insufficient; for by the Statute of Articuli Super Chartas, cap. 3. the coroner of the county, together with the coroner of the King's houshold shall do the office which belongs to it, and send the roll, to which office two coroners are requisite: but here, in the taking of this inquisition there was but one person although two capacities, id est, coroner of the county, and also coroner of the verge: and so the indictment was taken, coram non Judice: see the statute of the Star Chamber, which is, that the Chancellor, &c. calling to them one bishop, and one temporal lord of the King's Council, &c. If the Chancellor be a bishop; yet another bishop ought to be called &c. If I devise that my lands shall be sold by two

bishops, and J. S. hath two bishopricks, yet his sale is not sufficient. Egerton, contrary, Although here is but one person, yet there are two coroners: quando duo jura concurrunt in una persona æquum est, ac si essent in diversis. At the common law, before the Statute, de Articulis Super Chartas, the coroner of the verge by himself might enquire of murther; but because the Kings Court oftentimes removed into another county, by reason whereof no enquiry could be made for the remedying thereof, that statute was made, which is in the affirmative, and doth not abridge the common law before, and therefore it shall have a reasonable construction: see the statute of West. 1. cap. 10, by which it is enacted, that sufficient men shall be chosen coroners, of the most loyal and the most [161] sage knights, this statute shall not be taken, stricto sensu, that none shall be chosen coroners, but knights; but the statute requires, that sufficient persons shall be chosen. As to the statute of 3 H. 7. it is to be known that the common law [before acquitted] was a good plea, and the cause was for the great regard that the common law had to the life of a man; in which case a great mischief, as the statute recites, did ensue, that to save the appeal of the party; they would not arraign the party within the year and day after the murther, within which time, the offender did compound with the party interessed; and so after the year expired, all the matter concerning the prosecution, at the King's suit, was put in oblivion: wherefore it was enacted, that such offender shall be within the year arraigned at the suit of the King; and if the party be acquitted at the Kings suit, within the year and day, that the justices before whom, &c. should not set the party at large, but to remain in prison, or to let him to bail, untill the year and the day be past; and within the said year and day, the wife, or next heir to the party slain may take their appeal against the party so acquitted or attainted, the said acquittal or attainder notwithstanding; and he said, that these words [person attainted] did not extend to person convicted; for they are two distinct conditions in law, for attainder procures corruption of bloud, but the same is not wrought by conviction: and every treason imports in it self felony; but yet notwithstanding they are distinct offences: see 22 E. 4. Coron. 44. where it was ordered by all the justices of England, that none should be arraigned of the death of a man, at the suit of the King, within the year and day; so as the suit of the party be saved. And the justices counselled all men of law so to do, and that the same be executed as a law without alteration, upon which rule of the justices, arose an inconvenience; for after that order of the justices was known, the offender would practice with the party to whom the appeal by the law belonged, to obtain from him a release for some sum of money, and then when the year and day passed, the heinousness of the murther was out of memory; this mischief being espied, was the occasion of the making of the statute of 3 H. 7. But the said statute doth not meet with our case; but our case is at the common law, for this statute extends onely unto persons attainted; but a person convicted is not touched by it, and therefore being out of the words of the statute, it shall be also out of the meaning of it; for being a penal law, it shall be taken by equity, as all statutes which give attaint shall be, stricti juris, and shall not be taken by equity. It hath been objected, that the Statute de Frangentibus Prisonam, 4 E. 1. hath been taken by equity, the same is not so; for it is not any penal law, but the same mitigates the rigor of the common law; for before that statute, the breaking of the prison was felony in every case, but now it is not felony, but where the party was committed to prison for felony, &c.

Co. 3. Inst. 31. 4 Co. 45.

CXCVI. 21 Eliz. In the Common Pleas.

In a formedon of a manor, the tenant pleaded joynt-tenancy by fine with J. S. The demandant did aver the tenant sole tenant, as the writ doth suppose, and upon that issue was taken, and found for the demandant; upon which, a writ of error was brought, and error assigned in this. That whereupon joynt-tenancy pleaded by fine, the writ ought to abate without any averment by the demandant against it, the averment hath been received against the law, &c. Southcote, at the common law, If the tenant had pleaded joynt-tenancy by deed, the writ should abate without any averment; but that was remedied by 34 E. 1. but

joynt-tenancy by fine did remain as **[162]** it was at the common law, for he hath punishment enough in that by that plea, if it be false, he hath by way of conclusion given the moyety of the land in demand to him with whom he hath pleaded joynt-tenancy; and the law doth not intend that he would so slightly depart with his land for the abatement of a writ; as in a præcipe quod reddat, the tenant acknowledgeth himself to be villein to a stranger; the writ shall abate without any averment, if frank and of frank estate; for the law presumes, that the tenant would not enthral his condition. Wray, to the same intent: But the demandant may confess and avoid the fine, as to say, that he that levied the fine was his disseisor, upon whom he had before entred, &c. And if tenant in fee-simple be impleaded, and he saith that he is tenant for life, the remainder over to A. in fee, and prayes in aid of A. the demandant shall not take averment, that the tenant, the day of the writ purchased, was seised in fee. Note that in this fine joynt-tenancy was pleaded but to parcel. It was holden by Wray and Southcot, that the whole writ should abate; as in a writ the misnosmer of one shall abate the whole writ against all the defendants; and so where the demandant enters into parcel of the land in demand, if the thing in demand be one intire thing, it shall abate the whole writ. In this case, the demandant ought to have in his writ de forsprise of the land in demand, whereof the joynt-tenancy by fine is pleaded, per availe, and under the gift of which the formedon is conceived, and therefore in respect of the title of the demandant, it remains in right, parcel of the manor, and therefore ought to be demanded accordingly with an exception: but if A. give to B. a manor, except ten acres in tail, there if after upon any discontinuance, the issue in tail have a formedon, in such case there needs no exception, for the said ten acres were never after the gift, parcel of the manor which was given in tail, for they were severed from the manor upon the gift; but if land in demand was several, as twenty acres except two, an exception is not good, for he might demand eight acres: see E. 1. F. N. B. 866. Præcipe unam bovat. terræ, except a seleon, and the writ was abated, for every demand ought to be certain, but a seleon is a parcel of land uncertain as to quantity, in some places an acre, in some more, in some less. Another point was, that because the tenant hath admitted and accepted this averment (scil.) sole tenant, as the writ doth suppose; if the Court notwithstanding the admittance of the tenant ought without exception of the party, ex officio, to abate the writ; and Wray conceived, that they should, for it is a positive law; as if a woman brings an appeal of murther upon the death of her brother, and the defendant doth admit it without challenge or exception, yet the Court shall abate the appeal, 10 E. 4. 7. And see the principal case there, non ideo puniatur dominus; and if an action be brought against an hostler upon the common custome of the realm, and in the writ he is not named common hostler, and the defendant doth accept of such writ, without exception to it, yet the Court shall abate the writ, ex officio, 11 H. 4. 198. and 38 H. 6. 30.

Dyer 291. 3 Len. 92.

CXCVII. 24 Eliz. In the King's Bench.

The case was this: King Henry the 8. seised of certain lands in the right of his Dutchy of Lancaster, granted them unto another, tenend. in fee-farm, reddend, dicto Dom. Regi, & hæredibus suis, aut illi cui de jure reddi debet 10l. And if this land should be holden of the King in capite, or holden of the dutchy, was the question? Egerton Solicitor General, argued much upon the statute of 1 H. 4. by which the dutchy and possessions thereof were severed from the Crown: see **[163]** Plowden in the case of the Dutchy of Lancaster, 213. And see ibid. the statute of 1 H. 4. entitled, Charta Regis, Hen. 4. 1. De separatione Ducas Lancastr. à Corona; by which it is enacted, that the Dutchy of Lancaster, taliter & tali modo deducatur, gubernetur & pertractetur, &c. ac si ad culmen dignitatis Regiæ assumpti minime fuissemus: so as by that Act the dutchy is dis-joined from the Crown, and in such point as to possession, as it was in a common person. But the possession of the dutchy doth not bind the person of the King: as 10 H. 4. 7. The King brings an action for certain lands to him descended from his uncle, the Duke of Lancaster, and the writ was, non omittas propter aliquam libertatem, and exception was taken to the

writ, because that such clause ought not to be in the King's writ, but where the King sueth as King, but that writ he sueth as Duke of Lancaster, but the exception was not allowed; the King cannot sue otherwise, but as King: for the person of the King ought not to be measured according to his possession, so as it was a severance in order, survey, government and process, and not in respect of the person. But after the statute of 1 H. 4. the said Act of Separation was repealed; and farther enacted, that the said King should hold the said dutchy to him and his heirs, Kings of England; so as thereby the dutchy is settled in the politick body of the King; afterwards came the statute of 1 H. 7. by which it is enacted, that the King shall hold the said dutchy, and the possessions thereof, in such manner and form, and so separated from the Crown as King Henry the Fourth and King Henry the Fifth did hold the same, so as the dutchy was devested out of the body politick of the King where it was setled, 1 H. 4. and vested in the body natural of the King so as the possession of the dutchy, as to their government, &c. are in the King, as they were in the Duke of Lancaster before he was King: and if the Duke of Lancaster had made a feoffment, &c. the feoffee should not hold of him, but of the King: so if the King himself maketh a feoffment of lands of the dutchy, the feoffee shall hold of the King, &c. which see in the dutchy of Lancaster's case, in the end of it: and he conceived, that notwithstanding the union of the Crown and the dutchy, yet the privity of the tenure doth remain, being preserved by the said Act of 1 H. 4. Another matter was, that here, the tenure reserved is tenend. in feodi firma reddend. 10l. &c. And he said, that this rent is not parcel of the tenure, but rather a rent-charge collateral to the tenure: for in all cases where there is a tenure expressed in suit, or implied in law before, there reddendo following shall not make the thing rendred parcel of the tenure, but it shall be a rent in gross: and here tenend. in feodi firma, makes the tenure, &c. and the reddendo after shall not make the rent reserved parcel of the tenure: see the case 33 E. 3. Annuity 52. before the Statute of Quia Emptores terrarum, a man makes a feoffment in fee tenend. de dom. capital. feod. &c. reddend. 10s. rent; here, because that the tenure was reserved, capital dom. feodi illius, this rent reserved is not parcell of the tenure, but a rent in gross: King Edward the Sixth gave certain lands to Cranmer, Archbishop of Canterbury, tenend. by the fifth part of a knight's fee, reddend. inde 6l. per ann. Cranmer made a feoffment in fee to the use of himself for life, and afterwards to the use of his eldest son in tail, the remainder to the right heirs of Cranmer, who is attainted of treason, by which the remainder in fee escheated to the King, by which the seignory is gone. But it was adjudged, that notwithstanding that escheat, the rent did remain, for the rent was not parcel of the seignory. Now this rent being a thing newly created, and not parcel of the possessions of the dutchy in 1 H. 4. nor ever descended from any ancestor of the King, being Duke of Lancaster, shall be accounted to be in the King in the right of his Crown, and so cannot pass by the dutchy-seal: see the **[164]** said statute of 1 H. 4. and the King cannot enlarge the said dutchy, nor the possessions thereof beyond the possessions which were of the dutchy at the time of the making of the said Acts: as if J. S. seised in fee is impleaded, and he saith, that he holds the lands in demand for life, the remainder to the King in the right of his said dutchy; now the said remainder is vested in the King, not in the right of the said dutchy, but in the right of his Crown. The villain of the King in the right of his dutchy of Lancaster, purchased lands, the King seizeth, he shall be seised thereof in the right of his Crown, and not of the dutchy: the King grants common out of certain lands parcel of his said dutchy, and afterwards makes a feoffment of the said lands to another, the grantee of the common dieth without heir, so as the common escheats to him; now he shall have the common in the right of the Crown and not of the dutchy; so although it is said, that the rent shall follow the nature of the land out of which, &c. yet the same is but to some intents, and not to every intent: see the statute of 2 and 3 Phil. & Ma. cap. 20. by which it is enacted, that all the lands which have been granted or severed from the dutchy to any person or persons, and after such grant, have come or reverted to the King in possession, reversion or remainder, or otherwise by attainder, escheat, forfeiture, &c. shall for ever be united to the said dutchy, and shall be adjudged and esteemed as part and member of the same; which proves that such lands were not holden of the King, as Duke of Lancaster, but as

King; for if they had been holden of the dutchy upon the escheat, they should be parcel of the dutchy again, without help of that statute. See the special reservation; reddendo domino Regi, & hæredibus suis, aut illi cui de jure reddi debet, &c. Now, when the King grants the seignory to the Lord Audley, it was in the election of the ter-tenant, to whom he would pay the rent, if it had been in the case of a common person; but it is otherwise in the case of the King: as if A. holdeth of two several lords by owel feoffment, and dieth, his heir within age; the lord which first gets the ward shall have him; but in the case of the King it is otherwise; Plowden, The King is not bound by the statute of West. 3. But in this case, in the making of this feoffment with this tenend. & reddend. the feoffee shall hold of the King as of his dutchy; for all grants of the King savour of the person of the King; and then his prerogative wrapt in the person, shall guide the same; and see the statute of West. 3. extends to all who make feoffments, tenend. de feoffatoribus: but the King is not tenant to any one. And if the King be seised of an advowson in the right of his dutchy, and the same becomes void, and the King presents to the same, he may repeal his presentation: and he vouched divers precedents of patents made to many great lords, to hold of the dutchy, and also to hold of others: and the King by his dutchy-seal may give lands in mortmain. And he argued, that this rent, although newly created, yet in so much as it came, and accrued in respect of the land which was parcell of the dutchy, it should be accounted also parcel of the dutchy; as if before the statute of West. 3. A. seised of lands in fee, of the part of his father makes a feoffment in fee, tenend. by such services, &c. the same seignory shall go to the heirs of the part of the father, in lieu of which the seignory is come: tenant in tail after the statute of 32 H. 8. makes a lease for years, according to the said Act, rendring rent to him and his heirs, it shall be intended, heirs in tail. It was adjourned.

Antea 150. More Rep. Saffron Walden's case. 3 Cro. 210, 211.

[165] PASCH. 26 ELIZ. IN THE KING'S BENCH.

CXCVIII. FORSTER AND WALKER'S CASE.

In an ejectione firmæ, by Foster against Walker, the case was, that Richard Meager was seised of a house in London: and 6 E. 6. he devised the same to his wife for life, the remainder to John his son in tail, the remainder to the Master and Wardens of the Cordwaynors in London, and died; the wife entred and died, John died, the master, wardens and commonalty of the Cordwaynors entred, and leased the plaintiff upon whom the heir general of the devisor did enter. The onely question was, inasmuch as the Cordwaynors of London are incorporated by the name of Master and Wardens and Commonalty of Cordwaynors, if this devise made to them by the name of Master and Wardens of the Cordwaynors of London be good or not? It was argued by Daniel, that the devise by the manner was good enough; and he insisted much upon the favour which the law gives to wills, and to legatees in the devises and construction of them, even in devises and grants to corporations: and as to grants to corporations, he cited the case of the Dean and Chapter of Norwich: decanus & capitulum sanctæ & individuæ Trinit. and they make a lease, leaving out these words [sanctæ & individuæ] and yet held the lease was good, notwithstanding that, for the words left out, are not words of substance of the name, but for the beauty and ornament of it: but in the case of devise, if the name be mistaken in matter of substance, yet if upon the devise the intent of the devisor sufficiently appeareth, it is good enough: for the intent of the devisor shall guide the devise, and therefore by devise, the fee-simple shall pass without the word [heirs.] And he said, that the opinion of Wray, Chief Justice, was in the case of the Dean of Pauls: If I devise that my executors shall assign my lands to J. S. the same, implicative, is a devise of the lands themselves to my executors; for otherwise they could not assign. So, if I will and devise, that A. shall pay yearly out of my manour of D. to J. S. 10l. the same is a good devise of the lands to A. So if in the case at bar this house had been devised to the Cordwaynors by the name of the Society of Cordwaynors, such devise had been

good enough: Cooper contrary; and he said, that the intent of the devisor ought to agree with the law, otherwise the Judges are not to regard it in point of judgment; and he put the case of 39 H. 6. 10. A. deviseth his lands, and afterwards is disseised, and before any entry dieth; now, notwithstanding the intent of the devisor, the devise is void; and he said, The defect of a will in words, in making of an estate shall be supplied by intent, but the defect in words, in naming of the devisor or devisee shall never be supplied, see 49 E. 3. 3. & 4. the case of Whitavers. And he cited a case, 25 H. 8. A stranger of the low-countries being made a denizen in England, returned into his countrey, and dwelling there became sick: and in making of his will, he was advised by council, that by devise of all his goods, his lands deviseable would pass, and therefore by such words he declared his will with the intention aforesaid; (scil.) to pass his lands, and died, and afterwards the states of the low-countries wrote unto King Henry the 8. acquainting him with the intention of the devisor, and also of the opinion of their laws there upon the said will, and all in favour of the devisee; whereupon the King referred the consideration of the matter to Norwick, then Lord Chief Justice, who declared his opinion to the King to be, that by that devise, the lands did not pass, notwithstanding the intent of the devisor.

3 Cro. 106. Shepherd's Touchstone of Conveyances, 416. 1 Rolls 616.

[166] PASCH. 26 ELIZ. IN THE KING'S BENCH.

CXCIX. CRABDELL'S CASE.

Crabdell was bound by recognizance to his good behaviour; upon which the Queen brought a scire facias, and surmised, that after the recognizance acknowledged, the said Crabdell was arrested and taken by the constable for suspicion of felony, and of his own wrong escaped: it was objected on the part of Crabdell, because it is not alledged by matter in fact, that a felony was committed. But the whole Court was of a contrary opinion; for it is not material, if the felony were committed or not; for if a subject be arrested by a lawfull officer, it is not lawfull for him to escape; but he ought to stand to the law, and to answer unto the matter with which he is charged. And so Crabdell was forced to answer.

PASCH. 26 ELIZ. IN THE KING'S BENCH.

CC. BASSET AND PROWE'S CASE.

In debt upon a bond, the case was, that Basset was bound with Prowe as his surety, to one Preston, in a bond of 500l. and that was upon a corrupt and usurious contract against the statute; and Prowe was bound unto the plaintiff in a bond as a counter-bond, to save the plaintiff harmless from the said bond of 500l. Basset is sued by Preston upon the said bond, and so damnified; and thereupon sued Prowe upon the counter-bond, who pleaded against Basset, the Statute of Usury, pretending that all assurances depending upon such usurious contract, as void by the statute; but by the opinion of Wray, Chief Justice, the same is no plea, for the statute is, that all bonds, collateral assurances made for the payment of money lent upon usury, shall be utterly void; but the bond here upon which the action is brought, was not for the payment of the money lent, but for the indempnity of the surety.

1 Cro. 588, 642, 643. 3 Len. 63. Goldsb. 174.

PASCH. 26 ELIZ. IN THE EXCHEQUER.

CCI. THE VISCOUNTESS BINDON'S CASE.

The executors of Thomas, late Viscount Bindon, brought detinue in the Exchequer against the widow of the said viscount, and declared upon the detainer of certain

jewels, the defendant did justifie the detainer of them as her parophornalia: and it was said by Manwood, Chief Baron, that parophorn. ought to be allowed unto a widow having regard unto her degree; and here the husband of the defendant being a viscount, 500 marks is a good allowance for such matter.

More 213. 1 Cro. 250, 251, 252.

PASCH. 26 ELIZ. IN THE KING'S BENCH.

CCII. OFFLEY AND JOHNSON'S CASE.

[See *Wolmershausen* v. *Gullick* [1893], 2 Ch. 520.]

Offley and Johnson were bound as sureties with one A. to B. who recovered against Johnson in London, and had execution against him; and now Johnson sued Offley, to have of him contribution to the **[167]** said execution, ut uterque eorum oneretur pro rata, according to the custome of London: Offley removed the cause by privilege into the King's Bench, whereupon came Johnson, and prayed a procedendo; and because upon this matter no action lieth by the course of the common law, but onely by custome in such cities, the cause was remanded; for otherwise the plaintiff should be without remedy: see the Book of Entries, 160.

More 136. Hob. 264. More 135. 3 Len. 148.

PASCH. 26 ELIZ. IN THE KING'S BENCH.

CCIII. LITCHFIELD AND CAGE'S CASE.

In an ejectione firmæ, the parties were at issue; and by the order of the Court, the trial was stayed, and yet the plaintiff against the order, did privily obtain a nisi prius, of which, Gawdy, Justice, being informed of it after the term, awarded a supersedeas unto the justices of assise, before whom, &c. and yet notwithstanding that, the enquest at the instance of the plaintiff was taken, and found for the plaintiff; and all this matter was shewed to the Court in the King's Bench, and there examined and proved, and it was ordered by the Court, that the verdict should not be entred of record, nor any judgment upon it: and so it was put in ure in a case between Vernon and Fowler. And then the plaintiffs council took exception to the supersedeas, because it was not subscribed with the hand of Gawdy, but, non allocatur; for the seal is sufficient.

3 Len. 100.

PASCH. 26 ELIZ. IN THE KING'S BENCH.

CCIV. SCOTT'S CASE.

William Scott was indicted upon the statute of 23 Eliz. of Recusants, by the name of William Scott of Southwark, gent. and upon that indictment judgment given for the Queen; upon which Scott brought a writ of error, and assigned for error: that in the indictment Scott is not named of any parish, but generally of Southwark; for within Southwark, there are divers parishes, and by the said statute it is ordained that the penalties accruing by the said statute ought to be divided in three parts, whereof one part is to be applied to the relief of the poor resident in the parish where the offence was committed, and therefore it ought to appear upon the indictment of what parish the party indicted is, or otherwise, non potest constare curiæ, to which parish the third part of the penalty doth belong, so that full execution may be made according to the statute: but the whole Court was clear of opinion, that the indictment is good enough, notwithstanding that exception; for all the penalty which accrues by the said statute, belongs first to the Queen; viz. a third part thereof to her own use, another third part for the relief, ut supra, to be delivered by warrant by the officers of the receipt of the

Exchequer. And afterwards the inhabitants of the parish in which the offence was committed, are to sue in the Exchequer for their third part of the penalty, and surmise in their bill, that the offence was committed within their parish; and rule was entred accordingly.

[168] PASCH. 26 ELIZ. IN THE COMMON PLEAS.

CCV. GERRARD'S CASE.

Gerrard, Master of the Rolls, presented Chatterton, Bishop of Chester, to the church of Bangor; to which church, one Chamber's also presented his clerk, by which several presentments the said church became litigious: the Archbishop of York being loci illius ordinarius, awarded a jure patronatus, &c. depending which, the archbishop admitted the said bishop; whereupon Chambers libelled in the Spiritual Court against the said bishop, because the said archbishop, dicto Episcopo plus æquo favore admisit dictum Episcopum, pendente the jure patronatus, in which case, by the law of the church, the admittance is void; for, lite pendente, nihil movetur: and now came the said bishop, and prayed upon that matter a prohibition, which was granted because that the right of the patronage came in debate, after which came the said Chambers, and prayed a consultation, because he did not meddle with the right of the patronage, but onely with the tortious admittance. To which it was said by the Court, that the awarding of the jure patronatus, is not a thing of necessity, but at the will of the ordinary, and so for his better instruction; but if he will at his peril, take notice of the right of the patronage, he may admit which of them he will, without a jure patronatus awarded: and it may be in this case, that after the jure patronatus awarded, and before any verdict given upon it, the archbishop was satisfied of the right of the now plaintiff in the prohibition to the patronage, and thereupon admitted the clerk, &c. and if he was deceived to subject himself unto a quare impedit, whereof he had discharged himself, if he had attended the verdict in the jure patronatus: and by the clear opinion of the Court, the consultation was denyed.

3 Len. 98.

MICH. 29 & 30 ELIZ. IN THE COMMON PLEAS.

CCVI. BARKER AND TAYLOR'S CASE.

The case was; that a woman, tenant in tail, within the statute of 11 H. 7. accepted of a fine, sur conusans de droit come ceo, &c. and by the same fine, rendred back the lands to the conusor for 100 years. It was moved, if this conveyance and disposition be within the penalty of the said statute; for the statute speaks of discontinuances, &c. And it was the clear opinion of the whole Court, that it is within the statute; for by such practice, the meaning of the statute might be defeated; and if such a render for 100 years should be good, by the same reason, it might be for 1000 years, which is like mischievous, and as dangerous unto him in the reddition, as a discontinuance; and by Rhodes, Justice, it hath been adjudged, that if a woman, who hath title of dower, before that she be endowed, will enter, and levy a fine, that the same is within the said statute, and yet she is not tenant in dower: see Dyer, 5. Ma. 140. Penycock's case; and see now, 36 Eliz. Sir George Brown's case adjudged accordingly.

3 Co. 51.

[169] TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CCVII. MORRIS AND WEBBER'S CASE.

In an ejectione firmæ, by George Morris against Webber, alias Turnor, the plaintiff declared upon a lease by Humphrey Bury, &c. And upon not guilty, the jury found this special matter: that Hen. Bury was seised, et cepit in uxorem quandam Willmottam Gifford. 4 Mariæ. And afterwards: 1 Eliz. she libelled in the Spiritual Court against the said Henry, in causa divortii de nullitate matrimonii; and found upon the libel,

in hæc verba, and all the sentence upon it; viz. In Dei nomine, amen. Per depositiones & examinationes medicorum, & aliorum fide dignorum, & honestarum, & expertarum matronarum comperimus & invenimus: quod prædict. Henr. & Willmotta legit. ætatis & plenæ pubert. exist. per duos annos integros simul cohabitaverunt, & in uno lecto concubuerunt. & licet dict. Willmotta operam liberis dare cupierit, nunquam tamen per carnalem copulam cum dicto Henrico conjungi, aut ab illo cognosci potuit, aut potest, idque propter vitium perpetuæ frigiditatis & naturæ impotentiæ generandi, quæ nulla medicorum opera curari pot. idque prædict. Humphrid. sæpius confessus est, se nunquam cum prædicta Willmotta tanquam virum cum uxore conjunctum fuisse, aut conjungi potuisse. Igitur invocato primitus Dei nomine; matrimonium prædict. irritari, cessari quatenuscunque de facto processit cassum, irritum, nullumque in lege, juribus juris omnino carere, & carere debere decernimus, & declaramus, ipsosque quatenus sunt de facto matrimonialiter ad invicem conjuncti a vinculo matrimonii separamus, &c. Humphry made a feoffment in fee unto the use of himself for life, and after to the use of the first, or eldest son of the body of the said Henry in tail. Willmot married Cary, Henry took to wife Phillippam Mountjoy scientem matrimonii prædict. & definitivæ sententiæ prædict. & durantibus ambobus matrimoniis, tam inter dict. Cary & Willmotta, quam inter dictos Henricum & Phillippam, dicta Phillippa exitum habuit per dict. Henricum, Humphrey the lessor, upon which lease the plaintiff declared, Humphrey died: Henry entred, and leased to the plaintiff. Shuttleworth, Serjeant, argued for the plaintiff, that this divorce not reversed or undone by appeal, or otherwise, should stand in force, and according to it the law of the land should judge: see 47 E. 3. 17. casu ultimo. Five manner of divorces are mentioned: 1 Causa professionis: 2 Præcontractus: 3 Consanguinitatis: 4 Affinitatis: 5 Frigiditatis; upon a divorce, causa professionis, the wife shall be endowed, and the heir shall inherit, but in the other not. And the principal cause is reported by the Lord Dyer, 2 Eliz. 179. where Cary and Willmott levying a fine of the lands of Willmott, as husband and wife; and it was moved, that such fine ought not to be engrossed, because that now the divorce is avoided; for Henry in his second marriage hath issue, therefore there is no perpetua frigiditas, &c. but at the last it was engrossed, because the sentence of the divorce doth continue in its force, and then Humphrey, born in the second marriage, is the first son of Henry lawfully begotten; and so capable of the use to him limited upon the feoffment of Henry 22 E. 4 Fitz. Consultation, 51. by Catesby: where my father and mother are divorced without lawfull cause, and afterwards they marry themselves elsewhere, and die, the said divorce, as long as it is in force shall bind me in point of inheritance, and I cannot have an action as heir, &c. during the divorce, is in force: for the divorce being a spiritual judgment shall not be reformed but in the Spiritual Court; and therefore this sentence of divorce, causa perpetuæ frigiditatis, as long as it is in force not repealed or reversed, shall bind all persons: but **[170]** in some cases, such a divorce shall not disable the party to sue; as if a man bringeth an action, de muliere abducta cum bonis viri, where after the trespass committed, the husband and wife are divorced, yet the action lieth, for this action is not in the right, but in possession onely, and in such action, never accoupled in legal matrimony, is not any plea, but the defendant ought to answer to the possession, not his wife; for although they are divorced, yet the action lieth; and if judgment is given in the Spiritual Courts, the Courts of the King shall receive and admit of them, as long as they are in their force. The Abbat of Fountain's case, 9 H. 6. 32. the custome of the abby was, that at every vacation of the abbat, the monks should proceed to a new election, and that he who should be chosen by the greater number of the monks, should be abbat: and the case was, that upon such avoidance, one A. was elected by the greater number of voices, (scil.) 22 monks. And B. was chosen by the lesser number, (scil.) 20 monks; but notwithstanding that, B. entred and carried himself as abbat, by the institution of the visitor, and made a deed by consent of the covent, and died; it was holden, that the said deed should bind the house: for here is a spiritual act, (scil.) the institution of the visitor, which being in force, shall bind us, and our law, 34 H. 6. 38. upon contention betwixt two patrons, claiming the presentment unto a church, the bishop awarded, jure patronatus; which found for one of them, upon which the bishop admitted the clerk of him for whom it was found by the jure patronatus; and afterwards, the other party brought a quare impedit, and it was

found for him : now this judicial act done by the bishop, shall excuse the bishop from any disturbance. Fenner, Serjeant, contrary, Although that the sentence of this divorce be set down in peremptory and final terms, as matrimonium cassum, irritum, nullum, yet our law shall respect the cause and ground of it, (scil.) perpetua frigiditas, &c. and now it appeareth by the success of the second marriage, (scil.) the issue Humphrey, that the cause and matter upon which the divorce was grounded, &c. was an offence of the time, and not of nature for he is now recovered ; and in as much as the church hath erred in the sentence of this divorce, which error is now apparent ; this Court shall adjudge according to the truth of the matter, as the spiritual law ought to have adjudged, and not as they have adjudged : and he cited Fox's case, 16 Eliz. The said Fox being parson of a church, was deprived in the Parliament time for incontinency, and by the same Parliament, all incontinencies were pardoned ; now upon the matter, we are to adjudge this deprivation meerly void without any other spiritual act. At another day, the case was argued by Walmsley Serjeant, that the sentence definitive of the Spiritual Court, in cause of divorce, causa frigiditatis, should stand ; and he argued much in what manner the law of the church, and the law of the land should determine marriage : and he argued that the right of marriage, was determinable by the spiritual law ; and he said, that such sentences ought to be passed by our law : and taken notice of ; and therefore he who pleads a divorce, ought to shew before what Judge the divorce is had, to the intent the Judges may know to what persons they shall write for the trial of it ; and it appears in our books, that our law takes upon it the conusance of the competency of an Ecclesiastical Judge ; which see, 2 E. 4. 15 and 16. The Judges of the Temporal Courts of the King, have determined, that the Pope is not a competent Judge within this realm : and it is true, the common law doth yield unto the law of the church the trial and determination of the right of marriage ; but the trial of the possession of the marriage retains to it self : as if an infant marrieth within the age of consent, and afterwards at full age of consent, doth disagree, now the common law shall determine that the same is not any marriage : so **[171]** 11 H. 4. 167. The Temporal Court shall adjudge upon marriage in fact and in possession, but if the party will plead, that they were never accoupled in lawfull matrimony, a writ shall go unto the bishop to certifie the same ; and in trespass, de muliere abducta cum bonis viri, and in cui in vita, &c. this issue, not his wife, is to be tried by the Temporal Court of the King : for the right of the marriage is not in question, but it is sufficient, if it were a marriage in fact and in possession : see 44 Ass. 12. & 13. and see 21 H. 7. 39. The Temporal Court shall determine of the marriage, if void or voidable : a deacon marrieth a wife, that marriage is not void, so of a priest ; but if a man marrieth a nun, the marriage is void : but in our case, here is a sentence definitive, in a cause of divorce, in which case it doth not belong to us to examine the cause, but be the divorce right or wrong, it shall stand, &c. 10 E. 3. Bar. 296. Nisi sit quoad thor. tantum, vel causa castitatis : and see by Shelley, 28 H. 8. 13. If they of the Spiritual Court give judgment in any cause, be it true or false, untill it be defeated or reversed, it shall bind all the world : see 22 E. 4. Fitz. Consultation 5. Corbet's case, 4 H. 7. 14. by Oxenbridge, 18 E. 4. 30. by Chock ; and 9 E. 4. 24. He who pleads a divorce, ought to shew before what Judge the divorce was had ; but that is not to examine the matter, but to know to what person the Court shall write for the trial of it. It is true, that in case of resignation and deprivation, but in case of divorce, the cause thereof ought to be shewed ; for some divorces dissolve the marriage utterly, and do bastardize the issue, and disable the wife to be endowed ; and some divorces do not dissolve it : as that which is but à thoro & mensa, 11 H. 7. 27. But generally, in spiritual judgments, the causes of them do not fall in judgment in any Temporal Court : 3 H. 4. 34. An excommengement pleaded without shewing of any cause ; and although in our case, the cause of this divorce being for frigidity, sublata jam causa toleretur effectus ; and now, the party in whom such frigidity is assigned, is become whole, as appeareth by his success in his second marriage, having now issue ; yet we ought not to regard that, for then we should resort unto the cause of the divorce, with which we are not to meddle. Gawdy, Serjeant, to the contrary : and first he confessed, that the determination of the right of marriage doth belong unto the Spiritual Court ; but as unto the case in question, (scil.) the divorce in causa frigiditatis, it appeareth by 44 Ass. 13. by Knivet, that the party may receive his

nature, in which case he may have again his wife, and there need not in such case a new marriage; and because that here it appeareth, that Bury hath recovered his nature forasmuch as he hath now issue by another wife, the divorce is become of no force, which see Dyer 2 Eliz. 179. where the case now at the bar was in debate; where a woman inheritrix took a husband, from whom she was divorced, causa frigiditatis, the wife afterwards was married to Carie, by whom she had issue, and gave all her inheritance to her said second husband: and the first husband also took a wife, of whom he had issue; in that case, the opinion of the doctors was, that the first husband and his wife should be compelled to cohabite together as man and wife, because ecclesia decepta fuit in priore judicio. Anderson, That which we have argued is very clear; (scil.) that the Ecclesiastical Court hath authority to determine the right of marriage; but the point of this case is, if this judgment of divorce being given for cause of frigidity, which was adjudged to be perpetual, and now by matter subsequent it appeareth that the party is not frigidus, but he hath recovered his nature, if the divorce shall be accounted ipso facto void, without other circumstance of the spiritual law: and although their sentence be definitive in terms, yet upon this special matter, ex post facto, if the force thereof shall fail. And I have conferred with many learned in the canon law, which are of such opinion; and of that opinion was Doc-**[172]**-tor Dale; and therefore it is convenient, that your clients, each of them do retain one who is learned in the said law, who can inform us what their law is. And Rhodes, Justice, agreed in this case to what the Lord Anderson said, and put the case which was in the King's Bench, 16 Eliz. Foxe's case, which is before vouched, and it was adjourned. And after, at another day, by the appointment of the justices, the case was argued in Court by the civilians and canonists: Goldingham, on the part of the plaintiff, and Steward on the part of the defendant: and first it was said on the plaintiff's part, that by the sentence, all the matter, transit in rem judicatam, and therefore we shall not resort to the matter censured, the sentence being in its force. And as to that, it was answered by Steward, that transit in rem judicatam, but not in case of marriage, and in the like cases, where vertitur periculum animæ; for in such cases the sentences are subject to the success; as if after it appeareth, ecclesiam fuisse deceptam per errorem licet probabilem (ut illi loquuntur) for then periculum animæ vertitur, for then they should continue their adultery, unless the sentence of the church be annulled. Goldingham, It transit in rem judicatam, non quoad instantiam, non quoad causam: so that as long as the sentence is in force, it is causa judicata; yet the cause is subject to the censure of the church. Steward, In our case here, all our books are, matrimonium sit nullum: Goldingham, The words are also in such, reparabitur matrimonium, in which it is implied, that some solemnity of the holy church is requisite in such reparation of marriage. Steward, Where a man is divorced, causa frigiditatis, it is prohibited by such sentence that he shall not marry again, and if he doth marry, he is holden in our law perjured, and an adulterer; and to that purpose he cited divers authorities of the canon law. Goldingham, This sentence is not properly a divorce, for here was never properly a marriage: as in cases de præcontract. Divorce upon that cannot be said properly a divorce, but a sentence of the church upon the errour of the parties: and he put many degrees of impositions in such cases, perpetua frigiditas, & naturalis impotentia generandi; frigiditas ex malefacio: i.e. quoad unam aliquam personam, and many others, quæ possunt matrimonium contrah. & dirimere contractum: and the sentences which in our law, are contra jus constitutionis: as where there is not any citation, declaration, or that the sentence is of another thing than that which is contained in the libell, in such cases the sentence is utterly void; but sentences there given, contra jus partis, are voidable onely; see panormit. fraternitatis: si notorie apparet sententiam divortii fuisse injustam, libet revocari, non obstante quod non fuerit appellat. sententia cessat cum notorie constat de injustitia: et in institutionibus juris. can. 189. si vir causetur arctitudinem in muliere, per quam non est habilis ad coeundum, & ex eo separatur, si mulier postea aliquem invenierit qui seras reserare possit, ad primum conjugium redire compellandi sunt: vid. corpus canon. 357. conjugium confirmatur officio, sed postquam confirmatur officio non licet viro uxorem dimittere, nec uxori à viro discedere nisi causa fornicationis, verum antequam confirmatur impossibilitas officii solvit vinculum conjugii: and panorm. fratern. propter arctitudinem mulieris, si apparet quod præter divinum miraculum absque periculo corporis

habilis reddi non possit, seperentur: matrimonium tamen redintegrabitur si post appareat ecclesiam fuisse deceptam: per matronarum visum datum fuit intelligi quod nunquam potuit esse mater, & eam ob causam divortium inter eos celebrat. fuit, mulier virum cepit, qui seras reseravit, sententiam divortii per errorem licet probabilem novimus esse prolatam, cum patet ex post facto quod ipsa cognoscibilis erat illi cujus semen commiscetur, & ideo inter ipsam & primum virum matrimonium extitisse, quare inter eam & secundum conjugem matrimonium non esse, &c. Eosque præcipimus ab invicem seperari. Vid. secundum partem summæ sylvestrianæ. Si ecclesia sit decepta in hoc quod ille in quo erat impedimentum carnalem copulam cum alia perfecerit, redintegrabitur præcedens matrimo-[173]-nium, & dirimetur secundum, quamvis de sententia ecclesiæ factam. Et alibi: si ecclesia se deceptam invenierit ex hoc quod impedimentum quod judicavit perpetuum, apparet temporale, redintegrabitur primum matrimonium, &c. And afterwards the case was adjourned.

Afterwards, that is to say, Mich 30. and 31 Eliz. the case was moved again, and judgment was prayed for the plaintiff; and then the Lord Anderson, ex assensu sociorum, commanded that judgment should be entred for the plaintiff; and shewed unto the council of both parties, that about the certificate, which the four doctors have shewed unto us, of their opinions upon the point, we our selves have conferred with the said doctors, who have given us their answers, that the said sentence of divorce being yet in force, not reversed is peremptory, and not subject to the success: and although in the examinations and depositions taken in the Ecclesiastical Court, no matter appeareth, upon which such peremptory divorce might be granted, yet it might be, as we are informed by the said doctors, that upon the examination of physicians and matrons, sufficient matter did appear to the said Ecclesiastical Judges, (which for modesty sake ought not to be entred of record) and that appeareth within the sentence; i. habito sermone cum matronis & medicis, which speech not entred of record (causa qua supra) might be the cause that induced the Ecclesiastical Judges to give sentence for the divorce, notwithstanding that the matter within the record be too general to prove, naturalem frigiditatem generandi, but rather maleficium; and afterwards judgment was given for the plaintiff, and so the sentence is bound by the divorce, as long as the sentence doth continue in force: see this case in Coke, 5 Part. where upon a writ of error brought, 41 Eliz. the judgment was affirmed.

5 Co. 98. 1 Len. 53, 181. 3 Len. 129.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CCVIII. GITTINSON AND TYRREL'S CASE.

Gittinson brought an action of debt against Tyrrel, warden of the Fleet, by a bill of privilege, but he would not appear; and the Court was in great doubt, what remedy the plaintiff hath to compell the defendant to appear. For he cannot be fore-judged the Court, because he hath an estate of inheritance in the said office; and afterwards it was surmised to the Court, that the said Tyrrel had made a lease of his said office to another for three years, and then the Court was clear of opinion, that the said Tyrrel should not have the privilege; for now during the lease, he is not officer, but the lessee.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CCIX. HARRIS AND THE LORD MOUNTJOY'S CASE.

[See *Ex parte Morris, In re Duke of Newcastle*, 1869-70, L. R. 5 Ch. 173; 4 H. L. 661.]

Harris affirmed a plaint of debt in the Guildhall in London, against the Lord Mountjoy, and made an attachment of the goods of the said lord in the hands of Sir Drew Drewrie; the lord removed the matter into the Common Pleas, by a writ of privilege; if now the said lord shall find bail was the question, because that he is a

Lord of the Parliament, &c. And the opinion of the whole Court was, that he should find bail, for that is the course of the Court, whosoever is party. And by Anderson, admitting the law to be, that the body of a Lord of Parliament shall not be taken in execution (which I do **[174]** not believe) yet notwithstanding that bail shall be found in such case: for the condition of bail doth consist upon two points: first, that he render his body to prison in execution, if judgment be given against him. Secondly, or to pay the condemnation: and therefore if the body of a Baron of Parliament is not subject to execution, yet the bail shall stand for the second; i. e. to pay the condemnation; and all the justices were of clear opinion, that for execution upon a statute-staple; merchant, upon the Statute of Acton Burnel, or upon the statute of 23 H. 8. the body of a Baron of Parliament shall be taken in execution; for by these statutes, such persons were not exempted.

Dalton's Off. of Sher. 105.

CCX. Trin. 29 Eliz. In the Common Pleas.

Note, it was said, that the division of a great meadow into many parcels, by making of ditches, is not waste; for the meadow may be the better for it; and it is for the profit and ease of the occupiers of it: and by Windham and Rhodes, Justices, if a termor converteth a meadow into a hop-garden, the same is not waste, for it is imployed to a greater profit, and it may be a meadow again: Periam, Justice, Although it be a greater profit, yet it is also with greater labour and charges; and the conversion of a meadow into an orchard is waste, although it may be to the greater profit of the occupier.

Hob. 234.

CCXI. Mich. 29 & 30 Eliz. In the Common Pleas.

In a replevin, the defendant avowed for damage feasant, and upon issue joined, it was found for the avowant, and damages assessed; and now issued a retorno habendo, upon which the sheriff did retorn, averia elongata, whereupon a withernam was awarded, and now came the plaintiff and tendred in Court the damages assessed by the jury, and prayed stay of the withernam, and threw the moneys into Court; but the whole Court was clear against it, for in this case the plaintiff ought to pay a fine, because he had essoigned the cattel, which is a contempt; wherefore the Court assessed a fine of three shillings four pence upon the plaintiff, and then the plaintiff had his prayer.

Pasch. 29 Eliz. In the Common Pleas.

CCXII. Shrewsbury and the Inhabitants of the Hundred of Ashton.

An action upon the Statute of Hue and Cry, was brought by Shrewsbury against the inhabitants of the hundred, of the three hundreds de Ashton in the county of Bucks: it was moved on the part of the defendants, that if upon such hue and cry the inhabitants do their endeavours, as much as in them is, to follow and take the malefactors, and yet they cannot apprehend them, that in reason they ought not to be charged by the said statute. But the whole Court was strongly against it: and by Anderson, The inhabitants of the hundred, in which the robbery was done, are bound to apprehend the felons, or satisfie the party robbed. And the party robbed is not bound to give notice to the inhabitants, nor to direct them which way the felons took their flight, but the inhabitants are bound to follow the felons without **[175]** any such instruction, and after the enquest was taken, and gave a verdict in this manner: that whereas the plaintiff had declared, that the robbery was done in the parish of D. in the hundred aforesaid, the jury found, that the place where the robbery was done, is a lane within the said hundred; and that the one side of the said lane is within the parish of S. and the other side within the said parish of D.

and that the robbery was done in the side of the said lane, which was in the parish of S. and prayed the opinion of the Court upon that matter. And the Court was clear of opinion, that notwithstanding that exception, the plaintiff should have judgment; for here is the right hundred which ought to be charged; and the mistaking of the parish is not to any purpose. But then it was moved on the part of the plaintiff; that for as much as the verdict aforesaid was special, by reason of the doubt which the jurors conceived upon the mistaking of the parish, in the plaintiff's declaration, that the charges of the jurors should be indifferently born by both parties, as the course is in cases of special verdicts; but the whole Court was clear against that, and commanded that the plaintiff alone should pay the said charges, for the matter here found specially is not any doubt; but out of all question, for it is clear that the action is well brought, for as much as the hundred is charged, the mistaking of the parish shall not hurt.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CCXIII. HELLYARD'S CASE.

A habeas corpus was to the warden of the Fleet, to bring the body of one Hellyard, who retorned the writ, that the said Hellyard was committed to the Fleet, per mandatum Francisci Walsingham, militis unius principalium Secretariorum Dominæ Reginæ, &c. and because the warden did not shew in his retorn for what cause the said Hellyard was committed, the Court gave him day to amend his retorn, or otherwise the prisoner should be delivered.

CCXIV. MICH. 30 ELIZ. IN THE COMMON PLEAS.

Upon a recovery in a writ of entry, sur disseisin of two acres of land, habere facias seisinam was awarded, the sheriff as to one acre retorned habere feci; as to the other tarde. And the retorn was shewed to the Court; and all the justices but Periam held, that the sheriff should be amerced for that retorn, contrary and repugnant in it self; but by Periam, it may be, that the acre of which no seisin is had, was so far distant from the other acre, whereof seisin was, that the sheriff, for want of time, could not make execution of both, being so remote the one from the other. To which it was answered, that if the truth of the case was such, then might the sheriff make execution in one acre in the name of both acres. And if upon a capias ad satisfaciend. against two, the sheriff doth retorn as to one, cepi, and to the other tarde, he shall be amerced, for those several retorns cannot stand together.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCXV. EDGAR AND CRISPE'S CASE.

Edgar recovered against Crispe in debt, and afterwards released to Crispe, and afterwards, notwithstanding the release, Edgar sued for a capias ad satisfaciend. against Crispe, and pursued the same untill **[176]** Crispe was outlawed: and it was the opinion of Anderson, Cheif Justice, that Crispe should have an audita querela, notwithstanding the outlawry; and if the audita querela passeth with Crispe, the outlawry also should be avoided.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

CCXVI. FRANKWELL'S CASE.

In trespass for carrying away of tithes, the case was; that Frankwell, parson of the church of D. was accused, in forma juris, before the High Commissioners, who

pleaded, that the same cause and crime was prosecuted against him in the Arches, and prayed that he might not be doubly vexed for one and the same offence; and notwithstanding that he was deprived, and another clerk presented to the same church by the patron, and was admitted, instituted and inducted; and upon entry, brought trespass against the former incumbent. And note, the manner of the deprivation, as it was found by verdict: that the Bishop of London, with the assent of the other Commissioners, gave sentence of deprivation against him; and it was shewed, that the High Commissioners had not power by 1 Eliz. to give sentence of any thing which is dependant in another Court: for it was not the intent of the said Act, to take away the jurisdiction of the other Ecclesiastical Courts; for then it is in vain to have such Courts: it was also moved, because the pleading is, that the Bishop of London, ex assensu of the other Commissioners, gave sentence, the same is a void sentence; for it ought to be the sentence of all the Commissioners, for they shall have equal authority: and to this purpose, he cited the case, 29 H. 8. Dyer 40. where a lease is made of lands, whereof the dean and chapter are seised, in common, per nomen decani ex assensu, & consensu totius capitul. but it was holden a void lease; for the chapter ought to be party to such lease; contrary, where the lease is made of the land which is the proper and peculiar inheritance of the dean: but that exception was not allowed; for the form of entries in all cases, hath always been so. Coke, posito, that the Commissioners ought not to proceed in this case, yet, because they have so done, the same ought not to be examined here; for the Judges here, ought to think that this deprivation was duly made; for, cuique credend. in sua arte, which Wrey granted: and it was said by him, that the Court was created for two causes: 1 For the expedition of the causes depending in the Spiritual Courts: 2 To give to such Judges authority to punish offences in more high degrees; for before they could not but onely excommunicate, but now they may imprison; and if the party had libelled against him in the Spiritual Court of the Arches, it is no reason but that the party for his own expedition, and for to procure due punishment against the offender, may send the cause into the high Court; and after judgment was given according to the deprivation: and afterwards error was brought thereupon, and the error assigned upon the matter in law, whether the said deprivation was lawfull or not? Coke, I remember the reason of the judgment given by the Court was, that admitting that the sentence of the High Commissioners was erroneous; yet it shall bind untill it be reversed by appeal, Fenner, If the party grieved might be restored by appeal, I agree, that such sentence should bind untill it were reversed; but in our case, no appeal lieth from the High Commissioners, wherefore we ought to be helped here; or otherwise we are without remedy. Coke, If the delegates give sentence, no appeal lieth, and yet the party grieved shall **[177]** not be helped here. Fenner, 16 Eliz. One Foxe was deprived the last day of the Parliament for incontinency, which offence was pardoned by the same Parliament, and that sentence of deprivation was holden void. Anderson, In your case, the offence it self was pardoned and discharged: also it is against a general statute, of which every one ought to take notice Periam, When the case was in the Common Pleas, it was moved; if of a sentence given by the High Commissioners, an appeal did lie; and it was certified by Clark, doctor of the civil law, that it did; for the Commissioners are as the delegates of the Queen: and as by the canon law one might appeal from the delegates of the Pope, unto the person of the Pope; so now, one may appeal from the High Commissioners, to the person of the Queen: see for that, 24 H. 8. 12. another error was assigned, because that the commission gave authority to the Commissioners, to adjudge upon confession of the party, or upon the witnesses; but here none of these two ways is found by the verdict; but sentence was given upon his plea, that he was sued in the Arches for the same cause, and so they have not pursued their authority: for the Act is, that such Commissioners shall have authority by vertue of the said Act, and of the said letters patents to exercise, &c. and they are directed by the letters patents, that they shall proceed upon due proof had by confession or true witness, to give sentence. Periam, Although they have not observed the due form prescribed unto them by the letters patents; yet such sentence is not void. Anderson, If the party appeareth and will not answer, it shall be taken pro confesso, and he shall be condemned.

Co. 4. Inst. 326, 327.

TRIN. 38 ELIZ. IN THE COMMON PLEAS.

CCXVII. SIR JOHN SAND'S AND PACKSAL BROCAS'S CASE.

Sir John Sands brought an action upon the case against Packsal Brocas, upon a trover of goods and houshold-stuff; the defendant pleaded as to parcel, that they were fixed to his freehold in S. in Hampshire, absque hoc, that he found them in other manner; as to the part, that the plaintiff gave them to him at D. in Hampshire, and as to the other part, he pleaded, not guilty: for the first part, the plaintiff caused it to be entred, non vult ulterius prosequi, and took issue upon the two other; and it was found for the plaintiff by several juries, in several counties, and damages and costs assessed by the juries: and now the defendant brought error, and assigned error, i. because the plaintiff as to the first had entred, non vult ulterius prosequi, which is a non-suit, and non-suit in part, is non-suit in all. Anderson, It is a question, if this be a non-suit? the entry is, querens venit, & gratis concessit, that as to the goods mentioned in the first pleas, non vultulterius prosequi; ideo, consideratum est quod nihil de iisdem versus the defendant fiat, est ille & pleg. in miseric. & the defendant eat inde sine die. Periam, A non-suit is, when the plaintiff is demanded and doth not appear; but when he comes into Court, and saith, quod non vult ulterius prosequi, the same is a retraxit: Nelson, Prothonotary, Non-suit is upon default; but here the plaintiff appears, and this is the usual form of entry of a retraxit. Another error was assigned, because both juries have assessed costs, and judgment given according; whereas the last verdict ought to do it. And where two juries are to try the issue, the form of the entry after the first verdict is, cesset executio, untill the other issue be tryed: vid. 21 H. 6. 51. 36 H. 6. 13. Anderson, Several issues cannot sever the costs, although they may the damages, for it is but one suit; therefore but one costs; and that is the reason that judgment shall not be given untill the last issue be **[178]** tryed, because that costs shall be but once assessed, which was granted by the whole Court: and by Periam, The first jury may assess costs for the whole suit, quod fuit concessum. Coke, Here are several judgments for the costs; and although it be void for the later issue, yet it is good for the first. Periam, How shall it appear unto us which verdict was the first, and which the last? although that the one verdict be entred of record before the other, the same doth not make that it was first given; wherefore, the whole shall be reversed.

MICH. 31 ELIZ. IN THE COMMON PLEAS.

CCXVIII.

A man, 30 Eliz. made a feoffment in fee to the use of himself for life, and afterwards to the use of his first son, and his heirs; the father and the feoffees before issue, for money, by deed, give, grant, and enfeoff J. S. and his heirs, who hath not notice of the use; the tenant for life hath issue, and dieth, the issue entreth: Glanvile, The use limited to the first son is destroyed; for without regress of the feoffees, it cannot rise; and that the same is gone by their livery: see Plowden's Com. 340. and also he vouched the case of the Earl of Kent, whereby the release of the surviving feoffee, a sleeping use was destroyed, and could not afterwards be revived. Harris, The use may rise without entry of the feoffees: and he put a difference between uses created before the statute and uses created after; for in the first case, they ought to enter; and if they be disabled by any Act, as in the case betwixt Gascoign and the Earl of Kent, they shall never rise, but in the later case, all the authority and confidence is by the statute out of the feoffees, and the uses contingent shall rise without aid of the feoffees by the operation of the law; for the land is bound to the uses, and charged with them: as upon a recovery in a warrantia chartæ, the land of the defendant is charged, pro loco & tempore; and according to the common experience in conveyances for the payment of the debts of the King: as in the case betwixt Breden and Dennis. The debtor of the King makes a feoffment in fee to the use of himself and his heirs, untill he makes default of payment of such a sum unto the King at such a day, and upon default, to the use of the King and his heirs. Cooper, There needs no entry of the feoffees; and he put the difference put before by Harris, betwixt an use created before

and an use created after the statute: and now the feoffees have not any power to revive or destroy such cases, but are onely as instruments to convey the uses; for the use is created upon the livery, and is transferred by the statute, if the person to whom the use is limited be capable thereof at the time of the limitation thereof; but if not, the law shall preserve the same, and it cannot by any means be prevented. And he put the case of Bro. Feoff. to Uses, 50. 30 H. 8. And there is a great difference betwixt an use limited before the statute and after the statute; for now, after the statute, the feoffees have not any seisin, whereof they may make a feoffment: and he put the case between Cheney and Oxenbridge; Cheney leased to Oxenbridge for 60 years, and afterwards enfeoffed Oxenbridge to the use of the said Cheney and his wife for their lives, with divers remainders over; and it was adjudged in the Court of Wards, that by that feoffment the term was not extinct: and he put the case of the Lord Paget in the King's Bench adjudged. A feoffment was made unto the use of the feoffor for life, the remainder to him whom the feoffor should name at his death, in fee; the feoffor and the feoffees for good consideration, levied a fine unto a stranger, and afterwards the feoffor named one and died, the party named by the feoffor shall have the land, notwithstanding the fine. Beaumont, The contingent use here, is utterly destroyed [179] by the feoffment aforesaid; and it appeareth by the preamble of the Act of 27 H. 8. that the makers of the Act did not favour uses, but their intent was utterly to extirpate uses: and if contingent uses which are not, nor cannot be executed by the statute should stand in force, the mischief would be, that no purchasor should be secured and safe in his purchase, but should always be in danger of a new born use, not known before; and he grounded his farther argument upon the reason of Manwood and Dyer, where a man makes a feoffment in fee to the use of himself and his wife which shall be, and afterwards he and the feoffees, and those in remainder, make a feoffment to divers new feoffees, and to new uses; and afterwards he takes another wife, and dieth: it was the opinion of the said two Judges, that by that feoffment, ut supra, the contingent uses are destroyed: for when the estate which the feoffees accept is taken away, which was the root and foundation of the uses which are the branches and fruit of the body of the said tree, it necessarily followeth, that they be also taken away; and because the feoffees by their livery, are barred to enter to recontinue the estate which should yield such uses, they also are gone and extinguished. Yelverton was of opinion, that notwithstanding the said feoffment, that the use should rise in his due time according to the limitation of it. It was adjourned.

2 Len. 224.

Trin. 30 Eliz. In the King's Bench.

CCXIX. The Lord North's Case.

The Queen granted unto the Lord North and his heirs, the fines, pro licentia concordandi, and one would not pay him the fine; for which cause, the Lord North brought an action upon the case against him, and declared upon indebitatus assumpsit, &c. Godfrey moved this matter to the Court, to know their opinion, if such action would lie for the matter or not. Fennor, For a fine in a court-baron, or court-leet, debt lieth; but as he conceived, here this action doth not lie, for it is a real fine, and there is no contract betwixt the parties; but the same is given by the law: and some were of opinion, that debt lieth for a relief, for there is a contract by fealty. Gawdy conceived, that the action doth well lie; for it is not any casual profit and therefore debt lieth for it, although it be an inheritance: and see Dyer 28 H. 8. 24. The heir shall have an action of debt upon a nomine pœnæ reserved by his ancestour. Wray, I do not see that he hath any other remedy, and therefore I am of opinion that this action will lie.

1 Leon. 249, 250. 3 Len. 56. 234.

TRIN. 31 ELIZ. IN THE EXCHEQUER.

CCXX. MRS. PASCHALL'S CASE.

Mistress Paschall was bound with sureties, for her appearance before the High Commissioners, that she should not depart without licence under the hands of three of them; and she pleaded the general pardon at the last Parliament, in which there is an exception of all bonds and recognizances, except only such bonds and recognizances as are for appearance: and Atkinson argued, that she ought to be discharged, by the exception; for although the departure without licence be not specially named, yet it is within the sense; for the not departure without licence, is no other thing, than to continue her appearance. Popham contrary: for, the non departure without licence, was set down in the condition to this purpose, that she should **[180]** not go into the countrey to be corrupted there, or to corrupt other, and receive seminaries, &c. therefore it is another thing than appearance: between Hore and Hare, the case was, one was bound to make his appearance at such a day, and in the mean time thrice every month to repair unto such a preacher to be better informed in religion, although the non appearance was pardoned; yet the other point, i. the resorting to the preacher, is to be answered. Atkinson, There the resorting to the preacher is collateral, and a several point from the appearance: but in the case at bar, the not departure is pursuant to the appearance. And the opinion of all the Barons was, that the pardon did not extend to the same.

CCXXI. TRIN. 31 ELIZ. IN THE COMMON PLEAS.

An action was brought against an executor, who pleaded, that he refused the executorship, upon which the parties were at issue. The bishop certified, quod non recusavit, whereas in truth, he had refused before the commissary of the bishop. Fenner, Serjeant, moved to have the advice of the Court upon this matter, and argued, that the Court ought to write to the commissary, which was denied by the Court, for he is not the officer to this Court as to that purpose, but the bishop himself is our officer: and the party cannot have an averment against the certificate of the bishop, no more than against the retorn of the sheriff: and the Court also held, that the onely remedy for the defendant, was by an action upon the case against the bishop for his false certificate: but it was moved, that the issue joined upon the refusal, ought to be tried by the countrey, and not by the certificate of the bishop; and such was the opinion of Windham and Walmsley: Periam, Where the issue is, that the executor refused before such a day, or after, there the issue shall be tried by the countrey; contrary, where the issue is upon the refusal generally, for the refusal is before him as Judge, as also resignation is.

1 Len. 205.

MICH. 28 AND 29 ELIZ. IN THE KING'S BENCH.

CCXXII. GILES'S CASE.

A writ of error was brought in the King's Bench, to reverse a judgment given in an action upon the case, in the Court of Common Pleas; where the writ brought against the defendant there in that case, was, quare exaltavit stagnum per quod pratum of the plaintiff was inundatum: the defendant in the action there pleaded, not guilty, and the jury found, that the defendant erexit stagnum; and they said, that if the Court shall judge, that erectio and exaltatio be all one, then they find, that the defendant is guilty; and afterwards judgment was given in the said Court of Common Pleas for the plaintiff: whereupon this writ of error is brought. And Glanvile, Serjeant, who argued for the plaintiff, in the writ of error alledged the general error; viz. that judgment was given for the plaintiff, where it ought to be found for the defendant: and he said, that erigere stagnum est de novo facere,

exaltare, is erectum majoris altitudinis facere, deexaltare est ad pristinam altitudinem adducere: prosternere stagnum, est penitus tollere: and in every action upon the case, such apt and precise words are to be in the writ, according as his case requires, unto the end that judgment may in such action be given to the plaintiff according to his plaint, and his damages, in 7 E. 3. 56. In assise [181] of nusans, quare exaltavit stagnum ad nocumentum liberi tenementi sui: the defendant pleaded, that he had not inhanced it after it was levied; and there it was said by Drew, Serjeant, that there is not any other writ in the Chancery, but quare exaltavit stagnum. But that was denied by Herle: for that he said that the plaintiff might have a writ out of the Chancery, quare levavit stagnum: and there by that book it is assigned, that levare stagnum, & exaltare stagnum do differ: and therefore he said, that in this case, the writ should abate for the using of one word for another, 8 E. 3. 21. Fitz. Nusans 5. by Chauntrel, in a writ of nusans, quare levavit, if it be found that he levied it to the nusans, &c. the whole shall be destroyed; but in a writ quare exaltavit, nothing shall be pulled down, if it be found for the plaintiff, but that which is enhaunced onely: so 8 Ass. 9. Br. nusans 17. the same case is put. And see 16 E. 3. Fitz. Nusans, 11. If the nusans be found in any other form than the plaintiff hath declared, he shall not recover: and in 48 E. 3. 27. the writ was, quare divertit cursum aquæ, &c. and the plaintiff shewed, that the defendant had set piles, and such other things in the water, by reason whereof the course of the water was straitened; and because the plaintiff might have had a writ, quare coarctavit cursum aquæ, the writ was abated: another exception was taken, viz. that the assise of nusans ought to be brought against the tenant of the freehold, and therefore it would not lie in this case; it not being shewed that the defendant was tenant of the soil: vid. 33. H. 6. 26. by Moile, if a way be straitned and impaired, an action upon the case lieth; but if it be altogether stopped up, then an assise must be brought; but there it is said by Prisoit, that if the stopping up of the way be done by the tenant of the land, then an assise lieth; if by a stranger, then an action upon the case: but for common nusances no action lieth, but they ought to be presented in the Court-leet or turn, and there redressed: and such was the opinion of the whole Court in this case. Then it was moved, that one of the plaintiffs in the writ of error had released; and the question was, whether that release should bar his companion? to which nothing was said: at another day the case was moved again, and Drew, Serjeant, said, that exaltare and erigere, are all one; but all the justices were against that; for that erigere is de novo facere, and exaltare is in majorem altitudinem attollere, and afterwards judgment was affirmed.

6 Co. 25.

Trin. 30 Eliz. In the King's Bench.

CCXXIII. Freeman and Drew's Case.

In an action upon the case by Freeman against Drew, the defendant pleaded, that after the assumpsit whereof the plaintiff had declared, there was an agreement betwixt them, that the defendant and two others should be bound in a bond to the plaintiff for the sum promised; and that they entred bond accordingly: the plaintiff confessed the agreement, and that the bond was made according to the agreement, and that the parties bound did deliver the same as their deed, cuidam ignoto, to the plaintiff; the defendant said, that they did deliver the deed to one J. S. and gave notice thereof unto the servant of the plaintiff, and that they are now ready to deliver it to the plaintiff, upon which there was a demurrer: Godfrey argued, that the said plea of the agreement specially executed, ut supra, was good, as in a case lately adjudged between Alford and Leigh, Tr. 29 Eliz. where the arbitrament was made, that Leigh should release unto Alford before the Feast Petri ad vincula, and before the said feast, Leigh sealed and delivered such a release unto the use of the said Alford, [182] and after the feast he tendred it to Alford, but he refused it, and brought debt upon the bond for performance of the arbitrament; and it was adjudged, that the action would not lie; for if he do recover upon that action, he also should take advantage of the release. Coke, In Alford's case, a tender was to the plaintiff himself, which is not in this case;

and although that it was after the feast, yet it was before the suit commenced, and also in our case the tender is depending the suit. Gawdy, If the plaintiff should recover in this action, he might plead the recovery in bar of the suit upon the obligation. Wray, Let the plaintiff release the bond, and take judgment here, which was done accordingly.

1 Cro. 54. Ante 110.

32 Eliz. In the Common Pleas.

CCXXIV. Somers and Sir Richard Buckley's Case.

In the case betwixt Somers and Sir Rich. Buckley; where the plaintiff prayed a prohibition to the Court of Admiralty; the case was, that the defendant sued in the Admiral Court for the moyety of a ship and prize taken by them upon letters of reprizal; for the civil law is, that if two ships meet at sea together, although they do not go forth as consorts, and the one ship in the presence of the other taketh a ship with goods in it, the other ship which was present shall have the moyety, or one half of the ship and goods taken; for although it did not take the ship, yet the presence thereof there at the time of the taking, was a terrour to the other ship which was taken, sine quo, the other ship could not be so easily taken: and now the plaintiff for the prohibition did surmise, that after they were arrived in England, they did agree amongst themselves, that the plaintiff should have four parts of the said ship and goods so taken, and the other five parts: and the plaintiff said, that he had pleaded this matter in the Court of Admiralty, and they would not allow the plea, and thereupon he prayed a prohibition, which was granted; but afterwards it was moved on the other side, that the said Court of Admiralty would allow the plea, and there trie it; and thereupon a conditional consultation was granted by the Court; so that that Court allow that plea, and trie it there: and it was said, if the Court there should not allow the plea, that they should incur the offence of contempt of this Court, and the other party should have a prohibition.

2 Inst. 205. 2 Roll. 205. 2 Roll. 171.

Mich. 32 Eliz. In the King's Bench.

CCXXV. Sir Richard Buckley's Case.

Sir Richard Buckley was indicted upon the Statute of Præmunire of 13 and 15 R. 2. and the effect was, that whereas one Griffeth Matthew had murthered one Robert Footman at Beaumarris; and whereas one Owen Wood prosecuted the said Griffeth Matthew for the said murther; the said Griffeth Matthew, præmissorum non ignarus, sed intendens, the said murther, a Curia Dominæ Reginæ ad aliud examen, &c. pro quodam supposito contemptu Curiæ Admiralitatis traxit in placitum: the said Owen Wood, coram Julio Cæsar. in the Court of Admiralty holden at Islington, supposing the said murther to be done upon the high sea, and thereupon caused him to be arrested, and being under arrest, to enter bond unto the Lord Admiral, that he should not prosecute the said murther against the said Griffeth Matthew, nor examine any witnesses concerning the said murther, and that the said Sir Richard Buckley **[183]** was abettor and procurator of the said Griff. Mathew therein. To this indictment many exceptions were taken by Coke: in placitum pro quodam contemptu, and doth not shew the contempt in certain; for it is too general, and so not good: see 18 Ass. for the stealing of certain sheep, without shewing what sheep they were, is not a good indictment. And here he doth not say; concerning the said murther, or concerning the premisses: 2 Although that the matter of the indictment be true; yet the Stat. of Præmunire doth not extend to it, for the statute inflicts a punishment as well upon the Judge, (scil.) the admiral, as upon the party: see 10 H. 4. 164. If one libelleth in the Court of Admiralty for a thing done upon the land, and it appeareth upon the libel, that the thing was done upon the land, and they, notwithstanding that hold plea of it; a præmunire lieth upon it. But if the same doth

not appear within the libel, then it is not within the statute; but a prohibition shall onely issue: so in the case of tithes; if the parson sueth for tithes severed from the nine parts, and that appeareth in the libel, the same suit is within the Statute of Præmunire; and that was Cardinal Woolsey's case: 3 It is alledged, that Sir Richard Buckley procured him to do it, but it is not shewed any place where the procurement was had: and that was resolved in the case of the Lord Paget, and the Bishop of Coventrey and Lichfield: where the bishop was indicted, that he commanded J. S. to enter into the close of the Lord Paget, and to do a trespass there, and because the place of the commandment was not set forth in the indictment, the bishop was discharged. M. 25 and 26 Eliz. Another matter was objected, because that the words are, that the said Sir Richard Buckley did abet and procure, in hac parte; without shewing what thing. As to this last objection, the Court was of opinion, that the words (in hac parte) did refer to the whole offence contained in the indictment: Wray, It is hard, that the matter of the indictment should be within the Statute of Præmunire; for by the suit it is supposed, that the offence was done upon the sea; and the admiral hath jurisdiction to punish murthers committed upon the sea, so in some degree the Admiral hath conusance to enquire of murther; but if they hold plea of any thing of which in no degree they have conusance, it is otherwise. And as to the place where the commandment was made, the Court was clear of opinion, that it ought to be shewed.

1 Len. 5.

MICH. 32 ELIZ. IN THE KING'S BENCH.

CCXXVI. HOOPER'S CASE.

John Hooper, alias Bartholomew of D. &c. was indicted upon the statute of 8 H. 6. of forcible entry, and exception was taken to the indictment in default of addition of the place, &c. for the addition is here after the alias dict. and so there is no addition; and therefore the party was discharged, and it was holden in this case, that uxor is a good addition; and where the husband and wife are indicted, and the husband be indicted of such a place, although the wife hath no addition of place, yet the same is good enough; but Ive said, that in that case there needs not any place.

1 Cro. 198.

CCXXVII. MICH. 32 ELIZ. IN THE KING'S BENCH.

A. was indicted for not repairing of a bridge lying in such a highway, which A. is bound to repair by reason of his land adjoyning; and the indictment was, that the bridge was so ruinous, ita quod **[184]** ligei Dominæ Reginæ per eam transire non possunt, and concluded, ad nocumentum eorund. &c. and that was challenged, because it doth not say, ad nocumentum omnium subditorum: for otherwise it may be intended a private way, of which a man cannot be indicted, but the party grieved shall have his action upon the case: but the exception was not allowed, but the indictment is good enough; for the words of the indictment are, Sic quod ligei Dominæ Reginæ illuc pertransire non possunt; i.e. all the liege people and subjects of the Queen; and then, ad nocument. eorund. amounts to as much as, ad commune nocumentum, &c. and for that cause the indictment was holden good enough.

MICH. 32 ELIZ. IN THE KING'S BENCH.

CCXXVIII. ASHPERNON'S CASE.

One Ashpernon was indicted at the sessions, in the county of Sussex, for an unlawfull assembly and entry into the close of one A. called, the parsonage land, before two Justices of Peace there, and exception was taken to it, because it is not set down in the indictment, that one of the justices was of the quorum, but that the

exception was disallowed; for the indictment is sufficient, if none of them be of the quorum, for they may enquire, but not determine; another exception was, because the contents of the close is not set down in the indictment; (scil.) the number of the acres, nor if it be arrable, pasture, or meadow; but that was disallowed also; for this is but an indictment of trespass, contrary, it is upon an indictment upon the statute of 8 H. 6. for there the party grieved is to have restitution, but so he is not here: another exception was taken, because that in the indictment no time is set down when the trespass was done, but onely of the assembly; but that was disallowed also; for both shall be taken to be done together all at one time.

Postea, 186.

MICH. 32 ELIZ. IN THE KING'S BENCH.

CCXXIX. LEVERET AND TOWNSEND'S CASE.

In an action upon the case, for disturbing him of his common; the plaintiff declared, that he was seised in fee of a messuage and certain land, and that he, and all those whose estate, &c. have common of pasture in 16 acres of land called D. from the time that the corn was reaped, untill it be sowed again; and also common of pasture in lands, called R. omni tempore anni, as appendant to the said messuage and land: and that the defendant had plowed the said lands, and so disturbed him of his common, and found for the plaintiff, and it was moved in stay of judgment, that here it appeareth, that the plaintiff was seised in fee, and so he ought to have an assize, and not an action upon the case; but the exception was disallowed per Curiam, see 2 H. 4. 11. 8 Eliz. Dyer, 250. 11 H. 2. Action upon the case, 36.

1 Cro. 198. 3 Len. 263.

MICH. 32 ELIZ. IN THE KING'S BENCH.

CCXXX. HORE AND WRIDLESWORTH'S CASE.

Hore brought an action of trespass against Wridlesworth, quare clausum & domum suam fregit. The defendant pleaded, and put the plaintiff to a new assignment: i. a house called a stable, a barn, and **[185]** another house called a carthouse and garnier, and that was assigned for error, for that assignment is not warranted by the declaration. Gawdy, The same is good enough; for domus in the declaration, contains all things contained in the new assignment. But if the declaration had been of a close, and the new assignment of a barn, it had not been good. Wray, Domus est nomen collectivum, and contains many buildings, as barns, stables, &c. and so was the opinion of the whole Court.

MICH. 32 ELIZ. IN THE KING'S BENCH.

CCXXXI. SAVACRE'S CASE.

A writ of error, was brought by Savacre and the Bishop of Gloucester, M. 31 and 32 Eliz. upon a judgment given in a quare impedit, for the Queen. And error assigned: 1. An attachment was awarded against the defendant in the quare impedit; retornable Quind. Pasch. at which Savacre appeared, and cast an essoin; and notwithstanding that, a distringas was awarded against them both, retorned, Crast. Trin. and the awarding the distringas was erronious; for the essoin was as an appearance for to save, &c. and therefore against him no distringas ought to have been awarded: and upon alledging of diminution, the record of the essoin was certified; for the same did not appear upon the plea roll. 2. The record is, ipsi in misericord. and so both of the defendants are amerced for the default of appearance, Quind. Pash. whereas Savacre was then essoigned, and so no cause of amerciment of him. Coke, The original writ was here sued, Mic. 26 Eliz. retornable Quind. Hillar. and then both the

defendants made default, for which an attachment was awarded retornable, 15 Pas. and then Savacre appeared, and judgment was given, quod ipsi sint in misericord. in which point the error is assigned: but I conceive, that it is not error; for upon the attachment, the parties ought to put in sureties for their appearance: and the said sureties took upon them, that the defendants, and each of them should appear, and if they, or one of them maketh default, the sureties should be amerced; and so here, this judgment, ideo ipsi in misericord. shall refer to the sureties, not to the parties: for the defendants shall not be amerced untill the end of the suit, and but once onely in one action, which see, Book of Entries, 464. where there was but one defendant; and therefore, if the amerciment shall refer to the defendant, then it should be, ideo ipse, not ipsi, &c. and that is the reason, wherefore neither the Queen nor an infant shall find pledges, for no amerciament shall be upon their default, therefore in vain for them to find pledges, &c. And if the pledges be amerced where they ought not to be amerced by the law, yet the defendant shall not have error upon it, for he is not the party grieved by that amerciament. And upon this reason it is, that in a scire facias against the bail, if erronious judgment be given against him, the defendant in the action shall not have a writ of error, the awarding of the distress upon the roll against both, where the one of them onely makes default, is not error, especially as this case is; for though that one of them was essoigned untill the day aforesaid, yet at the said day they make default, and so the distress is well awarded against him; and although that the writ were ill awarded; yet when they appear, Cr. Trinit. at the day of the retorn of the distress, all mean defaults in the process are saved, and so the misawarding of the distress, by appearance afterwards is supplyed: as 39 E. 3, 7. The law requires that in an action grounded upon the Statute of Præmunire, 27 E. 3. the defendant hath warning by two months; yet if the defendant having not had such warning appeareth, the process is well enough: so 9 E. 4. 18. where, upon any **[186]** process the defendant appeareth, although the day of appearance be not lawfull, yet the parties shall be put to answer: and see many cases there to the same purpose: and such was the opinion of the Court in the principal case. And as to the second error, that the judgment, ideo ipsi in miseric. shall be referred to the sureties onely, and not unto the party; and that the defendant shall be but once amerced in one action, the same is true, that he shall be but once amerced for one default; but if many defaults be, the defendant shall be severally amerced for every default: and it should be unreasonable that the sureties should be amerced, and that the defendant who is as principal should go free: see the Book of Entries, 193. Ipsi & plegii sui in misericordia, &c.

Ante, 4.

Mich. 32 Eliz. In the King's Bench.

CCXXXII. Farnam's Case.

Farnam, schoolmaster, and others, were indicted upon the statute of 8 H. 6. for entring, in domum rectoriæ de Putney, ac in cert. terras eidem domui part. jacen. in Putney, &c. Exception was taken to the indictment, because it recited the two parts of the statute: 1. Expulsion and disseisin with force: 2. Holding out; and there is not any offence in it contained as to one of them; (scil.) holding out; and although it was not necessary to recite the statute, yet the party meddles with it, and doth not apply it to the special matter, the same is naught: see for that the case between Strange and Partridge, Plow. Com. 2. The entry is supposed, in domum & certas terras eidem domui pertinen. jacen. in Putney; which is incertain, as to the lands, and it is naught for the house also; for it is not shewed in what town the house is, for this clause, ac certas terras eidem domui pertin. jacen. in Putney, is a distinct clause by it self, and refers onely to the lands, and doth not extend to the house: as to the first exception, it was disallowed; for it is not like unto Partridge's case, for there the statute is recited, which needs not, and therefore, being misrecited, made the indictment insufficient; but here the statute is well recited, and therefore as unto that matter, the indictment is sufficient: as to the second exception, the justices were of opinion, that the indictment in that respect, was too general and incertain:

the third exception was not allowed; for the latter words, i.e. in Putney, do refer to the whole, and extend as well unto the house as unto the lands: but as to these words, lands to the said house belonging. See the case between Partridge and Croker, 7 E. 6. 85. where it is good enough, because that the number of the acres is set incertain. And it was holden by the Court, that a schoolmaster is a good addition, for it is a mystery, as a scrivener; and afterward the indictment for the house onely was holden good.

Antea, 184.

MICH. 32 ELIZ. IN THE CHANCERY.

CCXXXIII. GRAY A BENCHER OF THE TEMPLE'S CASE.

Gray, a bencher of the Temple's case, was this; it was found by office, that one H. was seised in fee of certain lands called Drayners, and Codred, alias Codreth, in the county of Hertford, in his demesne as of fee, and thereof enfeoffed certain persons, unto the use of himself, and Anne Capel, with whom he afterwards intermarried, and of the heirs of their two bodies begotten, and of such estate died [187] seised; and farther it was found, that the said H. was also seised of other lands, in Barmesden in his demesne as of fee, and therefore died seised; and now came Gray into the Chancery, and shewed that the said H. was seised of the said land, called Drayners, in his demesne as of fee, and thereof enfeoffed certain persons unto the use of himself, and the said Anne Capel, for the term of their lives, and afterwards, by his indenture, dated the 23 of Decemb. and enrolled, bargained and sold the reversion thereof to the said Gray, &c. by force whereof, &c. Absque hoc, that he was seised in tail, and absque hoc, that he thereof died seised in his demesne, as of fee-tail, as it is found by the said office: and for the land in Barmesden, he said, that the lady Judde was seised thereof for the term of her life, the reversion to the said H. in fee, who granted to him the said reversion in fee, &c. absque hoc, that he died seised in his demesne as of fee, &c. And upon that, the Queen's attorney joined issue, and the venire facias issued, De Cottred & Barmesden; and the jury found, that H. did not make the feoffment to the use of himself and Anne his wife in tail; and farther found for Gray in all, &c. And it was objected here, that the same is not a good and lawfull trial: for the land is alledged to be in Codrett, and the venire facias is of Codred, &c. And although the venire facias be well awarded, as unto Barmesden, yet being naught in part, it is naught in all, which was granted by the whole Court; and then a new venire facias shall issue forth for the whole. Another objection was, because he pleads that the Lady Judde was seised of that land for the term of her life, in which case Gray, who is in reversion, ought not to be admitted to this traverse, because that tenant for life, for any thing that is pleaded to the contrary, is yet alive; and it is clear, that none shall be put to his traverse, but the party grieved; and here he in the reversion upon an estate for life, cannot be restored to the possession, and by consequence shall not have traverse; see for that, 6 H 7. 15. and 37 Ass. 11. &c. 2. The seisin in tail ought to be traversed, and not the descent, or dying seised; for if they were seised and disseised, and so died, the Queen shall have the ward. Coke, contrary, for Codred and Cottered, idem sonant, &c. And although that it be found by office, that H. was seised of lands in Codred, alias Codreth, yet the defendant supplies the said matter; for he saith thus as unto the land in Codred prædicta: which words import that the said land was known by the one name or the other; for this word prædicta, is as an averment: which see 33 H. 8. Br. Averm. 42. And so here, this word prædicta is an averment, that Cottered and Codred are one: and if so, then the venire facias is well awarded. The statute of 18 H. 6. gives traverse to those who find themselves grieved by such offices, or which are put out of their lands or tenements; and we are within the words of it, for upon the whole matter, we are out of possession, as it was ruled in the case of one Stukely in the Court of Wards the last term. If it be found by office, that A. died seised of my manor, and that he held the said manor of the Queen: now I am out of possession; and for that cause, the bargain and sale of Dorrel to Sir Francis Walsingham was holden void by the whole Court: and 4 H. 6. 12. Traverse is given in lieu of petition; but he in

the reversion may have petition, therefore he shall be also admitted to traverse: and this case may be resembled to the case of 2 E. 3. 23. where a præcipe was brought against tenant for life, and he in the reversion for life prayed to be received: it was said by Thorp, that is not within the case of the statute, for he is tenant onely in the remainder, and it is possible that neither shall have any thing; and the statute speaks onely of reversion; and yet it was awarded, that he should be received, otherwise great prejudice would follow. And here we are at prejudice; for now, by reason of this office, we cannot have our action of waste: also here we need not to **[188]** traverse the dying seised in tail, but it is sufficient to traverse the gift in tail; for if there be not a gift in tail it is not possible that he should die seised in tail, which see 2 E. 4. 15. by Laicon. Gawdy, Justice, conceived, that the trial is not good; for the venire facias is not from the place where the land is; and this word (prædicta) doth not amount to an averment; and the case cited before is but the opinion of Brook. Wray said, that as to the first exception, that it was good enough, for both the names, idem sonant; and as to the office, by that the Queen hath gained possession; so as he who traverseth cannot have an action of waste: and so he is prejudiced by the office, &c.

MICH. 32 ELIZ. IN THE KING'S BENCH.

CCXXXIV. PERCHALL'S CASE.

Perchall was indicted upon the statute of 5 E. 6. cap. 4. for drawing of his dagger in the church, against J. S. without saying, that he drawed it to the intent to stick the plaintiff, and therefore the indictment was holden void as to the statute; and it was moved, if it should not be a good indictment for the assault, so as he might be fined for it, and by Sands, Clerk of the Crown, and the whole Court, the indictment is void for the whole; for the conclusion of the indictment is, contra formam statuti, and there the jury cannot enquire at the common law.

MICH. 32 ELIZ. IN THE KING'S BENCH.

CCXXXV. MEAD AND CHENEY'S CASE.

Mead brought an action of debt upon a bond against Cheney, executor of one Skipwith, and recovered; and upon a fieri facias, the sheriff did retorn devastavit: and it was moved to have an elegit, and the justices would advise of it: and afterwards, at another day, a precedent was shewed to the Court of 17 Eliz. and thereupon the elegit was granted.

TRIN. 32 ELIZ. IN THE KING'S BENCH. ROT. 910.

CCXXXVI. TOMPSON AND TRAFFORD'S CASE.

In an ejectione firmæ, the case was, that the warden and fellows of New College in Oxford, 8 Eliz. leased a mansion house in the burrough of Southwark, to one Standish, for 21 years, and afterwards, 25 Octob. 21 Eliz. they demised the same mansion house to the said Standish for 21 years, to commence the Michaelmas after: and the stat. of 14 Eliz. cap. 11. and 18 Eliz. cap. 11. were also found: and if this second lease shall be said a lease in reversion, and so be void by the statute of 14 Eliz. was the question. Foster moved, that it is a lease in reversion; for the first lease doth continue untill Michaelmas; and so was the opinion of the Justices of Assise at the trial. Towse contrary: For when Standish accepted the second lease, the same is presently a surrender of the former lease; for he giveth power unto the lessor for to contract for the house presently; and to that purpose he cited Corbet's

case, 8 Eliz. Coke, It is a surrender presently, for you cannot apportion the term. It was adjourned.

Poph. 8, 9.

[189] MICH. 32 ELIZ. IN THE KING'S BENCH.

CCXXXVII. WOOD AND AVERY'S CASE.

Debt upon a bond by Wood against Avery; the condition was, that where the plaintiff had demised to the defendant for term of years, two messuages, &c. If the defendant at all times, during the term, shall maintain, sustain and repair the said two messuages with good and sufficient reparations, that then, &c. And the defendant pleaded, that he had performed the conditions in all, but as to one kitchin, which was so ruinous at the time of the demise, that he could not maintain or repair, and therefore he took it down, and rebuilt it again, in so short a time as he could possible, in the same place, so large, and so sufficient in breadth, length and heighth as the other kitchin was; and that the said kitchin all times after the re-edifying of it, he had sustained and maintained, and well repaired, and demanded judgment, &c. upon which plea the plaintiff did demurr in law; and by the Court, the plea were a good plea if it were in an action of waste, but here where he hath by his own act tied himself to an inconvenience, he ought at his perill to provide for it: and here it was said, that if the condition be impossible the bond is single: contrary, where a man is charged by an Act in law.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCXXXVIII. BOSTWICK AND BOSTWICK'S CASE.

Dorothy Bostwick brought dower against Bostwick an infant, and the case was, that the husband of the demandant was seised of certain lands holden by knight's-service of M. C. and by his last will, devised two parts of the premisses to his executors, during the non-age of his heir, and died, his heir within age; after whose death M. C. entred into the third part, descended as guardian in knight's-service, and the executors into the other two parts, upon which the demandant brought one writ of dower against the guardian, to be endowed of the third part; and another writ of dower against the heir within age, in whom the freehold of the two parts was; the heir appearing by attorney, pleaded to issue, which was found for the demandant; but the judgment was afterwards reversed, because the heir, being within age, did not appear by guardian but by attorney; for which cause she again brought a writ of dower against the heir, and the sheriff did retorn him summoned, but the heir made default; for which cause the Court was moved in the behalf of the demandant, to have the aid of the Court in this case: for if upon default of the tenant, a grand cape should issue forth, and so a recovery by default should follow; the same would be error: which see 6 H. 8. Br. Liver. Defaul. 50. And therefore it was prayed, that some person be appointed guardian to the heir, who may appear and plead for him, for otherwise the demandant is at great mischief; for the guardian now will not suffer the heir to appear in person: and if the widow now demandant should stay for her dower untill the heir should come of full age, it would be a great mischief: but by *Walmesley, Periam and Windham*, We cannot appoint a guardian to the heir for his appearance here, unless the heir be here in person in Court before us; and he was appointed to be brought in person into Court.

Ante 59.

[190] MICH. 32 ELIZ. IN THE COMMON-PLEAS.

CCXXXIX. SIR ANTHONY DENNY'S CASE.

Sir Anthony Denny, seised in fee of the manor of Chessam, extending into Chessam, and in the town of Hertford, and also of other lands in Hertford, by his last will, devised the manor of Chessam to Henry Denny his son and heir in tail; and his lands in Hertford, to Edward Denny his younger son, &c. It was holden by Walmsley, Periam and Windham, (absent. Anderson) that the younger son should have that part of the manor of Chessam, which lieth in the town of Hertford. Another point in the case was, that upon the death of Sir Anthony, an office was found without any mention of this devise; for which cause, the Queen seised, and leased all the lands so devised to a stranger, during the minority of the heir; the heir comes of full age, and hath livery of the whole, and without any express entry, leaseth the lands for years, rendring rent; the lessee entreth, and payeth the rent to the heir, the heir dieth, the lessee assigns over his term, and the rent is yearly paid to the right heir of Sir Anthony: and now Edward Denny entred, and per Curiam his entry is lawfull; for if the heir entreth in this case, and many descents follow; yet the devisee may enter at any time, for his entry doth not make any abatement or wrong, but may well stand with the devise; for if the devise be waved, or the devise doth defer the execution of the devisee; it is reason that the heir enter and take the profits, untill the devisee entreth: but if a stranger abateth after the death of the devisor, and dieth seised, the same shall take away the descent.

1 Inst. 111. a. 240. b. 3 Cro. 145. Ow. 86, 87.

TRIN. 28 ELIZ. IN THE KING'S-BENCH.

CCXL. THE CASE OF THE TOWN OF LEICESTER FOR TOLL.

An action of trespass, tam pro Domina Regina, quam pro seipso; and shewed, that the town of Leicester is an ancient town, and ancient demesne, and the inhabitants there have used to be discharged of toll; and that the Queen by her letters patents, gave command to all bailiffs, sheriffs, mayors, &c. that those of Leicester should be discharged of toll; and notwithstanding that, that the defendant took toll, &c. Exception was taken, because that the suit was prosecuted, tam pro Domina Regina, quam pro seipso: whereas the party grieved was onely to have the information. See the case, 49 E. 36. where the writ is, ad respondend. tam pro nobis, quam, &c. and no exception is taken to it: another exception, the plaintiff declares, that Leicester is an ancient town, and ancient demesne, and doth not shew that it is parcel of a manor: see 20 E. 3. Ancient Demes. 25. such exception is taken, but after, the defendant pleads, that all such towns, whereof the land in question is parcell, is ancient demesne; and such plea was holden good: see 30 E. 3. 12. parcell of a manor, which is ancient demesne; and the plaintiff replied, absque hoc, that it is parcell of the manor: another exception, that lands holden in socage onely, and no other ought to be discharged of toll; and here it is not shewed in the declaration, that the place where, &c. is holden in socage, to which it was answered, that the same needs not to be set down in the declaration; for that is implied in these words, ancient demesn. for otherwise it cannot be but socage land onely, and of no other tenure: a fourth [191] exception, the letters patents here shewed in discharge, are of no value; for the King by his letters patents cannot disinherit any one, erg. nor discharge one of toll which is a kind of disinheritance; to which it was said, that the plaintiff doth not declare of any grant, but of an usage or custome, for those of ancient demesn; and farther, hath commanded by the said letters patents, that such customs and usages should hold place; and upon the custome, and the contempt, this action is grounded: a fifth exception, because the plaintiff hath not shewed, that the toll whereof the plaintiff hath counted, was concerning things for provision for their houses, manurance of their lands, &c. 7 H. 4. 111. In an action upon the case for not paying of toll, the defendant said, that he

held certain lands of R. lord of the manor of H. which manor is ancient demesn, of which manor all the tenants have been free, to sell or buy beasts or other things, for the manurance of their lands, and maintenance of their houses, without paying toll in any market or fair, &c. and so justifies, that he came to the same market, and bought certain beasts, as the plaintiff had declared, and that some of them he used about his manurance of his lands, and some of them he put into pasture to make them fat, and more fit to be sold, and afterwards, he sold them at such a fair, &c. and the opinion of the Court was with the defendant: and by Godfrey and Coke, Such tenants shall be discharged of toll, not onely for buying of things which concern their sustenance, provision, and manurance of their lands, but also for all things bought, as common merchandizes: 28 Ass. ult. by Thorp, Green and Seton, of all things bought by any for his own use, they shall be quit of toll: and then, if the privilege of tenants in ancient demesn, shall not be quit of toll, but for things bought for their sustenance, provision and manurance of their lands, they have no more favor than ordinary subjects: see 19 H. 6. 66. Some are of opinion, that such tenants shall not pay toll for things sold and bought, coming upon their lands, and touching their sustenance: see F. N. B. 228. D. such tenants are discharged of toll for all things by them sold and bought, by way of merchandize; as also of things of necessity, as sustenance: and see Crook, in the cases of Itiner. 138. he conceives, that such tenants for merchandizes shall pay toll as other merchants; but see the writ of F. N. B. 228. the words are de bonis, & rebus suis, and Coke said, that he had found the reason wherefore such tenants should be quit of toll throughout the realm, in an ancient reading, viz. that all the lands in the hands of Edw. the Confessor and Wil. the Conqueror set down in the Book of Doomsday were ancient demesn, and so called terræ Regis, and they were to provide victuals for the Kings garrisons, for then they were troublesome times; and for those causes, and because they made provisions for others, they had many privileges, amongst which this one; ut quietius aratra sua exercerent, & terram excolerent: the lord himself, in ancient demesn shall not have such privilege, for his seignory is pleadable at the common law: vid. F. N. B. 228. B. and he said, that the plaintiff ought to alledge, that his lands are parcel of such a manor; for there cannot be ancient demesn, if there be not a Court and suitors, &c. and he granted, that such a town might be ancient demesn of the Crown, but yet they shall not have the privileges and liberties which the tenants in ancient demesn have. Towns were before manors: London hath the name of ancient demesn, and yet they have not such liberties, nor the lands in it pleadable by writ of right close. 7 H. 6. 31, 32. Shute, Justice, was of opinion, that an inhabitant within ancient demesn, although he be not tenant shall have the privileges; see for that, F. N. B. 228. B. Tenants at will in ancient demesn shall be discharged of toll, as well as tenants of the freehold for life, or for years, 37 H. 6. 27. by Moile. London is ancient demesn; for they prescribe, that a villein who hath **[192]** there dwelt, &c. shall not be taken from thence by capias, or attachment, Billing. London is not in the Book of Doomsday. Moile, They make their protestation in a writ of right patent. Littleton, That is used in divers places, and at this day in Exeter. And by Clench, If a tenant in ancient demesn levyeth a fine of his lands, then he shall not have the privilege, untill the fine be reversed, quod fuit concessum: if the lord of a manor in ancient demesn, purchaseth all the tenancies, the whole privilege is gone, which Coke denyed. The case was adjorned.

2 Inst.

TRIN. 28 ELIZ. IN THE COMMON PLEAS.

CCXLI. LENNARD'S CASE.

In the case of Lennard, Custos Brevium, who was plaintiff in an action of trespass for breaking of his close; the defendant pleaded, that William Heydon was seised of the lands, and enfeoffed him: and upon ne enfeoffa pas, the parties were at issue; and it was found by special verdict, that the said William Heydon was seised, and leased the lands to the defendant for years; and afterwards he made a deed of feoffment to the same lessee of the same lands in fee, by the words of dedi & concessi, with a letter

of attorney within the said deed, to make livery to the lessee; and the deed of feoffment was delivered to J. to deliver the same to the said lessee, who delivered the same accordingly: the lessee delivered the same to the attorney named in the deed, who made livery accordingly: and it was moved by the council of the plaintiff, that upon all this matter, here is not any feoffment: and by Walmesly, Serjeant, This deed so delivered took its effect presently as a confirmation; and then the livery and seisin comes too late; for as soon as the said deed was delivered to the lessee for years, the law gave to it, its operation to this effect, to vest the fee and the freehold in the lessee by way of confirmation: see for that, Littl. 532, 533. But the whole Court was of a contrary opinion; for it is in the election of the lessee to take the conveyance as a feoffment, or as a confirmation: and here it appeareth upon the deed, that the intent of both parties was, that the lessee should take by way of feoffment, and not of confirmation; for otherwise, to what use should be a letter of attorney inserted in the deed? and here the lessee hath liberty to make his election how he will take; either by feoffment, or by confirmation, which election he hath determined by the acceptance of the livery: and by Anderson, If tenant in tail be disseised, and makes a charter of feoffment, and delivers the same to the disseisor, who delivers the same to the attorney, named in the charter, who makes livery accordingly: here is a good feoffment, and a discontinuance; and afterwards, after many motions made, and day given to shew cause, judgment was given, that the plaintiff should be barred.

2 Roll. 787. 3 Len. 128.

TRIN. 28 ELIZ. IN THE COMMON-PLEAS.

CCXLII. ROOKE AND DENNY'S CASE.

In an action upon the case, by Rooke against Dennis, for misusing of the plaintiff's horse, by occasion of which misuse, the said horse became blind of one eye, and gall-back'd. the plaintiff counted, that the said horse was stolen by three felons, after whom the plaintiff made fresh suit, and that the felons were apprehended, and attainted **[193]** at his suit before Justice Windham: and that the said horse came unto the hands of the defendant, who misused it, ut supra: the defendant said, that before that, and the said attainder of the said felons, the said felons had waived the said horse within his manor; in which manor he had waife and estray, &c. And it was holden by the Court, that the same was no plea, without traversing the fresh suit, whereof the plaintiff hath declared; for by the fresh suit, the property of the plaintiff in the said horse was preserved; and so upon that misuser of the horse by the defendant, an action well lyeth: and judgment was given for the plaintiff accordingly.

Hetley's Rep. 64. Rolls 809. More 572.

HILL. 29 ELIZ. IN THE KING'S BENCH.

CCXLIII. PRETIMAN AND COOKE'S CASE.

In ejectione firmæ, the case was, that one Hawkins was seised of three messuages in Bury, and had issue, Robert, a son, and Christian and Joan, daughters; and by his will, devised his three messuages to his wife for life, the remainder of one of them to Robert his son and his heirs, and the remainder of another of them to Christian his daughter, and her heirs; and the remainder of the third messuage, to Joan his daughter, and her heirs: and farther willeth, that if any of his said three issues should die without issue, of his, or her body, that then the other surviving, shall have, totam illam partem, betwixt them equally to be divided; the devisor died, the wife died, one of the daughters died, having issue; the son died without issue, the sister surviving, entred into the whole part of Robert, the son, and died; her husband held in the land as tenant by the curtesie; and the question was, if the surviving daughter should have all the part of him that died without issue, or she and the issue of the

other daughter; Coke, The survivor shall have the whole: and he said, that the devisees have an estate in tail, for the fee doth not vest in them, for it is incertain which of them shall survive; but when one surviveth, then he shall not have for life, but in fee; for the words, totam illam partem, goe as well to all the estate, as to all the things. A. tenant for life, the remainder to B. in tail, the remainder to the right heirs of A. A. grants, totam statum suum, both the estates pass, and the grant includes the whole; see 41 E. 3. Fitz. Br. 541. In ravishment of ward, supposing the ravishment of two daughters, quarum maritagium ad ipsum pertinet, and it was challenged, because he doth not say maritagia, but the challenge was not allowed; and he said, that if a man deviseth his land wholly to A. that he hath a fee-simple: see the case, H. 28 Eliz. the case between Higham and Harwood: and Coke said, that they had by this devise a fee-tail, with a fee-simple expectant, each of them severally in the messuage to them limited: Golding, Each of the devisees hath an estate-tail in the messuage, to them devised, and but an estate for life in the messuage which is to accrue upon the death without issue, &c. For no estate is limited expressly, nor what estate the survivor shall have; for here are not any words which do import a fee-simple, as (according to Littleton) imperpetuum; or to do what he will with, &c. See for that 22 E. 3. ad terminum qui præteriit: but here are onely bare words, of which no farther construction can be made, but for life: and as to the words, totam illam partem, the same doth not extend farther, than if he said, partem suam: and he said, that nothing vests in him who survives; for there ought to be two to take by the survivor, or otherwise nothing shall accrue to the survivor; for the words of the devise are æqualiter inter eos dividend. and that which accrues by survivor shall be divided betwixt two, otherwise nothing shall accrue. And if it cannot survive to two, then it **[194]** shall descend to the issue of the sister who is dead, and to the surviving daughter, and they shall be tenants in common, and not joint-tenants. Clench, These words, totam illam partem, go onely to the house, and not to the estate in it, which Shute granted: if both the daughters had survived Robert, they should have fee in the house of Robert not by the will, but by descent; and this devise shall not take effect otherwise, and the devise as to that is void, and then the common law shall hold place, and that is, to descend to the issue of the one sister, and the surviving sister: and here the survivor hath but an estate for life in the house of Robert, and then by the death of Robert, the fee-simple accruing to the surviving sister, the moyety of her estate for life is extinct. And if one of the daughters had died without issue before Robert, the house of such daughter had come to Robert and the other sister, as co-parceners; for the son is to have all the fee, and a moyety of the same executed, and a moyety expectant, and the other sister should have a moyety for life, and so the devise not void. And afterwards judgment was given against the husband of the surviving daughter.

Ante 129. 1 Cro. 52. 3 Len. 180.

Hill. 29 Eliz. In the King's Bench.

CCXLIV. Hurlston's Case.

Hurlston brought a writ of error against the Queen, upon a judgment given for the Queen, in the County Palatine of Chester; it was moved by Gawdy, the Queens Serjeant, that the writ did not lye; for he ought to sue to the Queen by petition, which see 2 3. E. 22. A writ of error cannot be granted, absq; speciali gratia Dom. Regis: see also 22 E. 3. 3. and the case was, that judgment was given for the Queen in a scire facias, to reverse the patent of the constableship of the castle of Chester, and by him in Chester, there are many Courts; King's Bench, Common Pleas, Exchequer, Chancery: and here a judgment or decree in the Chancery cannot be reversed, but by Parliament; and so he conceived of a judgment given in the Chancery at Chester, and it cannot be reversed in the King's Bench: also they have a custome in Chester, that they may reverse within certain months the judgment before. Clench, There needs no petition, for both the patentees claim from the Queen; and whether there be error or not, the Queen is not prejudiced: Coke, There needs

no petition, for it is now past, for the Queens Attorney's hand is to it; 11 Eliz. In one Haunce's case, a writ of error was brought against the Queen, and they were compelled to sue to the Queen by petition: Coke, In the Exchequer, if an erronious judgment be given for the Queen in a bill of intrusion, the party shall have a writ of error against the Queen without any petition. It was the case of one Eliz. Mordant, 15 Eliz. she brought a writ of error to reverse a fine, levyed by her, during her minority, against the Queen, and the proceeding in it was stayed, because she had not sued to the Queen by petition first: Wray, Many outlawries have been reversed by error without any petition, and yet in such case the Queen hath an immediate interest. 4 Len. 160.

MICH. 29 ELIZ. IN THE KING'S BENCH.

CCXLV. GOMERSALL AND GOMERSALL'S CASE.

In an account, the plaintiff charged the defendant as bailiff of his shop, curam habens, & administrationem bonorum: the defendant answered to the goods onely, and said nothing to the shop: Tan-[195]-field moved the same matter for error in arrest of judgment: as 14 H. 4. 309, 310. One charged another as bailiff of his house, et curam habens bonorum in eo existen. the traverse was, that he was not bailiff of the house, pro ut: that is good, and goeth to all, but he cannot answer to the goods, and say nothing to the house: see 49 E. 3. 7. Br. Accomp. 21. A man brought an accompt against one as bailiff of his manor, habens curam of twenty oxen and cows, and certain quarters of corn: and by Belknap, if he have the manor and no goods, yet he shall accompt for the manor, and it shall be no plea, to say that the plaintiff sold him the goods without traversing, without that, that he was his bailiff to accompt render: and as to the manor, he may say, that the plaintiff leased the same to himself for years, without that, that he was his bailiff: another exception was taken by him, that the plaintiff chargeth him with moneys, ad merchandizandum; and he traverseth, that he was not his receivor denarior. ad computandum pro ut: and so he doth not meet with the plaintiff, and so it is no issue. And it is not helped by the Statute of Jeofailes, 32 H. 8. but mis-joining of issue is helped by that statute, 19 Eliz. W. an attorney of the Common Pleas, did charge another attorney of the same Court, with a covenant to have three years board in marriage with the defendant's daughter; and he pleaded that he did not promise two years board, and so issue was joined and tried, and the same could not be helped by the statute, because it was no issue, and did not meet with the plaintiff: so if one charge in the debet & detinet, and he answers to the detinet onely, it is no issue; and therefore it is not helped by the statute. In 29 H. 6. in trespass for entring into his house, and taking of his goods, the defendant pleaded, non intravit, and the issue was tried, and damages given; and because the taking of the goods was not also in issue, all was void, 4 E. 3. One shall not accompt by parcels, because the action is intire; see 3 E. 3. 8. and Book of Entries, 202. A precedent, 14 H. 7. that the verdict was not full, and did not go to the whole, and therefore was void. Hele, Serjeant, contrary: and as to the first point he said, that there is a case in 9 E. 3. Accompt. 35. where the plaintiff chargeth the defendant in accompt as bailiff of his house, and that he had the administration of his goods; viz. forty sacks of wooll; and upon issue joined, the jury found, that he was not bailiff of his house; but they farther find, that he had received the forty sacks of wooll, to render accompt of the same; and the plaintiff in that case had judgment for the sacks of wooll; although there was no verdict found for the house: see 5 H. 7. 24. Where if a jury be charged with several issues, and the one of the issues is found, and the other not; that the same makes no discontinuance: or if one of the issues be discontinued, yet it is no discontinuance as to the whole. But admit the same be not helped by the common law, yet he said it is helped by the Statute of 32 H. 8. of Jeofailes; which is, non obstent. discontinuance or miscontinuance. Daniel, to the same purpose: and he said that the books before cited of 14 H. 4. and 49 E. 3. are not ruled, nor the cases there adjudged; in the one book the defendant pleaded, that the plaintiff gave the goods unto him, and in the other book,

that he sold the said goods unto him, and demanded judgment of the action: and he said, that it is no good answer; for they are pleas onely before the auditors, and not in an action upon accompt: and farther he said, that although the verdict be found but for part, yet it is good; for no damages are to be recovered in an accompt: in trespass, it is true, if one issue be found, and not the other, and joint-damages be given; the verdict is not good for any part, but if several damages be given, then it is good, as it is ruled in 21 H. 6. Coke, 26 H. 8. is, that the plaintiff cannot declare generally of an house, curam habens, & administrati-[196]-onem bonorum; but he must farther say: twenty quarters of corn, or the like, &c. In the principal case, it is a joint-charge and but one for the shop and goods; and he answers unto one onely, but he ought to answer to all, or else it is no answer at all. But Coke found out another thing, viz. that there is a thing put in issue which is not in the verdict, nor found, nor touched in the verdict, and that was the verdict of all which is found not to be good, and it is not helped by the Statute of 32 H. 8. of Jeofailes. I grant, that discontinuances are helped by the statute of 32 H. 8. but imperfect verdicts are not helped thereby: it was a great case argued in the Exchequer Chamber, and it was Brache's case: an information was against Brache, for entring into a house, and an hundred acres of lands in Stepney; he pleaded, not guilty, the jury found him guilty for the hundred acres, but said nothing as to the house; upon which a writ of error was brought, and judgment was reversed: and he said, it was not a discontinuance, but no verdict for part. Daniel, That was the default of the clerks who did not enter it, and it hath been the usage to amend the defaults done by the clerks in another term: all the justices said, That is true, if the postea be brought in and not entred; but here it is entred in the roll in this form. Daniel, Where I charge one in accompt with so much by the hands of such a one, and so much by the hands of such a one, although there be but one absque hoc to them all, yet they are as several issues. The Court answered, Not so, unless there be several issues joined to every one of them. But by Gawdy, Justice, If there be several issues, and the one be found, and the other not, no judgment shall be given: Clench, Justice, in the principal case, It is not a charge of the goods, but in respect of the shop, therefore that ought to be traversed: Shute, Justice, The traverse of the shop alone is not good: Egerton the Queen's Solicitor said, that the books might be reconciled, and that there needed not a traverse to the goods, for the traverse of the shop, prout, is an answer to all: but now he takes issue upon the goods onely, which issue is not warranted by the declaration; and he said, that if one charge me as bailiff of his goods, ad merchandizandum, I shall answer for the increase, and shall be punished for my negligence; but if he charge me as his receiver, ad computandum, I shall not be answerable, but for the bare money, or thing which was delivered.

Vid. 205.

CCXLVI. Mich. 29 Eliz. In the Common Pleas.

In trespass for taking of goods, the defendant justified, as *bailiff* to J. S. The plaintiff by replication saith, that the defendant prest his cattel of his own wrong, absque hoc, that he is bailiff to J. S. and by Anderson, If one hath good cause to distrain my cattel, and a stranger of his own head, without any warrant or authority takes my goods, not as servant or bailiff to another, and I bring trespass against him, he cannot excuse himself by saying, that he did it as bailiff, &c. for once he was a trespassor; but if one do distrain as bailiff, although that in truth he be not bailiff, if afterwards, he in whose right he justifies, assents to it, he shall not be punished as a trespassor; for this assent shall have relation unto the time of the distress taken, which Periam concessit, and also Rhodes. A. distrains, and being asked for what cause he distrains, and he assigns a cause which is not sufficient, and afterwards an action is brought against him, he may avow the distress for another cause.

Postea 215. 1 Leon. 50. 3 Co. 26.

[197] CCXLVII. MICH. 29 ELIZ. IN THE COMMON PLEAS.

The case was, that the Queen gave lands in tail to hold in capite, and afterwards granted the reversion: Windham, In this case the tenure is not incident to the reversion, but is in respect of the person; and therefore the tenure in capite doth remain; and the donee shall hold of the Queen as in gross: and also the grantee of the reversion, shall hold of the Queen in capite; and so two tenures in capite for the same lands; see 30 H. 8. Dyer 45. If the Queen in this cause had reserved a rent upon the gift in tail, the same should go with the reversion.

MICH. 29 ELIZ. IN THE KING'S BENCH.

CCXLVIII. DIGHTON AND CLARK'S CASE.

Dighton brought debt upon a bond, the condition of which was, that whereas the plaintiff was in quiet possession of such lands, if now neither J. S. nor J. B. nor J. G. did not disturb the plaintiff in his possession of the said lands by any indirect means, but by due course of law, that then, &c. that defendant pleaded, that neither J. S. nor J. D. or J. G. did disturb the plaintiff by any indirect means, but by due course of law; upon which there was a demurrer. Godfrey, The plea in bar is not good; for there is a negativa pregnans, (scil.) a negative which implies an affirmative: see 21 H. 6. 9. In a writ of entry, sur disseisin, the defendant saith, that the demandant by his deed, after the darrein continuance, did confirm and ratifie the possession of the tenant, &c. The demandant said, not his deed after the darrein continuance; and the same was holden to be, negativa pregnans; see more there, and see also 5 H. 7. 7. And see farther, 39 H. 6. 8. 9. Another exception was taken to the plea in bar, because he hath pleaded, that neque J. S. neque J. D. neque J. G. had disturbed the demandant by any indirect means, but onely by due course of law; and that issue cannot be tried; not by the countrey, for they cannot know what is a due course of law; and by the Court it cannot be tried, for the defendant hath not certainly shewed by what due course of law the demandant hath been disturbed, which see 22 E. 4. 40, 41, &c. The Lord Lisle's case. In debt upon a bond, the condition was, that if the defendant before such a day, or any other for him, and in his name, come to B. and there shew unto the plaintiff, or one of his council, by him assigned, a sufficient and lawfull discharge of an annual rent which the plaintiff claims out of two houses of the defendant in B. aforesaid, that then the said bond shall be void; and the defendant said, that he at the day assigned, contained in the condition, that A. and B. by assignment of the defendant came to B. and tendred to shew to N. and W. of the plaintiff's council, a sufficient discharge of the said annual rent, and that they did refuse to see it, upon which there was a demurrer in law: and judgment was given for the plaintiff, and that the plea was no plea, for the defendant ought to have shewed in his plea, what manner of discharge he would have shewed, as a release, unity of possession, &c. But as the case is here: if the plaintiff shall traverse the plea in bar, the issue joined upon it cannot be tried, for the jury cannot know which is a lawfull and sufficient discharge, but the same shall be tried by the Court; for if the defendant had tendred to the plaintiff a discharge by unity of possession, the jury cannot know if it be a sufficient discharge: and as the plea is here, he hath not shewed what dis-[198]-charge he would have shewed to the said council; and therefore we cannot judge of the same: if one be bound to plead a sufficient plea before such a day, in such a Court, in such an action, it is not sufficient that he hath pleaded a sufficient plea, but he ought to shew what plea he hath pleaded, otherwise the Court cannot judge if the plea be sufficient or not: vid. 35 H. 6. 19. and 37 H. 8. Br. Cand. 16. where a man will plead that he hath saved the party harmless, he ought to shew how. Shute, Justice, and Clench, Justice, If the defendant had pleaded, not disturbed by any indirect means, such a plea had been good enough: Gawdy, Justice, If he had pleaded, not disturbed contra, formam conditionis præd. it had been a good plea; in a writ of entry, ne entra pas, contra formam statuti, he did not alien within age,

is a negative pregnant: but the party may say, he did not alien, modo & forma; all the part to this plea which comes after the but, is surplusage, and negation: Gawdy, It is a plea which is pleaded with all the words of the condition intirely. Clench, The case put by Godfrey, 22 E. 4. differs from the case at bar: for there he pleaded all in the affirmative, therefore in such a case he ought to plead specially; but in the case at bar all is in the negative, in which case such special pleading is not necessary. If I be bounden that I shall not go out of Westminster-hall untill night, but tarry in the hall till night, in an action against me upon that bond, I may plead in iisdem verbis: if I be bound upon condition, that I will not return to Serjeant's-Inn the direct way, but by St. Giles, I shall plead, in totidem verbis: Godfrey, I agree those cases, for the matter which comes after the but, is triable by the countrey, but so it is not in the principal case: Clench, But is but a word of surplusage, and if that, and all which follows had been left out, it had been well enough. It was adjourned.

MICH. 26 ELIZ. IN THE COMMON PLEAS.

CCXLIX. COURTNEY AND KELLOWAY'S CASE.

Courtney brought an action upon the statute of 5 Eliz. concerning perjury, against Kelloway, and declared, that where Sir Gawen Carew had heretofore brought an action upon the case against the now plaintiff for slanderous words, viz. because that the said now plaintiff had affirmed, that the said Sir Gawen had had the pocks, to which declaration, the now plaintiff had pleaded, that Kelloway, the now defendant, reported to the said now plaintiff, that he himself, i.e. Kelloway, had heretofore healed the said Sir Gawen of the pocks, absque hoc, that he spake them simply of his own head; upon which they were at issue, and the said Kelloway was produced as a witness on the part of the said Courtney; and the said Kelloway, upon his oath, deposed at the trial of the said issue, that he never had reported to the now plaintiff, that he himself had healed the said Sir Gawen of the pocks; for which the jury found for Gawen, and also assessed greater damages in respect that they found, that Courtney spake the said words of his own head, &c. and not of the report of Kelloway. It was the opinion of the whole Court, that the now plaintiff should have this action; for notwithstanding that that oath doth not trench much unto the proof or disproof of the issue, yet because that by reason of the oath the jury have aggravated the damages, the action doth lie, as in case of trespass of breaking his close, and spoiling his grass, the defendant pleads, not guilty; and at the trial of the issue a witness is produced on the plaintiff's part, who deposeth upon his oath, that the land where, &c. was so rich in grass, that it was ready to be mowed whereas in truth none, or very little grass was there **[199]** growing, yet if the jury find upon other evidence the defendant guilty, it is an occasion to induce the jury to tax the greater damages: all which the Court granted.

MICH. 26 ELIZ. IN THE COMMON PLEAS.

CCL. HOLLAND AND DRAKE'S CASE.

In an ejectione firmæ, brought by Holland against Drake, and five others; Drake pleaded, not guilty; the other five, quoad 20 acres, pleaded not guilty also; and as to the residue, that long time before that, Andrews (lessor of the plaintiff) had any thing in the land; that Hen. Lord Cromwel was seised, and leased the same to them for two years, and afterwards granted the reversion to Andrews, to whom they attorned; Andrews within the said term, entred upon them, and leased to the plaintiff upon whom they re-entred, as was lawfull for them to do, the plaintiff by replication, said, that long time before the said Lord Cromwel had any thing, &c. Andrews himself was seised, until by the said Lord Cromwel disseised, and leased to the defendants, ut supra, and granted the reversion to the said Andrews with attornment, who entred, and leased to the plaintiff, who entred, and was possessed, untill by the said defendants

ejected, modo & forma, pro ut, &c. And upon this replication, the said five defendants did demur in law. It was argued, that the plaintiff in his replication, hath departed from his declaration; for by his declaration, he hath supposed himself to be ejected by all the six defendants; and in the replication he saith, that he was possessed untill by the said five defendants, who plead in bar he was ejected; so he hath departed from his declaration in the number of the ejectors; for he ought to have said, untill he by the said five, and also by the said Drake was ejected: as 12 E. 4. 6. in trespass upon entry upon the statute of 5 R. 2. against J. and E. J. died pendant the writ, and E. pleaded in bar, and the plaintiff did reply and conclude, and so was he seised untill the said E. simil cum dicto: J. named in the writ, entred upon the plaintiff, &c. But the opinion of the whole Court was clear to the contrary; for here in the case at bar, Drake, by his several issue, which he hath joyned with the plaintiff, upon not guilty, is severed from the other five defendants; and then when they plead in bar, the plaintiff ought to reply to them without meddling with Drake, who upon his several plea, and issue joyned upon it, is a stranger to them; as if the said five had been the onely defendants: but if he had not replyed to Drake, as if Drake had made default, or had died after the writ brought; as in the case before cited of 28 E. 4. there he ought to have replyed, as it is objected: so in an ejectione firmæ of twenty acres, the defendant, as to ten acres pleads, not guilty; upon which they are at issue; and the plaintiff replies, and says, as to the other ten acres, and so was he possessed, untill by the defendant of the said ten acres he was ejected; this is good without speaking of the other ten acres, upon which the general issue is joyned. And the Court was ready to have given judgment for the plaintiff; but they looked upon the record, and seeing that one issue in this action was to be tryed between the plaintiff and the said Drake: and although the plaintiff offered to release his damages, and the issue joyned, and to have judgment against the five defendants who had demurred; yet the Court was clear of opinion, that no judgment should be given upon the said demurrer, untill the said issue was tryed; for the action is an ejectione firmæ, in which case the possession of the land is to be recovered; and it may be, for any thing that appeareth, that Drake, **[200]** who hath pleaded the general issue, hath title to the land, &c. But if this action had been an action of trespass, there in such case, ut supra, upon release of damages, and the issue joyned, the plaintiff should have judgment presently.

Vid. antea 41.

MICH. 26 ELIZ. IN THE KING'S BENCH.

CCLI. FRENCH'S CASE.

It was presented before the coroner, that John French was, felo de se, and that certain goods of the said John French, were in the possession of J. S. and this presentment was certified into the King's Bench; upon which process issued forth against the said J. S. and continued untill he was outlawed. And now came J. S. and cast in his writ of error, to reverse the said outlawry, and assigned for error, because that in the presentment upon which he was outlawed, there is not any addition given to the said J. S. And at the first, it was doubted; if upon that presentment process of outlawry did lye: and Ive, one of the Chief Clerks of the Crown Office, said to the Court, that such process in such case did lye; and that he could shew five hundred precedents to that purpose. Another matter was moved upon the Statute of 1 H. 5. 5. of Additions: if this outlawry by the statute aforesaid, ought to be reversed by default of addition; for as much as the said statute speaks onely of outlawries upon original writs in personal actions, appeals and indictments; but it was agreed by the whole Court, that as to this purpose, the presentment should be accounted in law as an indictment, and afterwards the outlawry against French was reversed.

CCLII. MICH. 26 ELIZ. IN THE KING'S BENCH.

A lease for thirty years was made by husband and wife, if they so long should live, and if they die, &c, that the land should remain to A. their son, during the term afore-

said. And it was holden by Wray, Justice, that if the husband and wife do die within the term, that the son should have the land, de novo for thirty years: but Gawdy was of opinion, that he shall have it for so many years, which after their death should be expired.

MICH. 26 ELIZ. IN THE KING'S BENCH.

CCLIII. COOPER'S CASE.

In an ejectione firmæ, the case was, that the husband and wife had right to enter into certain lands in the right of the wife; and a deed of lease for years is written in the name of the husband and wife, to one A. for to try the title; and also a letter of attorney to B. to enter into the land, and to deliver the said deed of lease to the said A. in the name of the husband and wife, and as well the letter of attorney as the said deed of lease are sealed by the said husband and wife with their seals, and entry and delivery is made accordingly; the said A. enters, and upon ejectment, brings an ejectione firmæ, and the whole matter aforesaid was found by special verdict; and the plaintiff had judgment to recover, for the special matter found by verdict, i.e. the deed of lease, and the letter of attorney, do maintain the declaration well enough; and here is a lease made by husband and wife, according to that, the plaintiff hath declared.

3 Cro. 118. 2 Cro. 617. Yel.

[201] CCLIV. MICH. 29 ELIZ. IN THE KING'S BENCH.

In an action of trespass for breaking of the plaintiff's close, and killing of eighteen conies there; the defendant, as to all the trespass, but to the killing of the conies, pleaded, not guilty: and as to the killing of the said conies, he said that the place where, is a heath, in which he hath common of pasture, and that he found the conies eating the grass there, and he killed them, and carried them away, as it was lawfull for him to do: Cowper, Although conies be, feræ nature, yet when they are in ingrounds, they are reduced to such a property, that if they be killed or carried away, I shall have an action of trespass, vid. 43 E. 3. 24. And if a deer be hunted by the plaintiff in a forest, and afterwards in hunting it be driven out of the forest, and the forrester doth follow the chase, and the plaintiff kill the deer in his own grounds, yet the forrester may enter into the land of the plaintiff, and re-take the deer, 12 H. 8. 9. And although the defendant hath common in the soil; yet he cannot meddle with the wood there, nor with the land, nor with the grass, otherwise than with the feeding of his cattel, for he hath but a faint interest; and if he who hath the freehold in the land, bringeth an action of trespass against such a commoner for entring into his land, and the defendant plead, not guilty, he cannot give in evidence that he hath common there: and it hath been late adjudged, that where commoners prescribe, that the lord hath used to put in such a pasture but so many beasts, that such a prescription is a void prescription: it was argued on the other side, that the owner of the soil, hath not the true property of the conies in him, but a kind of property: and see F. N. B. 86 and 87. Quare clausum fregit, and 20 cuniculos cepit: against a stranger he may have an action, but not against the commoner, because he hath wrong in his common by the feeding of the conies there; for although he hath not an interest in the soil, yet he hath an interest in the profits of it, and a commoner may distrain the beasts of him who hath not right of common for damage-feasance, as the books are, 4 H. 7. 3. 15 H. 7. 15. and there the commoner hath not any remedy, if he cannot enter and kill the conies, for he cannot take them damage-feasance, nor can impound them; for no replevin lyeth of them: if the owner of the soil ploweth the lands, yet the commoner may put in his cattel, claiming his common, and he may well justifie the same, because the wrong beginneth in the owner of the soil. At another day, the case was moved again; and then it was argued by Coke, and he said, the point is; whether a commoner having common of pasture, may kill the conies which are upon the ground; and he argued, that he might not. And first, he said, it is to be con-

sidered, what interest he who hath the freehold may have in such things as are, feræ naturæ; and then what authority a commoner hath in the ground in which he hath common. As to the first point, he said, that although such beasts are, feræ naturæ, yet they are reduced to such a property when they are in my ground by reason of my possession which I then have of them, that I may have an action of trespass against him who taketh them away: as in the book in, 42 E. 3. If one hath deer in his park, and another taketh them away, he may have an action of trespass for the taking of them: see 12 H. 8. If a keeper or forrester follow a buck which is chase out of the park or forrest, although he who hunteth him killeth the buck in his own ground, yet the keeper or forrester may enter into his ground, and seize the deer, because the property and possession of the deer is yet in them by their persuit: in 7 H. 6. It is holden, that if a wild beast doth go out of the park, the owner of the soil hath lost his property in it; but upon the said book, it **[202]** may be well collected, that whilest it remains in the parke, that the owner of the park hath property in it; for 18 E. 4. 14. It is doubted, whether a man can have property in such things, which are, feræ naturæ: but in 10 H. 7. 6. it is holden, that an action of accompt lyeth for things which are, feræ naturæ, and see 14 H. 8. 1. In the Bishop of London's case, and 22 H. 6 59. that as long as such things are in the parties ground, they are in his possession, and he hath a property in them; and in an action brought for them; the writ shall be, quare damas suas cepit, by Newton; and see in the Register, fol. 102. where an action was brought, quare ducent. cuniculos suos pretii, &c. cepit. It hath been objected on the other side, that the defendant hath common there; to that I answer, admit he hath common, yet he hath not an interest in the soil; for he cannot meddle with the wood, grass, or other profit arising of the soil, but the interest which the commoner hath, is onely the feeding of the grass with the mouths of his cattel: and if he who hath the freehold in the ground, doth bring an action against the commoner for entring into his land; if the defendant pleads, not guilty, he cannot give evidence that he hath common there; for such evidence will not maintain the issue: see 22 Ass. A commoner cannot take in the cattel of a stranger to agist upon the common; and therewith agreeth the book of 12 H. 8. and so it hath been adjudged in this Court. Godfrey, contrary: and he argued, that it is lawfull for the commoner to kill the conies feeding in the common: and he agreed all the cases which were put by Coke; and farther he said, that the owner of the ground hath not an absolute, but a kind of a qualified property in the conies; and therefore see the book of 3 H. 6. and F. N. B. If a writ of trespass be brought, quare cuniculas suas cepit, the writ shall abate; and yet he hath a kind of property, or a possession rather in them. I grant that against a stranger the plaintiff might have his action for killing of his conies, but not against the commoner, because the commoner hath a wrong done unto him by the conies, eating of his common, and therefore he may kill them; and although the commoner may not meddle with the land, because he hath not an interest in it; yet in some cases he may meddle with the profits of it, and he may distrain the cattel of a stranger there, damage-feasance; as the book is in 15 H. 7. I grant that it is not lawfull for tenant for life to kill the conies of him who hath free-warren in the land. For if a man bringeth an action of trespass, quare warrenam suam intravit, & cuniculos suos cepit: it is no plea for the defendant to say, that it is his freehold. See 43 E. 3. accordingly. In L. 5 E. 4. in trespass, quare clausum fregit, & cuniculos suos cepit: the defendant said, that the plaintiff made a lease at will to J. S. of the land, and that he, as servant to the said J. S. did kill the conies there, and it was holden a good plea; and yet it is there said, that by the grant of the land, the conies do not pass; but the reason of the book might be, as I conceive, because the feeding on the land with the conies, is to his damage, and therefore, that he might justifie the killing of them: and so are the books of 2 H. 7. and 4 E. 4. If I have common of pasture in lands, and the tenant ploweth up the land, I shall have an action upon the case in the nature of a quod permittat. And in 9 E. 4. if one hath lands adjoining to myl and, and levyeth a nusance, I may enter upon the land, and abate the nusance: so if a man taketh my goods and carrieth them unto his own lands, I may enter therein, and seize my goods: so if a tenant of the freehold plows the land and soweth it with corn, the commoner may put in his cattel, and therewith eat the corn growing upon the land: so if a man

do falsly imprison me, and put me in his house, I may justifie the breaking open of his house to get forth. In 21 H. 6. all the inhabitants of a town do prescribe to have common in such a field every year after harvest, if one particular **[203]** man who hath freehold land, with the said field sowed, will not within convenient time gather in his corn, but suffer the same to continue there of purpose to bar the inhabitants of their common, the inhabitants of the town may put in their cattel into the said field, and therewith eat his corn, and he shall have no remedy for their so doing; and he put the question, what remedy the commoner should have for the eating and destroying of his common which his cattel should have, for that he can neither distrain them damage-feasance, nor impound them: for a replevin doth not lie of conies; and therefore he said, he hath no other remedy but to kill and destroy the conies. See 19 E. 3. and F. N. B. If the lord doth surcharge the common, the commoner may have an action against him; but in this case he can have no action: Gawdy, Justice, The commoner cannot destroy or kill the conies, because he may have other remedy: Shute, Justice, A commoner cannot take or distrain the beasts of the tenant of the land for damage-feasance, therefore he cannot take or destroy the conies which are upon the land, because he may have other remedy; for he may have an action upon the case, or an assize for putting of the conies upon the land, if the owner of the land leave not sufficient common for the cattel of the commoner; and afterwards judgment was given for the plaintiff.

Owen 114. 1 Cro. 876. 2 Cro. 195. 229. Godb. 123.

HILL. 29 ELIZ. IN THE EXCHEQUER-CHAMBER.

CCLV. MANWOOD AND BURSTON'S CASE.

Manwood, Chief Baron of the Exchequer, brought an action upon the case against Burston, and declared, that whereas Agnes Griffin was possessed of the third part of the manor and rectory of Higham for term of years, by demise of the Master and Fellows of St. John's College in Cambridge, made to Worthington; and whereas John Sutton was possessed of another third part of the said manor and rectory by the same demise; and whereas John Palmer was possessed of another third part of the said manor and rectory for the same term, the said Burston, 20 Aprilis, 28 Eliz. in consideration that the said plaintiff, *obtinuisset de præd. Agnet. totum terminum suum assurari* ipsis Rogero Manwood, and the defendant; (scil.) unam medietatem dictæ tertiæ partis dicto Rogero, & alteram medietatem, unto the said defendant, apud London, in such a ward, assumpsit eidem querent. quod si idem querens procuraret dictam Johannem Palmer, to assent and sell his third part, the one moyety to the plaintiff, and the other to the defendant for 320l. That the defendant solveret æquam portionem inde, (scil.) 160l. And licet, the plaintiff, had procured the said Palmer, 22 Aprilis, an. supradict. to assent and sell the third part for 320l. to be paid 3 Maii, the same year, and the rest at another day; and licet, the said plaintiff was ready to pay his part, and offered the same, (scil.) 160l. And licet the said Palmer was ready and offered to sell and convey his term aforesaid, &c. yet the said defendant, solvere æquam partem suam, (scil.) 160l. *Non fuit paratus sed recusavit.* for which the said Palmer, *noluit vendere* his part or interest, by which the plaintiff was damnified, &c. The defendant pleaded, that after the assumpsit, the plaintiff did discharge the defendant of the said promise; upon which they were at issue; and it was found for the plaintiff, who had judgment to recover. Upon which Burston brought a writ of error in the Exchequer Chamber. And divers errors were assigned: 1. It is not shewed at what time the term of Agnes Griffin did begin: 2. The lease of the college is not shewed to be by writing: 3. It is not shewed for what term Palmer was possessed: 4. It is not shewed at what time the plaintiff had obtained the part of Agnes: 5. The as-**[204]**-sumpsit is laid to be, apud London, in warda de Farrington extra, and so apud London; and extra London, which is repugnant: 6. The plaintiff hath declared, that the colledge had leased to Worthington; and that A. and B. were possessed, virtute dimissionis præd. To these errors, the Chief Baron put in his answer in writing: as to the two first, they are in the recital, and but matter of induction to the consideration, and not traversable,

nor otherwise material to be alledged for the commencement of them, or for the rent, but onely the ending of the term to come is sufficient: as in an action upon the case; that whereas the defendant was indebted unto the plaintiff in divers sums of money, amounting to 40l. the defendant, in consideration thereof, promised, &c. the plaintiff needs not to shew any certainty of the contract, or other circumstance, how, or in what manner the debt did accrue, or begin: as in an action upon the case, the plaintiff declares, that whereas he hath married the daughter of the defendant, the defendant in consideration that the plaintiff would assure to his said wife, land to the yearly value of 20l. for her jointure, as shall be advised by the council of the defendant, that he will pay unto the plaintiff 100l. And licet the plaintiff hath made such a jointure of land in S. unto such yearly value for the use of his wife, by the advice of the council of the defendant, &c. here the plaintiff needs not to shew what manner of conveyance, or assurance was advised; for it is sufficient, if the consideration recited be proved in evidence with the circumstances; but in pleading, it is not traversable nor issuable. The third error is mistaken: the fourth is answered as the two first; for it is but matter of recital; and the consideration past and executed before the assumpsit, and not at the time of the assumpsit, and but an induction or conveyance to the promise; the fifth matter is mis-construed; for there are two wards of Farrington, infra, and extra; infra, the walls, and extra, the walls, and yet both, apud London, and extra is to be referred to Farrington, and not to London; and there ought to be made a point after extra; as Farrington extra; London. The sixth is mistaken; for there is no error in that: for the assignee is possessed, virtute dimissionis; for the original lease is the virtue and strength of the possession of the assignee: but if these exceptions had been material, yet forasmuch as the issue is not upon the assumpsit, for that is confessed by the defendant, and by that the recital, consideration, and all the special matters confessed to be true: but the defendant hath pleaded a new matter after the assumpsit, in discharge of the assumpsit, which discharge is found against him, all the particulars in which the errors are assigned, are out of the book; and now the matter of discharge is onely material: as in debt for arrearages of rent reserved on a lease for years, if the time and place of the making of the lease be not set forth in the declaration, the declaration is not good. But if the defendant plead a collateral matter; as release of the arrearages, or other such matter, now all the imperfections of the declaration are waved, &c. At another day the matter was argued again. There are three manner of considerations upon which an assumpsit may be grounded: 1. A debt precedent: 2. Where he to whom such a promise is made, is damnified by doing any thing, or spends his labour at the instance of the promiser, although no benefit cometh to the promiser; as I agree with a surgeon to cure a poor man (who is a stranger unto me) of a sore, who doth it accordingly, he shall have an action: 3. Or there is a present consideration, &c. The first exception was, because the assumpsit being laid to procure such a lease which another had, i.e. one A. it is not shewed in the declaration, in facto, that A. had such a lease, and if he had not any such lease, then there cannot be any consideration to procure it: for, ex nihilo, nihil fit. Secondly, the declara-**[205]**-tion is, that A. was possessed of a lease for years, to be ended and determined in an. 1606. without shewing any beginning of it; and although that lease be but matter of conveyance and inducement, yet, because it is the ground of the action, it ought to be certainly and sufficiently set forth. Thirdly, the lease to be procured, is laid to be made by a college in Cambridge, and it is not shewed for what term of years, i.e. for 21 years or under; for if it be above, then such lease is void. Fourthly, it is not laid in the declaration, that the lease was by writing, and then void; for a college cannot make a lease without writing; and it shall be intended it was made without deed, because it is not laid to be by deed: as if a corporation makes a lease for life, and afterwards granteth the reversion for years, he that will entitle himself to the said reversion, ought to say in pleading that he made the lease for life by deed, although the lease for life in such case be but matter of conveyance: fifthly, it is not laid in the declaration, that the lease to be assured was in esse, and had continuance at the time it was to be assured; for although it be laid to be in esse, at the time of the promise, yet being a particular interest, it shall not be intended to continue, if it be not specially shewed: as 10 H. 7. 26. Sixthly, here the plaintiff hath not cause of action, but Palmer, for the assumpsit upon which the action is grounded, the

money is to be payable to Palmer, not to the plaintiff, 2 E. 4. 5. My bailiff lets my land to farm, rendring rent, he shall not have an action for the rent, but I my self, in whose right he leased: 25 Eliz. It was the case of one Crewe, I promised unto J. S. that in consideration that he will make unto me a lease for years of such lands, I will assign the same to his servant. If he will not make the lease, not J. S. but his servant shall have action upon the promise: and although the defendant hath pleaded collateral matter, by which the promise is confessed, yet the same doth not amend the matter; for if the declaration be insufficient, the Court, ex officio, ought to stay judgment: as 6 H. 7. 10. In trespass, the defendant pleads, that there was an accord betwixt them, that in satisfaction of the said trespass, he should pay to the plaintiff such a sum, and make two windows, the which sum he had paid, before the day, without speaking any thing of the windows, the plaintiff pleaded, no such accord, and it was found for the plaintiff; and although the plaintiff doth admit the plea as good, yet the Court, ex officio, shall stay the judgment: see the Book of Entries 4. A carpenter brought an action upon the case, and declared generally upon the assumpsit, pro diversis rebus vocat. Carpenters wares, & pro diversis laboribus per querent. at the instance of the defendant, in arte lignaria, &c. and holden good without any particulars. It was adjourned.

25. Eliz. Crew's case.

MICH. 29 ELIZ. IN THE EXCHEQUER CHAMBER.

CCLVI. PAYNE'S CASE.

Sir Moile Finches Case.

A writ of error was brought by Payne, Treasurer of the Records of the King's Bench, in the Exchequer Chamber, upon a judgment given in the Court of Exchequer, upon an assignment of a lease for years, by the Earl of Oxford, to the Queen: one error is assigned, that whereas the issue was joined upon intrusion, in taking of the profits, and so two matters put in issue; the jury have found Payne guilty of intrusion; but have said nothing of the taking of the profits, and so the verdict doth not fully meet with the issue; but the great matter of the case was upon this point; the information is, that the assignment to the Queen was 16 Maii, the intrusion, 17 Maii, the **[206]** inrollment of the deed of assignment, the 18. of May. So it appeareth upon the record, that the intrusion is supposed to be done before the Queen hath any interest in the lands, in which the intrusion is supposed, for nothing was in the Queen before the inrollment; for the Queen is a corporation of State, of such prerogative and excellency, that she cannot give or take interest in any lands without matter of record: and this lease is a chattel real, and interest in lands: see as to the inrollment, 1 H. 7. 30, 31. 5 E. 4. 7. 7 E. 4. 16. But I grant that if the lessee for years be outlawed, the lease shall be in the King, without office, for the outlawry it self is a sufficient record to entitle the King to it: if the Queen makes a lease for years of land, rendring rent, with clause, that if the rent be behind, that the lease shall cease if the rent be not paid, it was agreed here in Sir Moile Finche's case, that the lessee continuing his possession, shall not be accounted an intruder before office thereof found; but he shall be accountant to the Queen for the profits, as bailiff of his own wrong. But here we are charged with intrusion: it hath been doubted, if personal things be in the King without office, 37 H. 6. but now it is clear that it is: as 35 E. 3. Br. Prærogat. 113. The villain of the King purchaseth goods, the property thereof is in the King without seisure, and so of all personal chattels, because transitory, 1 H. 7. 17. 4 H. 7. 1. 39 H. 6. 26. And here it appeareth upon record, that this deed of assignment, was delivered to Baron Clark, the 16 of May, at Westminster: and to that we say, that the said day was, Dies Ascentionis, & sic non juridicus, and so no Court there then holden, and then the said deed was not delivered in Court of Record, and then not delivered unto him as a Judge, but as a private person, although it was delivered to the use of the Queen: but in 37 H. 6. there is some opinion, that if such a deed be delivered in Court to one of the Barons, or be put into the King's

coffers, that then it is a record. Atkinson contrary, And as to the first exception; it is to be known, that in every plea, where a contempt is laid to the charge of the defendant; he ought first to execute or clear the contempt; and therefore here, the exordium of the plea is, quoad venire vi & armis, & quicquid est in contemptum Dominæ Reginæ, nec non de tota ulteriore transgressione & contemptu per ipsos fieri supposit. ipse in nullo est inde culpabilis: and afterwards plead over; and so it is in an action of trespass: and also upon the statute of 8 H. 6. of forcible entry; and here the issue upon the contempt follows the other issue: for if the one issue be found against the defendant, so also is the other. As to the other point, I grant, that a corporation cannot take, or speak without writing: and the King being the corporation of corporations, and the chief of corporations, and who makes all corporations, cannot take without a writing of as high a nature: (scil.) record. And we have a record here (as it is granted of the other side) being inrolled the 18. of May, which was delivered the 16. of May; and then Payne, upon the whole matter, was the 17. of May an intruder, by relation of the deed to the time of the first delivery: and an intruder by his entry cannot gain any thing out of the Queen; and therefore the information upon the intrusion is, diversis diebus, & vicibus intrusit: although it be but one continued possession; and therefore at every instant, during his possession, he is an intruder: as unto the delivery of the deed of assignment upon the day of the Ascention, which is not dies juridicus, the same is not material, as is 12 E. 4. 8. by Pigot: if the day of the return of a writ, i.e. quarto die falls out in Die Dominica, yet it is good enough, although no Court can then be holden, but the day following, and the plea is not discontinued; and this delivery of the deed of assignment, might be out of term, and therefore at any day within the term, which is not dies juridicus, but contrary, of a thing which is necessarily to be done within the term: as in the case **[207]** between Fish and Broket, of proclamations made upon a fine: for a man may acknowledge a recognizance, or a deed to be inrolled in the time of Vacation, &c. Tanfield: As to the interest, the inrolment hath relation, but not as to the profits; for Payne cannot be an intruder, the 17 of May by any relation. Popham, the Queens Attorney, When an information upon intrusion and taking of the profits is here exhibited, the defendant ought to justify his entry; and if the entry be found against him, so as his entry is an intrusion, then the unlawfull taking of the profits is found also; and he said, that the deed acknowledged, and delivered to the Baron, is a record, although it be not enrolled, be the acknowledgment thereof either out of Court, or in Court: if an information upon a penal statute be exhibited unto a Baron of the Exchequer out of Court, and afterwards another informer exhibits another information upon the same statute for the same offence against the same person, and that is brought into the Court before the first, the first information shall be preferred, and the defendant shall answer to that, and not to the other; and for the exhibiting of it in Court, or out of Court, it is not material: and the assignment, when it is inrolled, hath relation unto the acknowledgment of it: a reversion is granted to one for life, the remainder to the King, the particular tenant attorns, the remainder is not in the King by the attornment, but if the deed be afterwards inrolled it shall be said to be in the King from the time of the attornment, and the King shall have the benefit of the whole mean profits from the time of the attornment: a lease for years is made by the King reserving rent, with clause of distress; that if the rent be not paid, that the lease shall be void, the rent is not paid, ten years after an office is found, the King shall be answered all the profits from the time of the default of payment of the rent; and although no intrusion can be laid on the information, 17 Maii, yet it shall be for the 18 day of May. Coke, The judgment for the Queen upon an information of intrusion, quod defend. de intrusione, transgressione, & contemptu prædict convincantur, &c. and afterwards a commission shall issue forth, to enquire of the mean profits, and there the defendant may shew the matter for to mitigate the damages: and if the intrusion be at any time in the information, it is well enough to have judgment; and in our case, the continuance is laid 18 Maii. Egerton, Solicitor General, The record doth warrant the judgment given upon it; for possession laid in the Queen is sufficient to maintain this information; and here Payne doth not answer to the title of the Queen, but traverseth the intrusion, and therefore being found an intruder by verdict, judgment ought to be given upon it, for the jury have found the

intrusion generally, and not specially, the 17 of May, and that cannot be assigned for error; for it is part of the verdict of which error doth not lye, but attaint: for if any error was, the same was in the jury and not in the Court; which Manwood granted: Tanfield, As unto the case of continuance of an intrusion, it is clear, that every continuance ought to have a beginning; for a thing which hath not a beginning cannot be continued; and here is not any beginning; for the beginning which is laid in the information, is pretended to be, 17 Maii, and that cannot be for the cause aforesaid: Popham, If an information be brought of intrusion, as appears in many memorandums in the Exchequer, where, in truth, there is not any record to prove it, and the jury find the intrusion: will you have a writ of error upon it? and every continuance of intrusion, is intrusion: Anderson, The same matter had been good evidence, sed non habet locum hic.

3 Len. 144.

[208] TRIN. 29 ELIZ. IN THE COMMON PLEAS. INT. HIL. ROT. 1544.

CCLVII. BEALE AND LANGLEY'S CASE.

John Beale was plaintiff in a replevin, against Robert Langley and Roger Hill: the case was, that Henry, Earl of Arundel was seised of the manor of Bury in his demesn as of fee, whereof the place in which, was parcel demised and demiseable, according to the custome of the said manor by copy in fee, whereof Langley was a copiholder in fee, &c. and the said earl so seised, enfeoffed divers persons of the said manor unto the use of himself for life, and afterwards to the use of the Lord Lumley, and Elizabeth his wife, daughter of the said earl, and the heirs of their two bodies begotten, who made a lease of the said customary lands by indenture unto the plaintiff for 100 years; and the question was, if by this lease, the lands be so severed from the manor, that the copihold is extinct: Walmesly took exception to the pleading; for that Langley pleads, that the custome within the manor is, that if any copiholder seised of customary lands of the said manor dieth thereof seised, having many sons, that the youngest son shall inherit; and he sheweth, that the lord of the said manor granted to his father and his mother the said customary lands, by copy, to have to his said father and mother, and the heirs of his father, &c. And that his father died, and that his mother survived him and died, and he as youngest son, according to the custome entred, and he said, that this custome, set forth by the defendant, doth not maintain his entry; for the custome intendeth but a general and immediate descent upon a copy made unto a man, and to his heirs, but such is not the descent here, for the wife surviveth; during whose life, the heir cannot enter; nor is there here such estate in the father of the defendant unto whom the custome set forth in the avowry can extend; for the custome is alledged, where a copyholder hath a copyhold estate to him and his heirs. And here the title of the defendant is, that a customary estate was granted to the father and the mother, and the heirs of the father, so as this estate is not within the letter of the custome; and to that purpose he cited the case of Sir John Savage, late adjudged, where one entitled himself to a copihold in this manner; that within the manor, there is such a custome, that if one taketh to wife any customary tenant of the said manor in fee, and hath issue by her, he, if he over-live such wife, should be tenant by the curtesie, and the case in truth was. That he married a woman, who at the time of the marriage, had not any copihold, but afterwards, during the coverture, a copihold descended to her. In that case, it was holden, that no tenancy by the curtesie did accrue by that custome, which did not extend, but where the wife is a copiholder at the marriage; and a custome shall be in construction taken strictly, and shall not be extended beyond the words of it. And as to the matter in law, he said, that by this lease, the custome was gone, and then by consequence, the customary tenancy, as to that land is determined; for the estate of the copiholder is, secundum consuetudinem manerii. ad voluntatem dom. And now by the lease, Langley cannot hold, secundum consuetudinem manerii; for now the services reserved upon the copy, and the advantages of waste, and other

forfeitures, are extinct; so that if notwithstanding the lease, the customary interest should endure, then such a copiholder should hold this land, discharged of all services, &c. in better estate than any freeholder at the common law, and because the services in law are discharge, and cannot be recovered, for that cause the customary interest **[209]** is determined; for the case is, 7 E. 4. 19. by Danby, that the copiholder shall have remedy against his lord, if he put him out, for he payes a fine when he enters; but here, during this lease, no fine can be paid upon any descent, &c. and the fine is the cause, for which the copiholder shall maintain his possession against the lord: but here no descent or surrender can be presented; for there is not any tenant who can do it; see 21 E. 4. 80. by Brian, as long as the copiholder payeth unto the lord the customs and services, if the lord putteth him out, he shall have an action of trespass: 42 E. 3. 25. If the copiholder will not do his services, the lord shall seize the lands: and he resembled this case, to the case where the King grants lands, pro. bis hominibus de D. the same is a good grant, and that onely in respect of the rent, and for the reason of that, it is a good corporation: but if the King releaseth the rent, the corporation is dissolved, and the grant is become void: Fenner, Serjeant, contrary; and he said, that by this lease, being the act of the lord himself, the customary interest is not determined, &c. And the whole Court was of clear opinion with Fenner, that the copihold did remain, for otherwise, by such practices of the lords, all the copiholders in England might be defeated; and if any prejudice be grown to the lord by this act, it is of his own doing, and against his own act he shall not be relieved: and by Periam, Justice, the lord by his act, i.e. the making of the lease, hath destroyed his seignory, and lost the services, as to this land: and Windham, Justice said, that the lord himself had destroyed the custome as to the services, but not as to the customary interest of the tenant; but the Lord Anderson was of opinion, that the rents and services do remain: and if the copiholder, after such lease committeth waste, that it is a forfeiture to the lord; and that will fall in evidence upon a trial, although such waste cannot be found by an ordinary presentment: and the same law which alloweth the copiholder his copihold interest against this lease, will allow unto the lord his rents and services: and he said, that the lord shall have the rents and services, and not the lessee, quod mirum, against his own lease; see 33 Eliz. between Murrel and Smith now reported by the Lord Coke in his 4 Report. fol. 20.

Sir John Savage's case, ante 109. Dyer 100. 1 Cro. 35.

Trin. 29 Eliz. In the Common Pleas.

CCLVIII. Russel and Broker's Case.

Russel brought trespass against Broker, for cutting down of four oakes. The defendant pleaded, that the place where, &c. and that he is seised of a messuage in D. And that he, and all those whose estate he hath, &c. habere consuerunt, rationabile estoverium suum, for fuel, ad libitum suum capiendum in boscis, subboscis, & arboribus, ibidem crescentibus: and that, in quolibet tempore anni, but in fawning time; the plaintiff by replication, said, that the place where, is within the forrest of, &c. and that the defendant, and all those whose estate, &c. habere consueverunt rationabile estoverium suum de boscis, &c. per liberationem forrestarii, vel ejus deputati, prout boscus pati potest, & non ad exigentiam petentis: and upon that replication, the defendant did demur in law: and the opinion of the whole Court was, that judgment should be given against the plaintiff; for if he should oust the defendant of his prescription by the law of the forrest, he ought to have pleaded the law of the forrest in such case; viz. lex forrestæ est, &c. for the law of the forrest is not the common law of the land, and we are not bound to take notice of it, but it ought to be pleaded, or otherwise the plaintiff ought to have traversed the prescription of **[210]** the defendant, for here are two prescriptions; one pleaded by the defendant by way of bar, the other set forth by the plaintiff in his replication without any traverse of that with is alledged in the bar, which cannot be good; but if the plaintiff had shewed in his replication,

lex forrestæ talis est, &c. then the prescription of the defendant had been answered without any more; for none can prescribe against a statute. Exception was taken to the bar, because the defendant had justified the cutting down of oaks, without alledging, that there was not any underwood, but the exception was not allowed; for he hath choice, ad libitum suum. Another exception was taken, because he hath not shewed, that at the time of the cutting, it was not fawning time; for at the fawning time his prescription did not extend to it and that was holden a good material exception; but because the plaintiff had replied; and upon this replication, the defendant demurred; the Court would not resort to the bar, but gave judgment upon the replication against the plaintiff.

3 Len. 218. Poph. 158. 2 Cro. 637, 679.

CCLIX. Mich. 29 Eliz. In the Common Pleas.

A black-smith of South-Mims, in the county of Middlesex, took a bond of another black-smith of the same town, that he should not exercise his trade or art of a black-smith within the same town, nor within a certain precinct of it; and upon that obligation, the obligee brought an action of debt in the Common Pleas, depending which, the obligor complained to the justices of peace of the said county upon the matter against the obligee, upon which the matter being found by examination, the justices committed the obligee to prison; and now, upon the whole matter, Puckering, Serjeant, prayed a habeas corpus for the said obligee to the Sheriff of Middlesex, and it was granted: and Fleetwood, Recorder of London, being at the Bar, the Court told him openly of this matter, that by the laws, justices of peace have not conusance of such offences, nor could meddle with them; for their power is limited by their commission and the statutes; and the recorder did much relye upon the opinion of Hull, 2 H. 5. 5. But by the clear opinion of the whole Court, although this Court, being a high Court, might punish such offences appearing before them on record, yet it did not follow that the justices of peace might so do: but as to the bond, the Court was clear of opinion, that it was void because it was against law.

Owen 143. 2 Cro. 596.

CCLX. Trin. 29 Eliz. In the Common Pleas.

A justicies issued forth to the Sheriff of H. for the debt of 40l. and the plea was determined before the under-sheriff in the absence of the sheriff, and it was now moved by Puckering, Serjeant, if a writ of error, or a writ of false judgment did lie in that case: and first, the opinion of the justices was, that the sheriff himself in his person ought to hold plea of a justicies; and if he maketh a precept or deputation to another, the same is meerly void: 34 H. 6. 48. And see the said case abridged; Fitz. Bar. 161. and it was said, that a justicies is not an original writ, but a commission to the sheriff, to hold plea, ultra 40s. and upon a judgment given upon a justicies, a writ of false judgment lieth, and not a writ of error: see for that, 7 E. 4. 23. And it was the opinion of Anderson, Chief Justice, that such judgment is utterly void, and coram non Judice.

Ante 34.

[211] CCLXI. Trin. 29 Eliz. In the Common Pleas.

Note, by Anderson, Chief Justice, that if cestuy que use, after the statute of 1 R. 3. leaseth for years, and afterwards the feoffees release unto the lessee and his heirs, having notice of the use, that this release is unto the first use: but where the feoffees are disseised, and they release unto the disseisor, although they have notice of the use, the same is to the use of the disseisor, and that was the case of the Lord Compton; and that no subpœna lieth against such a disseisor: see 11 E. 4. 8.

3 Len. 196. 4 Inst. 85. Kel. 41.

HILL. 31 ELIZ. IN THE KING'S BENCH.

CCLXII. HAMPER'S CASE.

Hamper was indicted upon the statute of 5 Eliz. of perjury, and in the body of the indictment, the record was, that he, falsa deceptive deposuit; whereas the statute is, wilfully; and although in the perclose of the indictment, the conclusion is, et sic commisit voluntarium perjurium: yet the opinion of the Court was, that the same doth not help the matter; and for that cause, the party was discharged: for, contra formam statuti, will not help the matter, nor supply it; and yet it was moved and urged, that contra formam statuti would help it, and it was holden in this case, that if a witness doth depose falsly, but the jury doth not give credit to it, nor give their verdict against his oath, although the party grieved cannot sue him: yet he may be punished at the King's suit.

1 Cr. 147. 3 Len. 230.

HILL. 31 ELIZ. IN THE KING'S BENCH.

CCLXIII. MOULTON'S CASE.

It was moved by Coke, that one Robert Moulton, tenant in tail, having issue two sons, Robert and John, died seised, and that Robert his son and heir, levied a fine thereof, and afterwards levied another fine, and died without issue; and John brought two several writs of error to reverse both the fines; and the tenant, to the writ of error, brought upon the first fine, pleaded the second fine in bar of it; and in bar upon a writ of error brought upon the second fine, he pleaded the first fine; and the Court advised him to plead, that the fine pleaded in bar was erroneous: 7 H. 4. 107. where a man is to annul an outlawry, his person shall not be disabled by any other outlawry.

1 Cro. 151.

TRIN. 30 ELIZ. IN THE COMMON PLEAS.

CCLXIV. BROCCUS'S CASE.

Broccus, lord of a manor, covenanted with his copiholder, to assure to him and his heirs, the freehold and inheritance of the copihold, and the copiholder in consideration of the same performed, did covenant to pay such a sum. And it was the opinion of the whole Court, that the copiholder is not tied to pay the money before the assurance made, and the covenant performed: but if the words had **[212]** been in consideration of the said covenant to be performed, then he had been bound to pay the money presently, and he should have his remedy by covenant.

1 Roll. 415. Pordage versus Cole, 20 Car. 2. B. R.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

CCLXV. FOSTER'S CASE.

Note, it was said, and holden by the whole Court in this case, that in debt brought against executors, if the defendants plead, that the testator was bound in a recognizance, in such a sum, beyond which they have not any thing in their hands; that it is a good replication to say, that the recognizance was entred into for performance of covenants contained in certain indentures, of which covenants none are yet broken.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

CCLXVI. PARTRIDGE'S CASE.

A quo warranto was brought against Partridge, in which case, it was holden by all the justices, that a man may prescribe to hold a leet oftener than twice in one year, and at other days than are set in the Statute of Magna Charta, cap. 35. because the said statute is in the affirmative; but Popham said, that one cannot prescribe against a statute, see for the same, Book of Entries, 13 E. 3. Leet 12. and he said, that the want of a tumbrel and pillory, is a good cause of forfeiture of the liberty: which Coke denied. And it was farther moved by Popham, that if a general pardon be granted with general exceptions in it, he that will take advantage of the same, ought to plead it, and shew that he is not any person excepted; for otherwise the Judges cannot allow him the benefit of it, because they do not know if he be a person excepted or not; but if there were special persons excepted by name, and none other excepted, but onely those persons, there the party needs not to plead it, for the Court may discern J. B. from J. D. See 8 E. 3. 7. and 26 H. 8. 7. If a man commits felony, and also treason, and afterwards comes a general pardon for the felony, but treason is excepted, and the party is arraigned of felony: by Coke, He shall have the benefit of the pardon; but Popham contrary, for he is disabled by the treason. And it was agreed by the whole Court, that in a quo warranto, it is not sufficient for the defendant to say, that such a subject hath lawfull interest to hold a leet, without making title to himself; for the writ is, quo warranto he claims, &c. And afterwards judgment was given for the Queen.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

CCLXVII. WIGGEN AND ARSCOT'S CASE.

In a prohibition, the surmise was, that the exposition of statutes doth belong unto the Queen's Temporal Courts; and Arscot had sued in the Spiritual Court for tithes, whereas in truth, for not reading of the articles according to the statute of 13 Eliz. he was deprived, ipso facto, and so he was not parson: for which cause, Gawdy prayed a prohibition; for he said, that the surmise was good and suffi-**[213]**-cient: for the question is, parson, or not parson? and that shall be tried here by the common law. And I do not know that it hath ever been ruled here to the contrary before. Clench, Justice, It hath not been ruled to the contrary; yet because great inconvenience may arise upon the admitting of it, the Court hath taken order, that no prohibition shall be granted upon such a surmise, without great probability of the truth of the surmise: where a prohibition is awarded upon such a surmise, the party needs not to prove his surmise according to the statute of 2 E. 6. cap. 13. for this surmise is conceived upon a cause of later time, since the said statute, and was not any cause to have a prohibition at the time of the said statute.

TRIN. 31 ELIZ. IN THE KING'S BENCH. ROT. 759.

CCLXVIII. WINTER AND LOVEDAY'S CASE.

In an action of covenant by Winter against Loveday; it was found by special verdict, that Winter, by deed indented mortgaged to Loveday, a certain lease upon condition to pay 400l. to Loveday at a day certain, at the porch of such a church; and upon such payment, Winter to have back his lease; and Loveday covenanted, that upon repayment of the money he should have back all his evidences concerning the same: and it was farther found, that at the day of payment one Cornwallys sent unto Loveday to know if Loveday would receive the money which Winter owed to him, at his house, who answered that he was content, and he came there, and the

money was told and delivered in bags to Loveday; but afterwards some contention did arise between Winter and Loveday for certain writings; for which cause Cornwallys said, that if they would not agree betwixt them, that they should not have his money. Whereupon Winter requested Cornwallis, that he might have the money to carry to the said porch of the said parish church, who was contented, and there Loveday came to receive it, and Winter would not pay it. Tanfield moved, that the same was a good payment to discharge the mortgage; for the money was told in the house of Cornwallis, and Loveday there put it up into bags; and the same is a good payment and receit: Coke contrary, Here is not any payment, for it was not the money of Winter, but of Cornwallis, as appeareth by the words of Cornwallis; (scil.) If they could not agree they should not have his money: also Winter requested Cornwallis, that he might have the money to carry to the porch of the parish church aforesaid, by which it appeareth, that it was not Winter's money. And for that cause, it was also the opinion of the Court, that the same was not any sufficient tender. See for this, the case of Watkins and Astwick, Hil. 28 Eliz.

1 Len. 34, 35.

TRIN. 30 ELIZ. IN THE KING'S BENCH.

CCLXIX. ORDWAY AND PARROT'S CASE.

Ordway brought a scire facias against Parrot and Hallsey, who were bail in a bill of debt, for one Bennet; and they pleaded, that the said Bennet had payed the money recovered, to the plaintiff, according to the condition of the recognizance; and it was the opinion of the whole Court, that it was no plea without alledging payment upon record; for if this should be suffered, every man should be inforced twice to trie his action; wherefore the plea was disallowed.

[214] TRIN. 30 ELIZ. IN THE KING'S BENCH.

CCLXX. CONIERS AND HOLLAND'S CASE.

In an action upon the case upon assumpsit, by Coniers against Holland, the defendant pleaded, that after the promise, that the plaintiff had discharged him of it: and by Wray, Chief Justice, It is a good plea, and so it hath been often ruled, and it was late the case of the Lord Chief Baron, against whom in such an action, such a plea was pleaded, and he moved us to declare our opinions in Serjeant's-Inn: and there, by the greater opinion, it was holden to be a good plea; for which cause, the Court said to Buckley, who moved the case, that the plea is good, and judgment was entred accordingly.

3 Cro. 279. 2 Cro. 483. & 620.

MICH. 33 ELIZ. IN THE COMMON PLEAS.

CCLXXI. RICHMOND AND BUTCHER'S CASE.

In a replevin, the case was this; a man made a lease for years, reserving rent to the lessor, his executors and assigns, where the lessor had a fee-simple in the lands; it was holden by the Court, that the rent should go to the heir, notwithstanding the special reservation, because the words of the reservation are, During the term, and the other words, To his executors and assigns, shall be void, and then the rent shall go with the reversion to the heir, which see, 27 H. 8. 19. by Awdley: and it was said by some, that a rent reserved during the term shall go to the heir with the reversion: and 12 E. 4. was cited, where a rent reserved to the lessor and his assigns, should not go to the heir, and that these words, During the term, did not mend the matter; for

the lessor might well overlive the term. But in the principal case, it was said by Periam, Justice, that the executors should not have the rent, for they have not the reversion; but if the lessor grants over the reversion, the grantee shall have the rent. And afterwards judgment was given against the plaintiff; for it was in a replevin, and judgment was given for the avowant, who was heir to the lessor.

1 Cro. 217.

CCLXXII. Mich. 30 Eliz. In the Common Pleas.

In an action of trespass brought by a poor woman for breaking of her close; she declared of a continuando of the trespass, by six years and upon nihil dicit pleaded, she had judgment to recover; upon which issued forth a writ of enquiry of damages; and now came the poor woman, and shewed to the Court, that the jury had found too little damages, i.e. but 10s. whereas the land is worth 4l. per ann. and the trespass had continued by six years together, and prayed that the said writ might not be received, and that the Court would grant her another writ to have a melius inquirendum of the damages, but the whole Court denied to grant any such writ, for so there might be infinite enquiries: but sometimes, at the prayer of the defendant, when excessive damages are found, or any misdemeanours alledged in the plaintiff, procuring or using such a writ of enquiry of damages, we use to relieve the defendant, by granting and issuing forth of a new writ, but to the plaintiff never, because the suing forth of the writ is his own act: and by Rhodes, Justice, The late Countess of Darby **[215]** brought a writ of dower, and had judgment to recover; and she surmised that her husband died seised, and prayed a writ of enquiry of damages, and had it granted unto her; and because too small damages were found, she would have suppressed the said writ, and procured a new writ, but she could not obtain it; and at last she was driven to bring in the first writ, and so it was done.

Hill. 30 Eliz. In the King's Bench.

CCLXXIII. Scrog's and Griffin's Case.

In an action upon the case, upon a promise by Scrogs, against Griffin; the plaintiff declared, that whereas such a day, one Brown and another, did run for a wager, from Saint-John-Street, to High-gate, that he of the said two, that first got thither, and came again, should have 5l. which wager, the said Brown did win; and whereas after the said match so performed, the said plaintiff affirmed, that there was deceit and covin in the performance of the said match, upon which the defendant, in consideration of twelve pence, to him delivered by the plaintiff, promised, that if the plaintiff can prove, that any deceit or covin was used, or practised in the performance of the said match, that then upon request, he should pay to the plaintiff 5l. And upon non assumpsit pleaded, it was found for the plaintiff, and it was moved by Foster, in arrest of judgment, that here is not any request set forth in the declaration: and also, that this deceit is enquired of in London, whereas it ought to be in Middlesex where the race was run: and it was agreed by all the justices, that the proof ought to be made in this action, as in the common cases of voyages: and that request now is but matter of conformity, and not of necessity. Wray, Justice, It is clear, that always proof ought to be as it is here; if not, that the matter be referred to a special proof, before a person certain. And as to the trial, the deceit is not in issue, but onely the promise; and therefore the issue is well tried in London: also this action here includes proof and request: for there cannot be made any other proof, and the proof is the effect; for which cause he concluded, that judgment should be entred for the plaintiff, which was done accordingly.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

CCLXXIV. FULLER AND TRIMWELL'S CASE.

[See *Durant & Co.* v. *Roberts and Keighley, Maxsted & Co.* [1900], 1 Q. B. 649.]

In a replevin by Fuller, against Trimwell, who made conusance, as bailiff to one house for damage fesance, the plaintiff in Bar of the conusance shewed, that one A. T. did pretend right to the land where, &c. and the defendant, in the right of the said A. T. took the cattel, &c, Absque hoc, that he took them as bailiff to the said house, upon which the defendant did demur in law; and it was argued by Shuttleworth, Serjeant, that the traverse is not good, which see, 26 H. 8. 8. 5 H. 7. 2. Not his bailiff; but if the truth of the case be so, he may plead of his own wrong, without such cause, &c. And see also, 28 H. 6. 4. The commandment is not traverseable, but in special cases, where the commandment determines the interest of the other party, which see, 13 H. 7. 12, 13. in the case of the Earl of Suffolk in trespass, the defendant pleaded. that before the trespass, the plaintiff was seised, and thereof enfeoffed one B. by whose commandment he entred, to which the plaintiff said, that after the feoffment, and before the trespass, the said B. leased to the plain-**[216]**-tiff, to hold at will, absque hoc, that the said B. did command him; and that was holden a good traverse; for the commandment determines that lease at will; and in the principal case, all the justices were of clear opinion, that the traverse is good; and they all said, that the custos brevium had shewed to them many presidents thereof, see 15 H. 7. 17. and see also, 7 H. 4. 101, 102. In trespass for taking of cattel, the defendant did justifie as servant to such a one for rent arrere, due to his master; the plaintiff, replicando said, that the defendant was not bailiff at the time of the taking, where it is said by Gascoigne, that if the defendant takes the cattel, claiming property, as a heriot due to himself, although that afterwards the lord agrees to the distress, as taken for rent arrere; yet he cannot be said his bailiff at the time of the distress, which was granted by Rhodes, Periam and Windham: and as to that which hath been objected, that if this traverse be allowed, the meaning of the party shall be drawn in question; i.e. the meaning of him who took the cattel, the same is not any mischief, for so it is in other cases; as in the case of recaption, see 9 H. 6. 1. 45 E. 3, 4.

1 Roll 46. Antea 196.

PASCH. 16 ELIZ. IN THE KING'S BENCH.

CCLXXV. HUMPHRESTON'S CASE.

In an ejectione firmæ, it was found by special verdict, that W. Humphreston seised of the manor of Humphreston, suffered a common recovery to be had thereof by Kinnersley and Fowk in the writ of entry in the post, to the intent that they should make an estate to the said W. Humphreston, and Elionar his wife for their lives, the remainder, seniori puero dicti W. and to the heirs of the body dicti senioris pueri legitime procreat. the remainder to the heirs of the body of the said W. Humphreston, with divers remainders over. And afterwards the recoverers in December following, by indenture made an estate accordingly, and made livery to W. Humphreston and his wife; and afterwards, in November, 2 E. 6. by indenture between the said W. Humphreston of the one party, and Kinnersley on the other part, the said W. Humphreston did covenant with the said Kinnersley, to do all such lawfull and reasonable things for to assure the said lands unto the use of the said W. Humphreston and Elionar his wife for their lives, and afterwards, to the use of the eldest child of the body of the said W. Humphreston lawfully begotten, and to the heirs of the body of the said eldest child of the body of the said W. Humphreston; and after to divers other uses over; and afterwards, Ter. Pasch. 2 E. 6. W. Humphreston and Elionar his wife, levyed a fine of the said land to C. and B. in fee, to the use of the

said indenture; Elionar died, W. Humphreston married another wife, and had issue a daughter, named Frances, and afterwards had issue a son, named William, and died. William the son, being of the age of six years, entred into the lands, and leased the same to the plaintiff for years, who being ejected by the defendant, brought the ejectione firmæ: and this special verdict. And the points moved upon it were argued by Atkins, Phetiplace, Fenner, Fleetwood, Plowden and Bromley, and afterwards this case was argued by the justices: and Gawdy, puisne Justice conceived, that judgment ought to be given for the plaintiff: first, he conceived, that this lease for years made by the infant, without deed and without rent reserved is not void; so as every stranger shall take advantage of it, but onely voidable; for an infant may make a bond, and a contract for his commodity and profit, and the same shall bind him; as for his meat and drink, apparel, &c. But **[217]** if upon such lease he had reserved a small rent, as one peny, where the land was worth 100l. per ann. such a lease had been void; and in our case, this lease was made upon the land, and was made for to try the title to it, which is a good consideration, and to the profit of the infant, and for his advancement, and then the lease is not void. It hath been objected, that here the recovery being suffered to the intent that the recoverers should make an estate, ut supra, &c. that the use shall rise presently upon the recovery to him who suffered the recovery, and then the recoverers could not make livery unto him; he held strongly, that the use and the possession should be adjudged in the recoverers, untill they made the estates, &c. for they otherwise could not make the estates, &c. and these words [to the intent] shall be construed, that they shall have the lands, untill they made the estates, &c. and he held, that the remainder limited, seniori puero, where there is not any, in rerum natura, is good enough: as a remainder limited to him who shall first come to Pauls. And he conceived, that the son should take this remainder, and not the daughter: and he conceived, that the estate tail here, was not executed, i.e. the second intail; divers authors of grammer, have been produced to prove, that puer, may be taken both ways, tam puer, quam puella, Deporterius, Calapine, Melancthon, and the grammer allowed, but I conceive, that puer is a word proper for a boy, and puella for a maid; and where we have proper words, we ought not to judge but according to them; and because the word is doubtfull, we ought to consider the cause upon the circumstances, and therefore it is to be intended that W. Humphreston had a greater desire that his son should have his inheritance, than his daughter, if there be not some special matter to prove that the intent of the father was for his daughter. Southcote, Justice, agreed with Gawdy in the first point; and also that the recoverers have convenient time to make the estates; and that they are to make the same without request for the benefit of the wife, who is a stranger to it, and is to have the lands for her joynture; and he cited the case of the Abbat of York, 44 E. 3. 8. and 9. where the difference is taken between a feoffment made upon condition to re-enfeoff the feoffor, or to enfeoff a stranger: and here in our case the feoffment is made in convenient time, and here is sufficient consideration, that the recoverers shall be seised to their own uses, untill, &c. And these words, [ea intentione] shall be taken for a condition: and also that this remainder limited, seniori puero, is good notwithstanding that there be not any senior puer alive at the time. And as to the word (puer) he held, that it did extend to both sexes indifferently; and because it is doubtfull what sex the father intended, we are to construe the same upon the circumstances, which appear upon the parts of the indentures: and here it appeareth upon the indenture, that he hath explained his mind, (scil.) eldest child, be it male or female: as if I have two sons named J. and I devise my lands, or limit a remainder to J. my son, the law shall construe this devise to extend to my younger son; for without devise or limitation my eldest son should have it. But if J. S. hath two sons, known by the names of A. and I devise lands to A. son of J. S. there I ought to explain my meaning openly: and he conceived, that the estate tail is executed defeasiable in W. Humphreston, upon issue afterwards had; and that the daughter should have the lands, and not the son; and if the fine destroy the remainder in abeyance limited to the eldest child, then the said eldest child shall have it, de novo, by the later conveyance. And as to the warranty of the fine, because the possession of the conusees is removed by the statute of 27 H. 8. to the daughter, she shall not have the benefit of the warranty as to vouch, but she shall rebutt: as 22 Ass. 37. 69.

where a feoffment in fee is made to my villein with warranty [218] and before that the feoffor dieth, I enter upon my villein, so as the warranty upon the death of the warrantor is not attached upon the possession of my villein, I shall not have advantage of that warranty: a disseisor makes a feoffment in fee upon condition, the disseisee re-leaseth the feoffee with warranty, the disseisor entreth for the condition broken; now the disseisor shall rebutt by that warranty, but not vouch. And here in our case, the fine is a discontinuance, so as the son is put to his action, if he had right, and then the warranty shall bind him; but contrary, if his entry be lawfull. And as to the lease made by the infant, he conceived that it being made without rent, it was meerly void, for it was without consideration. Wray, Chief Justice, As to the first point, he was of opinion, that the recoverers shall be seised to their own use, untill they make the estate for that was the use implied; for all uses are directed and ruled by the intent implied or expressed of him, to whom the land is; and his intent was, that such estates should be made, and to such purpose the recovery was suffered: as if I enfeoff A. unto the use of B. for his life, there it is implied, that B. shall be seised of the fee to my use, I covenant, that J. S. shall take the profits of my lands for his life, this is a good use of the lands for his life; and he held, that the recoverors should be seised to their own use, untill, &c. and the recoverers ought to make the estates within convenient time, or otherwise the use should be revested again in him who suffered the recovery; and here the estate was made within convenient time: and he said, that in every case where a remainder is limited in abeyance to one by a proper name, the same is not good, but by a general name it is good enough if the party be in esse when the remainder falls: as a remainder limited upon an estate for life unto the first son, or daughter of J. S. where J. S. at the time hath not any son or daughter, the same is good, if such person shall be in esse, at the time of the death of the tenant for life, 17 E. 3. A remainder limited filio primo genito, &c. and 3 E. 3. Fitz. Tail. 8. Land given to J. S. et uxori quam primo matrimonio duxerit in uxorem, and afterwards he taketh a wife, she shall take by the same conveyance. And as to the warranty, this fine with warranty was levyed to C. and B. unto the use of himself for life, the remainder to the use of the eldest child, &c. and he intended, that the daughter should not have the benefit of this warranty: for by the statute, the possession is removed, and transferred in the post before the warranty could attach: and therefore the same shall not bind the son, neither by voucher, nor by rebutter: but tenant by the curtesie shall have benefit of the warranty; for although he be in the post, yet he continueth the estate which was made to the wife. And as to the point in question, we ought to consider, that the Statute of 27 H. 8. of Uses is, that cestuy que use shall have the lands in such plight as he had the use, which was without warranty; and therefore it shall be transferred into possession without warranty: as to the lease made by the infant without rent, profit, or other recompence, he conceived the same to be utterly void; as if he grant a rent, or an advowson, he may say, that he did not grant, &c. for the thing included in the deed, doth not pass, although he delivereth the deed of grant, with his own hand: two joynt-tenants within age, one makes a lease of years, and dieth, the other shall avoid it; for the lease is utterly void, of which every stranger may take advantage; but of acts voidable it is otherwise: as two infants joynt-tenants, the one leaseth for life, and makes livery in person, and dieth, the other shall not avoid it: two joynt-tenants, the one maketh a feoffment upon condition, and dieth, the other shall not take benefit of the condition; but here the lease is meerly void, of which every stranger shall take advantage, and therefore upon this point the plaintiff shall be barred. And also he was of opinion, that [219] this remainder in abeyance limited, seniori puero, was not destroyed by the fine, for it is in the consideration of the law, and so preserved by the law; and therefore a descent in the time of vacation of an abbat, shall not bind the successor; and so where the party is beyond the seas; for such persons and their estates, the law privilegeth and preserveth: so a remainder limited to the right heirs of J. S. And where the King seiseth by reason of a ward, and during such seisin of the King, a descent is cast, the same shall not bind him who hath right; for he could not enter upon the possession of the King: and by the statute of 32 H. 8. a recovery had against tenant for life, the remainder unto the right heirs of J. S. who is alive at the time of the recovery, is not helped by the statute of 32 H. 8. For the words of the

statute are, To whom the reversion or remainder shall then appertain: see 11 R. 2. Fitz. Detin. 46. and so he concluded, because that this remainder is in the custody of the law, and not in esse, it is privileged and preserved and not destroyed by the fine; and upon issue had, the remainder shall be executed, notwithstanding the said act done by the father; and without any entry to be made by the conusees to raise the use, for the remainder limited, seniori puero, neither was, nor could be discontinued: as to the principal point of the case, viz. how these words, seniori puero, shall be expounded, although divers authorities have been cited out of Latine authours, that this word (puer) shall be taken for the male or female; yet I conceive, that more commonly it shall be taken for the male than for the female, and we ought to judge according to the intent of the parties, and not according to the strict signification of the word in Latine, especially where it is doubtfull how it shall be expounded: 9 H. 7. 16. A. was bound in a bond upon condition to pay, decem libras auri puri; although there be not any such phrase in Latine, yet because it appeareth so to be the meaning of the obligee to have fine gold, it was so taken: 39 H. 6. 10. and 11. The word (uterque) id est, quilibet pro parte sua, see the book: so it was lately adjudged in the Court of Common-pleas, where three were bounden, et eorum uterque, which was construed to be, quilibet, for we ought always in construction of deeds, to have regard to the meaning of the parties, and not to argue the aptness of the Latine word. And I conceive, that if a lease be made for life, the remainder puero of J. S. who hath a son and a daughter, the son shall have the land, &c. for the most worthy shall be preferred; and therefore, if a freeman marrieth a niefe, she is enfranchised for ever, according to the opinion of Fitzherbert, which I hold to be good law, for the husband is the more worthy: so if the lease for life be made to J. S. the remainder to the right heirs of A. B. who hath issue three daughters, and dieth, the eldest shall have the remainder, and not the other with her, because she is the more worthy; and so a remainder upon an estate for life of lands in gavelkind limited to the right heirs of J. S. who hath issue two sons, the eldest shall have it; so here in the principal case, (puer) shall be expounded son, because he is the more worthy: but here are other circumstances, which give occasion of another construction; for this doubtfull word (puer) is explained by the English indenture, which the father, W. Humphreston, caused to be made: [unto the use of the eldest child] which is a good exposition of the former conveyance: and I am of opinion, that the same ought to be meant of the daughter, for so soon as she is born, the remainder vests in her, and by the birth of the son after shall not be devested: land is leased to A. for life, the remainder to T. son of A. who hath two sons of the same name, the eldest shall have it, because the more worthy; but, if afterwards the doner declares his meaning to the contrary, the same shall stand, &c. And afterwards judgment was given against the plaintiff, and that the daughter should have the lands.

More 103. 1 Anders. 40. Dyer 337. Owen 64. Sty. 293. 2 Roll 789. Roll 407.

[220] CCLXXVI. Pasch. 16 Eliz. In the King's Bench.

A man devised his lands to his wife for life, and because he was in doubt whether he should have issue or no, he farther willed by his will, that if he should not have any issue by his wife, that then after the death of his wife, the lands should be sold, and the money thereof coming, distributed to three of his bloud, and made his wife and another his executors, and died; the executors proved the will, the other executor died, and the wife sold the lands; and it was the opinion of Wray and Southcote, Justices, that the sale was good, although it be not expressed in the will, by whom the lands should be sold; for the moneys coming of the sale, are to be distributed by his executors, to persons certain, as legacies, and it appertains to executors to pay the legacies, and therefore they shall sell, &c. As if a man willeth, that his lands shall be sold, and that the moneys coming thereof, shall be disposed of for the payment of his debts; now the executors shall sell the lands, for to them it belongs to pay debts: also they held, that the lands should be sold in the life of the wife, otherwise it could

never be sold; and also the surviving executor shall sell the lands because the authority doth survive.

Poph. 182. Hughs Abr. Tit. Devise. 657. Case 5. Savile 72, 73. Dy. 371. b. Shep. Touch. 449. 15 H. 7. 12. Ante 43. Perk. 547. 3 Cro. 278. 3. More 341. 1 Inst. 113. a. 1 And. 145.

CCLXXVII. Pasch. 16 Eliz. In the King's Bench.

Three men were bounden by recognizance, jointly and severally, against all which the conusee sued forth execution by scire facias; and upon issue joined, it was found for the plaintiff in the King's-Bench, and execution awarded by capias ad satisfaciend. And because the same erronicè emanavit, being upon a recognizance, it was drawn off the file; and now the conusee brought an action of debt upon the judgment against one of them, and the opinion of the whole Court was, that it would not lie, because the judgment was joint against them all three.

CCLXXVIII. Pasch. 16 Eliz. In the King's Bench.

A. brought an action upon the case, and declared, that the Dean and Chapter of Westminster, did lease unto him a house for years by deed indented, of which indenture he was possessed, and afterwards lost it, and by trover it came to the hands of the defendant, who sold it, and converted the money thereof coming to his own use; the defendant pleaded, not guilty; and the plaintiff gave in evidence, that the said lease was made to him, and to one B. and that the said indenture was delivered to the said B. (and that was agreed to be the possession of them both) and afterwards B. died, and afterwards A. the plaintiff, was the sole owner of it: and that was holden to be good evidence on the part of the plaintiff; and if the plaintiff can prove the other part of his declaration; i.e. that the indenture came unto the hands of the defendant, and that he sold it, that then he should recover. But it was given in evidence on the defendants parts, that the said B. sold to the said defendant his part and interest in the said lease, and also the said indenture; so as now he is become tenant in common with the plaintiff, and then his sale doth not give any cause of action to the plaintiff and that was holden by the whole Court to be good evidence without pleading of it; the case went farther; that A. being within age, his father leased the lands **[221]** for 20 years, and afterwards the son at his full age upon the back of the indenture did release to the defendant all his right; and it was holden by Wray, Justice, that when the father leased, he did it as guardian to his son; and it was not any ejectment of the son, but it was a lease in the behalf of the son, although the son might avoid it, and then when the indorsement is ut supra, the same is a good assignment; and afterwards the plaintiff was nonsuit.

CCLXXIX. Pasch. 16 Eliz. In the King's Bench.

In an action upon the case, the plaintiff declared, that B. by his will did devise to each of his daughters, he having two daughters, 200l. and that the survivor should have the whole; and shewed farther, that one of his two daughters died, and that B. made his wife his executrix, and that the said wife took to husband the defendant; and farther declared, that the defendant in consideration of all that, and that the defendant should take the surviving daughter to wife, and in consideration that the defendant had assets to pay all debts and legacies, &c. did promise to pay to the plaintiff 400l. at four several days: the first day of payment incurred, and no money was paid, whereupon the plaintiff brought the action; the defendant pleaded, that he made no such promise; and it was found for the plaintiff, and damages were assessed for the default of payment at the first day; and that was moved in arrest of judgment, because the assumpsit was intire, and the plaintiff ought to have forborn his suit until all the days of payment were past, and then to have one entire action for the whole;

but the opinion of the whole Court was against that; for they said, it is not like unto a debt upon a contract, or a bill, where the debt is to be paid at several days; for here no debt is to be recovered but onely damages for the debt; and this default of payment is a wrong, and therefore the action will well lie, and so it was adjudged.

CCLXXX. Pasch. 16 Eliz. In the King's Bench.

A. devised, that his lands should descend to his son, but he willed, that his wife should take the profits thereof until the full age of his son, for his education and bringing up, and died; the wife married another husband, and died before the full age of the son; and it was the opinion of Wray and Southcote, Justices, that the second husband should not have the profits of the lands until the full age of the son; for nothing is devised to the wife but a confidence, and she is as guardian, or bailiff for to help the infant, which by her death is determined; and the same confidence cannot be transferred to the husband; but contrary, if he had devised the profits of the land unto his wife until the age of the infant to bring him up and educate him, for that is a devise of the land it self.

1 Cro. 252. Hob. 285. Dyer. 251. a. Dy. 210. a. 3 Len. 9. 79. Yel. en Ayleff & Choppins Case. Vaugh. 184.

Pasch. 16 Eliz. In the Common Pleas.

CCLXXXI. Bawell and Lucas's Case.

In a replevin by Bawell against Lucas; it was agreed by all the justices, viz. Mounson, Manwood, Harper and Dyer, that if a man seised of a manor, leased part of the demeans for years, or for life, that the reversion doth remain parcel of the manor, but such a reversion by the grant of the manor, doth not pass without attornment **[222]** of the lessee: and where a manor is granted by feoffment unto another, and afterwards the tenants attorn, the services pass by the livery and not by any grant; and although in the first grant the lessee doth not attorn, but a long time after, yet the reversion is not severed from the manor; for the attornment, as to that intent, shall have relation to the livery to make the reversion to pass from the time of the grant, but not to charge the lessee with waste; and Dyer said, that if a feoffment in fee be made of a manor, with an advowson appendant, and the tenants do not attorn, yet the feoffee shall have the advowson; for the advowson is appendant to the principal part of the manor, (scil.) the demeans, and cannot be appendant to the services: and Dyer saith, that if A. maketh a feoffment in fee of a manor, part of which is in lease for years, habendum to the feoffee and his heirs, to the use of the feoffee and his heirs upon condition that the feoffee shall pay to the feoffor within ten days, 1000l. and if he fail, then to the use of the feoffor for life, the remainder to the use of his son in tail, and the money is not paid, the lessee attorns after the ten days to the feoffee, the same is a good attornment to raise secondary uses, although that the first uses did not take effect; for the condition is not annexed to the estate of the land but unto the use onely: and the meaning was, that the feoffor should never have again the inheritance: a feoffment is upon condition, that the feoffee shall give the land in tail to a stranger, who refuseth the gift, there the feoffor may re-enter; but a feoffment upon condition to enfeoff a stranger, or to grant a rent-charge, if the stranger refuseth, there the feoffor shall not re-enter, for his intent was not, that the land should revert, &c.

2 Leon. 265, 266.

Hill. 16 Eliz. In the Common Pleas.

CCLXXXII. Vavasor's Case.

The case was, that Nicholas Ellis seised of the manor of Woodhall, leased the same to William Vavasor and his wife, for the life of the wife, the remainder to the right

heirs of the husband: the husband made a feoffment in fee to the use of himself and his wife for their lives, the remainder to his right heirs, the husband died, the wife held in, and committed waste in a park, parcel of the manor; it was moved, if the writ of waste shall suppose that the wife holdeth in, ex dimissione Nichol. Ellis, or ex dimissione viri: and the opinion of all the justices was, that the writ upon this matter ought to be general; viz. that she holds in, de hæreditate, J. S. hæredis, &c. without saying, ex dimissione hujus, vel illius, for she is not in by the lessor, nor by the feoffees, but by the Statute of Uses; and therefore the writ shall be, ex hæreditate, &c. And also the opinion of the justices was, that the wife in this case, is not remitted, but that she is in according to the form of the feoffment: Dyer, The formedon brought against manures, rehearsed in the writ, a will and divers conveyances, by reason of which, the writ was of exceeding length; and in such cases the writ is good; yet if the writ be general, it is sufficient. Note in this case, that the plaintiff assigned the waste in destroying of deer in the park: and Mead, Serjeant, said, that waste cannot be assigned in the deer, unless the defendant hath destroyed all the deer, and of that opinion was Dyer: Manwood, If the lessee of a pigeon-house destroy all the old pigeons but one or two couple, the same is waste; and if the keeper doth destroy all the deer, so as the ground is become not parkable, the same is waste, although he hath not destroyed **[223]** the whole: see 8 R. 2. Fitz. Wast. 97. If there be a sufficient store left in a park; pond, &c. it is well enough, &c.

HILL. 16 ELIZ. IN THE COMMON PLEAS.

CCLXXXIII. MUTTON'S CASE.

Jane Mutton brought a writ of entry, sur disseisin, against Anne Mutton who pleaded, that one John Mutton was seised, and levyed a fine to the use of himself, and such wife and wives as the said John should after marry, by what name or names they should be called, for term of their lives, and afterwards to the use of the same Jane, now demandant in tail, the remainder over to the right heirs of the said John Mutton, and afterwards the said John Mutton took to wife, the now tenant, upon which bar the demandant did demur in law. And it was argued by Jeofries, Serjeant, that here the wife taketh nothing by this limitation, because she was not capable thereof at the time of the limitation; but if the use had been limited especially to John Mutton, untill he took a wife, and then unto the use of him and his wife for their lives, the same had been a good use to the wife; but in our case, the use is limited to the wife in præsenti, and not upon a contingent; and because the wife at the time of the limitation was not capable, she shall never take after; and yet it may be said, that a joynt estate may be in esse, and yet to begin at several times: as 18 E. 4. 12. A feoffment is made to three, and livery is made to one of them; and first one of them agrees to the livery, and a year after, another agreeth, and afterwards the third; although they take nothing untill agreement, yet when they have agreed, the agreement shall have relation to the time of the livery; but in truth, the reason thereof is, because the freehold shall be adjudged in them all, untill they have disagreed. And if a disseisin be to the use of A. B. and C. and first A. agrees to it, and afterward B. and after C. although they took nothing untill agreement, yet when they have agreed, their agreement shall have relation to the time of the first disseisin; and if in such case the disseisor had made a lease before agreement, the party to whose use after agreeing, shall avoid such lease.

1 Anders. 42. More 96. 13 Co. 48, 49 & 54, 55, 56. 1 Co. 101. 3 Len. 253.

HILL. 16 ELIZ. IN THE COMMON PLEAS.

CCLXXXIV. STAMFORD'S CASE.

The case was, A. took a wife, and afterwards married Elizabeth Stamford, living his first wife, and by deed gave part of his goods to the said Elizabeth; and as to the

residue of his goods, being but of small value, he made the said Elizabeth his executrix, and died; she refused the executorship, for which the Ordinary committed administration to B. Gawdy, Serjeant, asked the advice of the Court, against whom the action of debt should lie? for, if the creditor impleadeth the administrator, he hath not assets; if the executrix her self, she will plead that she hath renounced the executorship, and that administration is committed to B. And the opinion of Dyer, Justice, was, that the gift is void by the common law, and also by the statute of 13 Eliz. and then, if the gift be void any way, the creditor may have an action of debt against the said Elizabeth as executor of her own wrong: and see that such a gift is void by the common law, 43 E. 3. 2. And by Manwood, Justice, He who takes the goods of the dead, shall not be charged as executor of his own wrong, **[224]** unless he doth something as executor: as to pay debts, make acquittances, &c. See 41 E. 3. 31. 32 H. 6. 7. Dyer. If one takes the goods of the dead, and converteth them to his own use, he is chargeable as executor, and so it hath been adjudged in the time of this Queen, in the case of one Stokes, which was affirmed by Bendloes and Harper: see now Co. 2 Part. 53. Reade's case; where no lawfull executor, or administrator is, there, if a stranger takes the goods of the dead into his possession, the same is a good administration to charge him as executor of his own wrong.

CCLXXXV. Hill. 19 Eliz. In the Common Pleas.

The case was, a man made a feoffment in fee to the use of himself for life, and afterwards to the use of his eldest son in tail; and after, to the use of his right heirs, not having at the time of the feoffment any son; afterwards he suffered a common recovery, had issue a son, who died in the life of his father, having issue a son, and afterwards he himself died; it was holden by the justices in this case, that the son and heir of the son should not avoid this recovery by the statute of 32 H. 8. for there was not any remainder in him at the time of the recovery had, and the words of the said statute are; that such recovery shall be void against such persons to whom the reversion, or remainder shall then appertain, i.e. at the time of such recovery. And it was said by one of the Serjeants at Bar; that if lands be given to E. for life, the remainder to B. in tail, the remainder to C. in fee, B. dyeth, his wife young with child, with a son; a recovery is had against E. with the issue of C. and afterwards the son is born, he shall not be helped by this statute of 32 H. 8. for that remainder was not in esse, at the time of the recovery. But it was holden in the principal case, that the heir might avoid the said recovery by the common law; for the recompence cannot extend to such a remainder, which is not in esse.

Ante 178.

Pasch. 27 Eliz. In the Common Pleas.

CCLXXXVI. Sidenham and Worlington's Case.

In an action upon the case upon a promise, the plaintiff declared, that he at the request of the defendant, was surety and bail for J. S. who was arrested in the King's Bench, upon an action of 30l. and that afterwards, for the default of J. S. he was constrained to pay the 30l. after which, the defendant meeting with the plaintiff, promised him for the same consideration, that he would repay that 30l. which he did not pay, upon which the plaintiff brought the action; the defendant pleaded, non assumpit, upon which issue was joyned, which was found for the plaintiff. Walmsley, Serjeant, for the defendant, moved the Court, that this consideration will not maintain the action, because the consideration and promise did not concur and go together; for the consideration was long before executed, so as now it cannot be intended that the promise was for the same consideration, as if one giveth me a horse, and a month after, I promise him 10l. for the said horse, he shall never have debt for the 10l. nor assumpit upon that promise; for there is neither contract, nor consideration, because the same is executed: Anderson, This action will not lie; for it is but a bare agreement, & nudum pactum, because the contract was determined, and not in esse at the

time of the promise; but he said, it is otherwise upon a consideration of marriage of one [225] of his cosins; for marriage is always a present consideration: Windham agreed with Anderson, and he put the case in 3 H. 7. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warrant, for that such warranty ought to have been made or given at such time as the horse was sold: Periam, Justice, conceived, that the action did well lie; and he said, that this case is not like unto the cases which have been put of the other side: for there is a great difference betwixt contracts and this case; for in contracts upon sale, the consideration, and the promise, and the sale, ought to meet together, for a contract is derived from con and trahere, which is a drawing together, so as in contracts every thing which is requisite, ought to concur and meet together, viz. the consideration of the one side, and the sale or the promise on the other side; but to maintain an action upon an assumpit, the same is not requisit, for it is sufficient, if there be a moving cause or consideration precedent; for which cause or consideration the promise was made; and such is the common practice at this day: for in an action upon the case, upon a promise, the declaration is laid, that the defendant, for, and in consideration of 20l. to him paid, (postea scil.) that is to say, at a day after super se assumpit, and that is good; and yet there the consideration is laid to be executed; and he said, that the case in Dyer, 10 Eliz. 272. would prove the case: for there the case was, that the apprentize of one Hunt, was arrested when his master Hunt was in the country, and one Baker, one of the neighbours of Hunt, to keep the said apprentize out of prison, became his bail, and paid the debt; afterwards Hunt the master, returning out of the country, thanked Baker for his neighbourly kindness to his apprentize, and promised him, that he would repay him the sum which he had paid for his servant and apprentize: and afterwards upon that promise, Baker brought an action upon the case against Hunt, and it was adjudged in that case, that the action would not lie, because the consideration was precedent to the promise, because it was executed and determined long before. But in that case, it was holden by all the justices, that if Hunt had requested Baker to have been surety or bail, and afterwards Hunt had made the promise for the same consideration, the same had been good, for that the consideration did precede, and was at the instance and request of the defendant. Rhodes, Justice, agreed with Periam; and he said, that if one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him 20l. for his good and faithfull service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration; but if a servant hath wages given him, and his master, ex abundanti, doth promise him 10l. more after his service ended, he shall not maintain an action for that 10l. upon the said promise; for there is not any new cause or consideration preceding the promise; which difference was agreed by all the justices, and afterwards, upon good and long advice, and consideration had of the principal case, judgment was given for the plaintiff, and they much relied upon the case of Hunt, and Baker, 10 Eliz. Dyer, 272. See the case there.

1 Cro. 42.

[226] TRIN. 25 ELIZ. IN THE COMMON PLEAS.

CCLXXXVII. HIGHAM'S CASE.

It was found by special verdict, that Thomas Higham was seised of 100 acres of lands, called Jacks, usually occupied with a house; and that he let the said house, and 40 of the said 100 acres to J. S. for life, and made his will, by which he devised the said house, and all his lands called Jacks, then in the occupation of the said J. S. unto his wife for life, and that after the decease of his wife, the remainder thereof, and of all his other lands belonging to Jacks, should be to R. his second son, &c. And by Mead, The wife shall not have by implication the residue of Jacks; for she had an express estate in the house and 40 acres of lands, and having expressed his will concerning the same, it shall not be extended by implication; and he said, it had been adjudged between Glover and Tracy, that if lands be devised to one, and the heirs

males of his body, and if he die without heirs of his body, that then the land shall remain over, that the donee hath but an estate in tail to the heirs males of his body: Anderson, In the time of Sir Anthony Brown, it was holden that if a man seised of two acres of lands, deviseth one of them to his wife for life, and that J. S. shall have the other acre after the death of his wife, that the wife hath not any estate in the latter acre. It was also moved, what thing shall pass to his second son by this devise? and by the Lord Anderson, The words, usually occupied with it, amount to the words, the lands let with it: but these 60 acres are not let with it, therefore they shall not pass: Windham contrary; Although they do not pass by the words, occupied with it, yet they shall pass by the name of Jacks, or belonging to Jacks; and afterwards Anderson, mutata opinine, agred with him.

1 Cro. 15. More 221. 3 Len. 130. 1 Roll. 839.

The Third Part of the REPORTS of Several Excellent CASES OF LAW, Argued and Adjudged in the Courts of Law at Westminster, in the time of the late QUEEN ELIZABETH; from the First, to the Five and Thirtieth Year of Her Reign. Collected by a Learned Professor of the Law, WILLIAM LEONARD, Esquire, then of the Honourable Society of Gray's-Inn. Not before Imprinted; and now Published by William Hughes of Gray's-Inn, Esq. 1686.

[1] In the Time of Edw. the Sixth.

I. 6 Edw. 6. In the Common Pleas.

A man had a warren in fee extending into three towns, and leased the same by deed to another, rendring rent; and afterwards granted by deed the reversion of the whole warren in one of the said towns to another, and the lessee attorned; it was holden by all the Justices in the Common Pleas, that neither the grantor, nor the grantee, should have any part of the rent during the same term, because no such contract can be apportioned.

Benlow's Rep. 12. Owen Rep. 10. 1 And. 26. 13 Co. 57. 1 Inst. 148. a. 7 Co. 23. b. Goldb. 44.

II. 6 Edw. 6. In the Common Pleas.

A man by deed indented, bargained and sold land unto another in fee; and covenanted by the same deed, to make to him a good and sufficient estate in the said land before Christmas **[2]** next; and afterwards before Christmas, the bargainor acknowledged the deed, and the same is enrolled: it was the opinion of all the Justices of the Common Pleas, that by that act, the covenant aforesaid was not performed: for the bargainor in performance of the same, ought to have levied a fine, made a feoffment, or done other such acts.

1 And. 27.

III. 6 Edw. 6. In the Common Pleas.

In dower, the tenant made default at the summons: and now at the Grand Cape, he came and said, that he could not come, because he was in great infirmity at the

time of the summons, so as he could not appear. It was the opinion of the whole Court, that that matter should not save his default, because it cannot be tryed, as creit de Eue, and imprisonment may be.

1 And. 32.

IV. 6 Edw. 6. In the Common Pleas.

Debt against the executors, who pleaded, riens enter maynes; which was found against them. The plaintiff sued forth a writ of execution: upon which the sheriff retorned, nulla bona testatoris, within the county: it was the opinion of the Court, that the same was a good retorn, for it may stand with the verdict; for it may be that they have assets in another county. See 3 H. 6. 11. Where the retorn is general, quod non habent executores, aliqua bona testatoris that it was holden insufficient, but here in this case the retorn is special; scil. in the same county.

1 And. 32.

In the Time of Queen Mary.

V. 1 and 2 Philip and Mary. In the Common Pleas.

Tenant in tail had issue two sons, and enfeoffed his younger son and died: the younger son died without issue, leaving his wife priviment ensient with a son; the elder brother entred: it was holden in this case, that he was remitted; and although that afterwards the son was born; yet the same should not avoid the remitter.

1 And. 31.

Mich. 1 and 2 Phil. and Mary.

VI. Stapleton and Truelocks Case.

William Stapleton, executor of John Scardenyll, brought an action of debt against John Truelock, administrator of the goods of William Truelock, who died intestate, upon a bill sealed. The defendant demanded oyer of the testament: by which it appeared, that the said Scardenyll had made the plaintiff, **[3]** and the said William Truelock his executors: and in the said will was this clause, I will, that my friend William Truelock, shall pay to my other executor all such debts as he oweth me, before he shall meddle with any thing of this my will, or take any advantage of this my will for the discharge of the same debts, for that I have made him one of my executors. And upon this matter, it was clearly resolved, that the said William Truelock could not administer, nor be executor before he had paid the debts. And the defendant said, that the said William Truelock in his life had paid unto his co-executors all such debts which in vita sua debuit to the said Scardenyll; and also, that the said William Truelock in his life time had administered the goods of Scardenyll, with his co-executors. And in this case, judgment was given for the plaintiff, and that for default of pleading: for the defendant ought to have shewed acquittances of the payment of the debts to his co-executors; and also ought to have shewed in certainty, what debts they were.

More Rep. 11.

3 and 4 Phil. and Mary.

VII. Hecks and Tirrell's Case.

Debt by Hecks and Harrison against Tirrell as heir; who pleaded, nothing by descent. The plaintiff replyed, assets at such a place within the Cinque-Ports. And so it was found by a jury of the county adjoining, and judgment given of the moyety of his lands, as well those by descent, as by purchase: and a writ awarded to the constable of Dover, to extend the lands within the Cinque-Ports. But it was said, that first the plaintiff ought to have a certiorari to send the record into the Chancery, and from thence by mittimus to the constable of Dover.

1 And. 28.

4 AND 5 PHIL. AND MARY.

VIII. THE KING AND DUE AND KIRLEYS CASE.

The King and Queen brought a writ of disceit against Due and Kirley; and declared, that one Colley was seised of certain lands in fee, and held the same of the King and Queen as of their mannor of Westbury; the which mannor is ancient demesne: and so seised, levies a fine thereof to the said Due, sur conusans de droit come ceo, &c. Due rendred the land to Colley for life, the remainder over to Kirley in fee: Colley died; Kirley entred as in his remainder. Kirley pleaded, that the land whereof, &c. is frank fee, &c. Upon which, they are at issue: which issue depending, and not tryed, Due died. It was moved in this case, that the writ might abate. But that was denyed by the Court. For this action is but trespass in its nature for to punish this disceit; and no land is to be recovered, but only the fine reversed.

More Rep. 13.

[4] MICH. 4 AND 5 PHIL. AND MARY. IN THE COMMON PLEAS.

IX. ELIOT AND NUTCOMBS CASE.

The case was, that the Bishop of Exeter leased certain lands in the county of Devon for years, rendring rent payable in Exeter aforesaid, with clause of re-entry; and the Bishop of Exeter had a palace in Exeter aforesaid: it was the opinion of the justices in this case, that the rent ought to be demanded at the said palace, and not elsewhere: and if that the lessee come to the common gate of the said palace, and there tender the rent, it is a good tender without more, be the gate shut or open, notwithstanding that the bishop be within the palace, and that neither he nor any of his servants be at the gate for to receive it: for the lessee is not tyed to open the gate of the palace, if it be shut; nor to enter into the palace, if it be open.

1 And. 27.

X. MICH. 4 AND 5 PHIL. AND MARY. IN THE COMMON PLEAS.

Copyhold land was surrendred to the use of the wife for life, the remainder to the use of the right heirs of the husband and wife: the husband entred in the right of his wife: it was the opinion of the justices in this case, that the remainder was executed for a moyety presently in the wife, and the husband of that was seised in the right his wife: and, the wife dying first, that her heir should have it: but if the husband had died first, his heir should have had one moyety.

1 Roll. Lane and Pannel's Case.

MICH. 4 AND 5 PHIL. AND MARY. IN THE COMMON PLEAS.

XI. JOSCELIN AND SHELTONS CASE.

In an action upon the case, the plaintiff declared, that the defendant in consideration that the son of the plaintiff would marry the daughter of the defendant, assumed and promised to pay to him 400 marks in 7 years next ensuing, by such portions. And upon non assumpsit pleaded, it was found for the plaintiff. It was objected in arrest of judgment, that one of the said 7 years was not incurred at the time of the action brought, &c. and that appeared upon the declaration, so as the plaintiff had not cause of action for the whole mony promised. And for that cause, the writ was abated by the Court by award, although it was after verdict. See Br. Title, Action upon the Case, 108.

More Rep. 13.

[5] XII. 2 AND 3 PHIL. AND MARY. IN THE COMMON PLEAS.

In an assise against 4. they were at issue upon nul tenant del franktenement nosme en le brief. And it was found by the assise, that two of them were disseisors, and two tenants: and after verdict, and before judgment, one of those who were found tenants, died; and that was moved in arrest of judgment: but it was not allowed of by the Court, because the parties had not day in Court to plead it. But it was said, that after judgment given, a writ of error lieth.

IN THE TIME OF QUEEN ELIZABETH.

1 ELIZ. IN THE COMMON PLEAS.

XIII. CANONS CASE.

Upon an evidence to a jury in the Common Pleas; upon an issue there, this deed was given in evidence, viz. sciant præsentes & futuri, quod ego Richardus Canon, filius & hæres Richardi Canon, dedi, concessi, & hac præsenti carta mea confirmavi Willielmo Compton militi, omnia terr. tenementa, &c. ad usum mei præd. Richardi & Joannæ uxoris meæ pro termino vitæ absq; impetitione vasti, ac etiam rectorum hæred. mei præfat. Richardi, & assignatorum meorum post decessum mei præfat. Richardi & Joannæ uxoris meæ; et si contingat me præfat. Richardum obire sine exitu de corpore meo procreato, tunc volo, quod omnia dict. terr. & tenement a remaneant Tho. fratri meo & rectis hæredibus de corpore suo procreatis, & hæredib. & assignat. eorum. And it was the opinion of the justices, that a good estate tail was by that deed limited to the said Richard in use, after the death of his wife.
1 Roll. 839.

2 ELIZ. IN THE COMMON PLEAS.

XIV. HOLT AND ROPERS CASE.

In a replevin by Holt against Roper, the case was: J. abbot of W. leased to T. M. Knight, a close of land in B. for 44 years, who thereof possessed, was attainted of misprision of treason, and so forfeited to the King, who seised the same: the abbot and his covent surrendred, 31 H. 8. the King leased the same to Roper for 21 years, and died: King Ed. 6th in the fourth year of his reign, leased the same to one Philips, to have and to hold, after the term to T. M. ended, for 21 years: Roper surrendred to Queen Mary, who leased the same again to Roper for 30 years. In this case, it was adjudged, that the lease made to Philips, was ut-[6]-terly void, for that the King was deceived in his grant; for the lease made to F. M. was long time before determined by extinguishment in the person of the King, who had it by forfeiture upon the attainder of T. M. and the statute of 1 E. 6. cap. 8. shall not help that lease (notwithstanding the non-recital, or mis-recital of leases made before:) for here is not matter of recital, but matter of estate and interest, which is not well limited for the commencement of it, i. the lease to Philips; for there is not any certainty of the commencement of it: for that lease cannot begin after the surrender of Roper, for the words of the limitation of the beginning of it, cannot serve to such construction.
Post. 242. 243.

XV. 2 ELIZ. IN THE COMMON PLEAS.

A term for years is devised to A. The executors of the devisor entred into the land devised to the use of the devisee; it was the opinion of the Court, that the same was a sufficient possession to the devisee.

XVI. 3 ELIZ. IN THE COMMON PLEAS.

Two coparceners were of a reversion, the one of them granted his interest in it by fine to another; it was holden in that case, that the conusee should have a quid juris clamat for a moyety of the said reversion.

XVII. MICH. 4 ELIZ. IN THE COMMON PLEAS.

The lessor mortgaged his reversion in fee, to the lessee for years, and at the day of mortgage for payment of the mony, he paid the mony; it was holden in this case, that the lease for years was not revived, but utterly extinct.

XVIII. MICH. 4 ELIZ. IN THE COMMON PLEAS.

J. N. cestuy que use in tail, 14 H. 8. by indenture between him on the one part, and J. S. of the other part, in consideration of a marriage between his son and heir apparent, and Joan daughter of the said J. S. to be had, covenanted with the said J. S. that neither he, nor any of the feoffees seised to his use, have made, or hereafter shall make any estate, release, grant of rent, levy any fine, or do any other incumbrance whatsoever of any of his mannors, lands, &c. but that all the said mannors, &c. shall immediately descend or remain to his said son, and the heirs of his body, after the decease of the said J. N. It was the clear opinion of all the justices in this case, that by the said indenture, no use is changed in J. N. nor any use raised to the said son and heir; but that it is only a bare covenant.

[7] TRIN. 4 ELIZ. ROTT. 1622.

XIX. ANDREWS AND GLOVERS CASE.

In trespass by Andrews against Glover, the Lady Mary Dacres being seised of the mannor of Cowdam, by her indenture bargained and sold to the said Andrews, all those her woods, underwoods, and hedge-rowes, as have been accustomably used to be felled and sold, standing, growing, being in, upon, and within the mannor of Cowdam, &c. to have and to hold, &c. from the Feast of S. Michael last past, during the natural life of the said Lady Mary: and the said Andrews for himself, his heirs and assigns, doth covenant and grant, to and with the said lady, her executors, &c. to content and pay, or cause to be contented and paid to the said lady, her executors, &c. yearly during the said term, 10l. By force of which grant, he cuts down all and singular the trees, woods, and underwoods in the aforesaid mannor growing at the time of the making of the indenture aforesaid. And afterwards the said lady by her servants, felled all the other woods and underwoods growing in the same mannor, after the said felling made by the said Andrews: whereupon Andrews bringeth trespass. And the opinion of the Court was clear, that after the bargainee had once felled, that he should never after fell in the same place where the first felling was made, by force of the said grant, notwithstanding the rent yearly reserved, and notwithstanding the words of the grant, viz. to have and to hold, during the life of the said Dame Mary. Wherefore the said Andrews durst not demur, &c.

More Rep. 15. Post. 29. Winch. Rep. 5.

XX. 6 ELIZ. IN THE KING'S BENCH.

The case was; A. is bounden to B. in an obligation to pay to B. 20l. at the Feast of our Lady, without limiting in certain, what Lady-day, viz. the Conception, Nativity, or Annunciation; and the opinion of the whole Court was, that the deed should be

construed to intend such Lady-day, which should next happen and follow the date of the said obligation.

MICH. 7 ELIZ. IN THE COMMON PLEAS. ROTT. 1851.

XXI. SCARNING AND CRYERS CASE.

In a second deliverance by Scarning against Cryer, the defendant makes conusans as bailiff to J. S. and sheweth, that the said J. S. and at the time of the taking, &c. was lord of the mannor of A. within which mannor, there was this custom time out of mind, &c. That the tenants of that mannor and other resiants and inhabitants within the said mannor, or the greater part of them at the court-baron of the said mannor, at the mannor afore-[8]-said holden, were used and accustomed to make laws, and impose pains as well upon the resiants and inhabitants within that mannor, and the tenants of the said mannor there being; as upon every occupier of any tenements within the said mannor, for good government there to be had and kept, and for the preservation of the corn and grass there growing: and that the said J. S. and all those whose estate, &c. distringere consueverunt pro omnibus pœnis sic forisfact. & per juratores Curiæ præd. ex assensu dictor. tenent. inhabitant. & residentium ibid. in forma prædict. assessis & impositis; tam super quibuscunq; tenent. maner. prædict. aut inhabitantibus aut residentibus infra maner. illud, quam super occupatoribus aliquor. tenementor. infra idem maner': and further said, that at a court-baron there holden, that coram sectatoribus ejusdem Curiæ, by the homage of the said court then charged to present, with the assent of other tenants and inhabitants of the said mannor, it was ordained and established, that no tenant of the mannor aforesaid, nor any of the resiants or inhabitants within the said mannor, nor any occupier of any tenements within the said mannor from thenceforth, should keep his cattel within the several fields of that mannor by by-herds, nor should put any of their oxen, called draught-oxen, there before the Feast of St. Peter, upon pain, quod quilibet tenens residens, &c. should forfeit 20s. And further said, that the plaintiff, at the time, &c. occupied and had such a tenement within the said mannor; and that at such a court afterwards holden, viz. such a day, it was presented, that the plaintiff custodivit boves suos, called draught-oxen, within the several fields by by-herds, contrary to the order aforesaid, by which, the penalty of 20s. aforesaid, was forfeited, notwithstanding the said pain de gratia Curiæ illius per quosd. A. & E. afferratores Curiæ illius ad hoc jurat. assess. & afferrat. fuit ad 6s. 8d. And further he said, that the place in which the taking, &c. is within the mannor aforesaid; and that A. B. steward of the said mannor extraxit in scriptis extra Rotulis Curiæ præd. the said pain of 6s. 8d. and delivered the same to the defendant, bailiff of the said mannor, to collect and receive; by force of which, he required the said 6s. 8d. of the plaintiff, and he refused to pay it; and so avoweth the taking, &c. And upon this conusans of the defendant, the plaintiff did demur in law: and judgment was given against the conusans, 1. Because he pleaded, that it was presented coram sectatoribus, and doth not shew their names. 2. The penalty appointed by the by-law, was 20s. and he sheweth, it was abridged to 6s. 8d. and so the penalty demanded, and for which the distress was taken, is not maintained by the by-law; and a pain certain ought not to be altered. 3. He sheweth, that it was presented, that the plaintiff had kept his draught-oxen: and he ought to have alledged the same in matter in fact, that he did keep, &c.

More Rep. 75.

[9] 7 ELIZ. IN THE COMMON PLEAS.

XXII. DEDICOTS CASE.

Dedicot seised of certain customary lands, surrendred the same into the hands of the lord, to the intent that the lord should grant the same de novo to the same Dedicot for life, and afterwards to Jane his wife, during the nonage of the son and heir of Dedicot; and afterwards to the said son and heir in tail, &c. Dedicot died

before any new grant: afterwards, the lord granted the said land to the wife, during the nonage of the said heir, the remainder to the heir in tail, the heir at that time being but of the age of 5 years; so as the said wife by force of the said surrender and admittance, was to have the said lands for 16 years: the wife took another husband, and died; and it was the opinion of Brown and Dyer, Justices, that the husband should have the lands during the nonage of the enfant; for the wife had her said estate to her own use, and then her husband surviving her, should have it, and that without any admittance, for that he is not in of any new estate, but in the estate of his wife as assignee. And it was said by them, that if a copyholder be for years, and maketh his executors, and dieth, that the executors should have the term, and that without any admittance: Weston, contrary in that case, as to the executors.

Dyer 210, 251. Hob. 285. Hob. Rep. 281. Co. Case of Copyholders.

7 Eliz. In the Common Pleas.

XXIII. Tindall and Cobbs Case.

Waste was brought by Tindall, Knight, against Jeoffery Cobbe Esquire; and the plaintiff declared of a demise of the moyety of the mannor of Wolverton; and of the moyety of a wood called Wolverton-Wood. The defendant pleaded, that Robert Winckfield before the waste supposed, was seised of and in tertia parte alterius medietatis of the said mannor, and of and in tertia parte alterius medietatis of the aforesaid wood, and held the same insimul & pro indiviso with the plaintiff; and that the said Robert Winckfield, by his deed, sold to the defendant omnes & omnimodas arbores & subboscos suos crescent. in prædict. tertia parte alterius medietatis prædicti bosci ad libitum ipsius galfridi succidend. and so justified the cutting down of 300 oaks, in which the waste is assigned; with this, that he will aver, that the aforesaid 300 oaks were the third part only in numero & precio medietatis omnium arbor. & subboscorum at the said time when the waste is supposed to be done; and demanded judgment, if action: and divers exceptions were taken to the count: 1. He sheweth, that the demise of the moyety of the mannor was per nomen, &c. and doth not shew, that the demise was by writing; and if not, then he can-[10]-not plead it by a per nomen. 2. The waste is assigned in digging of clay in 100 acres of lands, parcel medietatis maner. de Wolverton, and hath not shewed in what town the land is: for he hath shewed before, the demise of the moyety of the mannor of Wolverton in Wolverton. 3. He shews the demise of the moyety of the mannor of Wolverton, and of other lands, and assigns the waste in cutting down oaks in quodam bosco vocat. Wolverton Wood, parcel præmissorum; and that cannot be: for this wood cannot be parcel of the mannor of Wolverton, and of the other lands also. And for these causes, the count by the whole Court was holden to be sufficient.

Vaugh. Rep. 175.

7 Eliz. Dyer. In the Common Pleas.

XXIV. Stamfords Case.

Hugh Stamford, seised in fee, had issue A. his eldest son, and B. his younger son: A. had issue George and Elizabeth by divers women; Hugh made a feoffment in fee to the use of himself for life, and afterwards to the use of George in tail, and afterwards to the use of A. in tail, and afterwards to the use of the right heirs of Hugh: Hugh dieth; A. dieth; George levieth a fine to the use of himself in tail, the remainder over to B. in fee, and dyeth without issue: it was holden by Bendloes, Carell, Kelloway, both the Bromleys, and Kingsmill, that Elizabeth is barred by this fine, by the statute of 4 H. 7. & 32 H. 8.

XXV. 7 ELIZ. IN THE COMMON PLEAS.

The case was this; grandfather, father, and son: lands are given to the grandfather for life, the remainder to the son in tail; the grandfather and father joyn in a feoffment with warranty; the feoffee makes a lease for years, and afterwards conveys the land to the grandfather for life, the remainder to the father in fee: the grandfather and father die; the son entreth, and puts out the lessee: Weston was of opinion, that the entry of the son was lawful; for it was the feoffment of the grandfather, and the confirmation of the father, and the warranty of the grandfather collateral to the father and his estate: but when the land is re-assured, as above is said, and afterwards the son entreth after the death of the grandfather and father, now he is remitted, and the warranty gone, by taking back the estate: and the son is now seised of as high an estate as his ancestor was at the time that he departed with the land, by which the warranty is determined. Dyer, contrary: Here had not been any discontinuance, if the warranty had not been; for the father was never seised by force of the entail; and I conceive, that against a warranty collateral, one cannot be remitted; for it binds the right, as a fine with proclamation, after the statute of 4 H. 7. And I con-[11]-ceive, that during the possession of the grandfather, the warranty is but suspended, and not determined: and although that by the death of the grandfather it be determined; yet having respect to the lessee, it is in being; for his estate is derived out of the estate which was warranted, and which descends with the warranty. Bendloes, One cannot make title by a collateral warranty only, &c.

8 ELIZ. IN THE COMMON PLEAS.

XXVI. SIMONDS CASE.

In a formedom, the tenant vouched Rose Simonds as daughter and heir of Henry Simonds, clerk; and because she was within age, he prayed that the parol might demur. Bendloes recited the case to be this; A fine was levied of the lands to Henry Simonds, upon condition, &c. who rendred back the land to the conusor by the same fine; and that the said Henry Simonds never had any possession, or seisin, but that which he had mean between the conusans, and the rendee; of which possession the wife should not be endowed: and therefore it is a good counter-plea to say, that the said Rose, nor any of her ancestors, &c. for that was not such a seisin upon which warranty might rise; and so if a feoffment in fee had been made to the said Henry Simonds to the use of another: and of that opinion, was Dyer, Justice; for Henry Simonds had not any possession by force of which he might be vouched. Welsh, contrary; For the fine imports in it self, that he hath a fee, and that he hath granted and rendred the same fee, and this fine amounts to a feoffment. Dyer said to Bendloes, The best way for you, is to plead the counter-plea generally; and if he estop you by the fine, to demur upon it. Afterwards, Bendloes moved another matter, viz. Henry Simonds was a priest, and therefore Rose is a bastard; and if so, then she cannot be vouched as heir: but I would not trust the bishop to certifie the bastardy, if I should plead it generally, and therefore I will plead the special matter, and so it shall be tryed by the country. Dyer and Welsh, So you may do, if you please; and yet if you plead general bastardy, it shall be tryed by the country: for Rose is not a party to the writ; and in such case, bastardy shall be tryed by the country.

XXVII. MICH. 8 ELIZ. IN THE COMMON PLEAS.

Note; it was said by Dyer and Brown, Justices, that if a man deviseth by his will to his son, a mannor in tail, and afterwards by the same will he deviseth a third part of the same lands to another of his sons, they by this are joynt-tenants: and if a man in one part of his will deviseth his lands to A. in fee, and afterwards by another clause in the same will, deviseth the same to another in fee, they are joynt-tenants.

2 Cro. 49. Yelv. 210.

[12] MICH. 8 ELIZ. IN THE COMMON PLEAS.

XXVIII. DREW BARRENTINES CASE.

The case was; Drew Barrentine and Winifred his wife, were seised of the mannor of Barrentine, which is ancient demesne, and holden of the Lord Rich, as of his mannor of Hatfield, levy a fine thereof sur conusans de droit, &c. by which fine the conusee rendreth the said mannor to the said Drew and Winifred in special tail, the remainder to Winifred in tail, the remainder to the Countess of Huntington in tail, the remainder to the heirs of the body of Margaret late Countess of Salisbury, the remainder to the Queen in fee: it was moved by Bendloes, Serjeant, If the Lord Rich being lord of the mannor, might reverse this fine by a writ of disceit, and so recontinue his seignory: and he said, that he might; and thereby all the estates which passed by the fine, should be defeated, even the remainder which was limited to the Queen, for by it the fine shall be avoided to all intents. Welsh, Justice, Such a writ doth not lie; for by the remainder limited to the Queen by the fine, all mean signories are extinct, then, if it be so, disceit doth not lie. If the tenant in ancient demesne levieth a fine, and afterwards the lord paramount, who is lord of the mannor, doth release to the conusee, and afterwards the lord of the mannor brings a writ of disceit, he gains nothing by it: and if the tenant in ancient demesne levieth a fine of it, and dieth, and the heir confirmeth the estate of the conusee, and afterwards the lord by a writ of disceit reverseth the fine; yet the estate of the conusee shall stand. But all these cases differ from our case. For in all those cases, another act is done after the action given to the lord; but in our case, the whole matter begins in an instant, & quasi uno flatu, and then if the principal be reversed, the whole is avoided; for the whole estate is bound with the condition in law, and that condition shall extend as well to the Queen and her estate, as to another. And if lands is ancient demesne be assured to the King in fee upon condition, now during the possession of the King, the nature of the ancient demesne is gone; but if the condition be broken, so as he hath his land again, it is ancient demesne as it was before: and so the estate of the Queen is bounden by a condition in law.

XXIX. MICH. 8 ELIZ. IN THE DUTCHY CHAMBER.

Note; it was holden by Welsh in the Dutchy Chamber, that whereas King Edw. the 6th, under the seal of the dutchy, had demised firmam omnium tenentium at will manerii sui de S. that nothing but the rent passed, and not the land: for firma, signifies rent; as in a cessavit de feodo firmæ: but the Clerks of the Court said, that their course had always been, to make leases [13] in such manner. But Welsh continued in his opinion as aforesaid: and further he said, that this was not helped by the Statute of Non-recital, or Mis-recital, &c. for that here is not any certainty; for sometimes (firma) signifies land, sometimes rent.

XXX. MICH. 8 ELIZ. IN THE COMMON PLEAS.

This case was holden for law by the whole Court; two coparceners are, and one of them dieth, her heir of full age, she shall not pay a relief; for if she should pay any at all, she should pay but the moyety; and that she cannot do, for a relief cannot be apportioned, for coparceners are but one tenant to the lord.

XXXI. 8 ELIZ. IN THE COMMON PLEAS.

An action upon the case was brought, for stopping of a way; the plaintiff declared, that the Duke of Suffolk was seised of a house in D. and leased the same to the plaintiff for life; and that the said duke, and all those whose estate, &c. have used time

out of mind, &c. to have a way over the lands of the defendant unto the park of D. to carry and recarry wood necessary for the same house, from the said park to the same house; and further declared, that the defendant obstupavit the way. It was moved by Carus, that upon this matter, no action upon the case lieth, but an assise, because that the freehold of the house is in the plaintiff; and also the freehold of the land over which, &c. is in the defendant; but if the plaintiff or defendant had but an estate for years, &c. then an action upon the case would lie, and not an assise: all which was granted by the Court. It was also holden, that this word obstupavit, was sufficient in it self; scil. without shewing the special matter how; as by setting up any gate, hedge or ditch, &c. for obstupavit implyes a nusans continued, and not a personal disturbance, as a forestaller, or in saying to the plaintiff upon the land, &c. that he should not go there, or use that way; for in such cases, an action upon the case lieth. But as to any local or real disturbance, obstupavit amounts to obstruxit: and although in the declaration is set down the day and the year of the obstruction, yet it shall not be intended, that it continued but the same day: for the words of the declaration are further, by which he was disturbed of his way, and yet is; and so the continuance of the disturbance is alledged: and of such opinion also was the whole Court. Leonard, Prothonotary, said to the Court, that he had declared of a prescription, habere viam tam pedestrem quam equestrem, pro omnibus & omnimodis cariagiis, and by that prescription he could not have a cart-way, for every prescription is stricti juris. Dyer, That is well observed, and I conceive that the law is so; and therefore it is good to prescribe, habere viam pro omnibus cariagiis, generally, without speaking of horse-way or cart-way, or other way, &c.

Post. 263.

[14] MICH. 8 ELIZ. IN THE COMMON PLEAS.

XXXII. STOWELL AND THE EARL OF HERTFORDS CASE.

In a formedom in the remainder by John Stowel and R. R. against the Earl of Hertford, the case was; that lands were given to Giles Lord Daubeney in tail, the remainder to the right heirs of J. S. who had issue two daughters, Agnes and Margaret, and died: the donee died without issue, and the demandants as heirs of the said Agnes and Margaret, brought a formedom in the remainder: and it was awarded by the Court, that the writ should abate; for the writ shall be brought by the heir of the survivor of the said two daughters, because they have that remainder as purchasors.

MICH. 9 ELIZ. IN THE COMMON PLEAS.

XXXIII. STUCKLY AND SIR JOHN THYNNS CASE.

Tho. Stuckly, administrator of the goods and chattels of one Tho. Curties, alderman of London, brought debt upon an obligation, against Sir John Thynn, and demanded of him 1000l. Et modo ad hunc diem venerunt, tam præfatus Tho. Stucklie, quam prædict. Johannes Thynn; et super hoc, dies datus est usq; Oct. &c. in statu quo nunc, &c. salvis, &c. At which day, the defendant made default, and thereupon the plaintiff prayed his judgment against the defendant. But the opinion of the Court was, that he could not have it; but was put to process over, because dies datus, is not so strong as a continuance.

PASCH. 10 ELIZ. IN THE COMMON PLEAS.

XXXIV. LUKE AND EVES CASE.

In a replevin by Luke against Eve, the defendant avowed, because that the jury at such a leet did present, that the plaintiff was a resiant within the precinct of the said leet, &c. and that the plaintiff was warned to appear there, and notwithstanding

that made default: for which he was amerced by the steward there to 5s. And so for that amercement, he avowed the taking, &c. The plaintiff in bar of the avowry, pleaded, that at the time of the said leet holden, he was not a resiant within the precinct of the said leet: upon which they were at issue; and it was found for the avowant. Whereupon judgment was given for the avowant to have a retorn.

[15] XXXV. MICH. 14 ELIZ. ROTT. 1120. IN THE COMMON PLEAS.

The Abbot and Convent of York, leased to J. S. certain lands at will; and afterwards by deed indented under their covent seal, reciting, that whereas J. S. held of them certain lands at will, they granted and demised that land to the said J. S. to hold for life, rendring the ancient rent; and by the same indenture granted the reversion of the same land to a stranger for life: it was holden by the Court clear, that an estate for life accrueth unto J. S. by way of confirmation, and the remainder unto the stranger depending upon the estate created by the confirmation.

MICH. 14 ELIZ. IN THE COMMON PLEAS.

XXXVI. SIR FRANCIS CAREWS CASE.

Sir Nicholas Carew, seised of the mannor of A. of which mannor B. held certain lands; B. is disseised by C. C. assures the same to Sir Nicholas Carew, who is attainted of treason; by which attainder, the mannor and land cometh to King Henry 8th who thereof dieth seised, and the same descends to King Edward the 6th, who grants the same mannor to the Lord Darcy, who grants the same to Queen Mary, who grants the same to Francis Carew, son of Nicholas Carew, who by fine assures the same to the Lord Darcy; the proclamations pass, and the 5 years pass; she who hath right to the lands whereof the desseisin was made, being for all that time a feme covert; and therefore the fine did not bar her: but because that the King was entituled to the land by a double matter of record, and by the descent from Hen. the 8th, to Ed. the 6th; and also because a seignory is reserved to the King upon the grant made by King Edward the 6th, to the Lord Darcy; The justices were all of opinion, that the entry of the heir of the disseisee was not lawful upon the patentee of the Queen, but that she ought to be relieved by way of petition.

2 Len. 122.

XXXVII. MICH. 14 ELIZ. IN THE COMMON PLEAS.

A man brought an action of trespass against another, for chasing of his ewes being great with lambs, so as by such driving of them, he lost his lambs. The defendant justified, because they were in his several damage-feasans; wherefore he took them, and drove them, to the pound: and it was holden by the whole Court, to be no plea: for, although that he might take; yet, he cannot drive them with peril, &c.

[16] XXXVIII. MICH. 14 ELIZ. IN THE COMMON PLEAS.

The case was; A. made a lease to B. for life, and further grants unto him, that it shall be lawful for him to take fewel upon the premisses; proviso, that he do not cut any great trees: it was holden by the Court, that if the lessee cutteth any great trees, that he shall be punished in waste: but in such case, the lessor shall not re-enter, because that proviso is not a condition, but only a declaration and exposition of the extent of the grant of the lessor in that behalf. And it was holden also by the Court, that lessee for life, or for years, by the common law, cannot take fewel but of bushes and small wood, and not of timber-trees. But if the lessor in his lease granteth fireboot expresly, if the lessee cannot have sufficient fewel, as above, &c. he may take great trees.

More Rep. 16, 23. 1 Len. 117.

XXXIX. Mich. 14 Eliz. In the Kings Bench.

In trespass, upon an evidence given to the jury at the Bar, the case appeared to be thus; land was given to A. in tail, the remainder in fee to his sisters, being his heirs at the common law: A. made a deed in this manner; viz. I the said A. have given, granted, and confirmed, for a certain piece of mony, &c. without the words of bargained, sold: and the habendum was to the feoffee with warranty against A. and his heirs; and a letter of attorny was to make livery and seisin: and the deed was in this manner, To all Christian people, &c. And the deed was enrolled within one month after the making of it; and the deed was indented, although that the words of the deed, were in the form of a deed poll: and after 4 months after the delivery of the deed, the attorny made livery of seisin. A. died without issue, and the sisters entred, and the feoffee ousted them of the land; and thereupon they brought an action of trespass: and the opinion of the whole Court, was for the plaintiff; for here is not any discontinuance, for the conveyance is by bargain and sale, and not by feoffment, because the livery comes too late after the inrollment, and then the warranty shall not hurt them: and although that in the deed there be not any word of indenture, and also that the words are in the first person; yet in as much as the parchment is indented, and both the parties have put their seals to it, it is sufficient. Also, it was clearly agreed by the Court, that the words, give for mony, grant for mony, confirm for mony, agree for mony, covenant for mony, if the deed be duly inrolled, that the lands pass both by the Statute of Uses, and by the Statute of Inrollments, as well as upon the words of bargain and sale. And by Catline, Wray, and Whiddon, the party ought to take by way of bargain and sale, and he hath not election to take the land by way of livery: but when all is in one deed, and takes effect **[17]** equally together, in such case the grantee hath election; but here in this case, the bargain and sale (the deed being inrolled) doth prevent the livery, and taketh his full effect before. And by Wray and Catline, If he in the reversion upon a lease for years, grants his reversion to his lessee for years by words of dedi, concessi, feoffavi, and a letter of attorny is made to make livery and seisin, the donee cannot take by the livery, for that the lessee hath the reversion presently.

2 Roll. 787.

XL. Mich. 14 Eliz.

In an ejectione firmæ, the case upon evidence appeared to be thus; the Bishop of Rochester, anno 4 E. 6. leased to B. for years rendring rent; and afterwards, granted the reversion to C. for 99 years, rendring the ancient rent, to have from the day of the lease without impeachment of waste; which grant was confirmed by the dean and chapter: but B. did not attorn; and for default of attornment, it was holden by the whole Court, that the lease was void; for it is made by way of grant of a reversion, and to pass as a reversion. But by Catline, If the bishop had granted the reversion, and also demised the land for 99 years, it should pass as a lease to begin first after the former lease determined. And as to the attornment, it was given in evidence, that B. after the notice of the grant to C. spake with C. to have a new lease from him, because he had in his farm but 8 years to come, but they could not agree upon the price: and the justices were of opinion, that that was an attornment, because he had admitted the said C. to have power to make a new lease unto him. Also the said B. being in company with one R. seeing the said C. coming towards him, said to the said R. See my landlord; meaning the said C. Bromley, sollicitor, that is no attornment, being spoken to a stranger. Barham, contrary, because he was present. And it was held by the whole Court, to be a good attornment. But it was holden, that if the attornment was not before that the bishop was translated to Winchester, that the lease should be void: and although that the confirmation of the dean and chapter was before the attornment, so as no estate had vested in C. yet it is good enough; for the assent of the dean and chapter is sufficient, whether it be before or after; by Catline, Southcote, and Whiddon: Wray, contrary.

XLI. MICH. 14 ELIZ.

The King seised of a mannor to which an advowson is appendant, a stranger presents, and his clerk is in by 6 months; the King grants the mannor, with all advowsons appendant to it, to B. The incumbent dieth, the grantee may present; for the advowson was always appendant, and the inheritance [18] thereof passeth to the grantee, and is not made disappendant by the usurpation, as in the case of a common person, for the King cannot be put out of possession. But the patentee shall not have a quare imped. of the first disturbance, for that presentment doth not pass to him, being a thing in action, without mention of it in his grant. And if the patentee bringeth a quare impedit of the second avoydance, he shall make his title by the presentment of the King, not making mention of the usurpation; yet if the bishop presenteth for lapse in the case of a common person, he ought to make mention of it; for that is his title to the presentment, &c.

MICH. 14 ELIZ. IN THE COMMON PLEAS.

XLII. HUMFREY AND HUMFREY'S CASE.

Between Humfrey and Humfrey, the case was, that the defendant in debt after judgment aliened his land; and the plaintiff sued forth execution upon the new statute: and the Court of the Request awarded him to the Fleet, because that he sued forth execution. Whereupon the Justices of the Common Pleas awarded a habeas corpus, and discharged the plaintiff. It was said by Bendloes, Serjeant, that the Chancery after judgment could not enjoyn the party that he shall not sue forth execution; for if they do, the party shall have his remedy as above.

XLIII. MICH. 14 ELIZ. IN THE KINGS BENCH.

A man seised of copyhold lands, deviseth a certain parcel of them to his wife for life, the remainder to his brother and his heirs; and afterwards in the presence of 3 persons of the Court, said to them, I have made my will, and I have appointed all things in my will as I will have it. And afterwards he said, and here, I surrender all my copyhold lands into your hands accordingly. And it was moved, if all his copyhold lands should be to his wife, or by those which were specified in the will. And the opinion of the whole Court was, that the surrender is restrained by the will, so as no more passeth to the wife upon the whole matter, but that which is mentioned in the will; and the general words shall not enlarge the matter.

XLIV. HILL. 14 ELIZ. IN THE COMMON PLEAS.

Lands were devised to the Mayor, Chamberlain, and Governors of the Hospital of St. Bartholomew in London, whereas in truth, they are incorporated by another name, yet the devise is good, by Weston and Dyer; which Manwood also granted, because it shall be taken according to the intent of the devisor: and it was said by Weston, if lands be devised to A. eldest son of B. [19] although that his name be W. yet the devise to him is good, because there is sufficient certainty, &c.

XLV. PASCH. 14 ELIZ. IN THE COMMON PLEAS.

The case was; A. seised of lands, deviseth the same to his wife for life, the remainder to his three younger sons, and to the heirs of their bodies begotten, equally to be divided amongst them by even portions; and if one of them die, then the other two which survive, shall be next heirs. The devisor dieth, one of the sons dieth; and,

by Dyer and Weston, Justices, the 3 brothers were tenants in common in remainder. But contrary it is, where such a devise is made between them, to be divided by my executors, &c. there they are joynt-tenants, until the division is made: but here, although the words are, equally to be divided, the same is not intended of a division in fact and possession, but of the interest and title; for if a man bringeth a præcipe quod reddat, de una parte manerii de D. in 7 parts to be divided, it is not intended, divided in possession, but divided in interest and title. And it was said by the said justices, that although one of the brothers dieth, the two surviving brothers have his part by purchase, and not by descent, and they are joynt-tenants of it. And this was the case of one Webster and Katherine his wife, the late wife of John Bradbury.

XLVI. Pasch. 14 Eliz. In the Common Pleas.

The case was; Lessee for years of the pawnage of the park of H. grants all his goods and chattels, moveables and immoveables within the said park: it was holden by Weston and Dyer, Justices, that the lease of the pawnage passeth by these words. And it was said by Dyer, if a man hath a lease for years of a house, and grants all his goods and chattels being in the same house, that as well the lease of the house as the goods within it, pass by such a grant.

XLVII. Pasch. 14 Eliz. In the Common Pleas.

Note: it was said by Weston, and Bendloes, that a retraxit cannot be before a declaration; which Leonard and Filmer, Prothonotaries, granted: and Dyer said, that it being before a declaration, it is but a nonsuit; and Wheatley and Filmer affirmed the same: and therefore, it was adjudged, that such a retraxit in the Court of Hustings before the sheriff, is no plea in bar.

[20] XLVIII. Pasch. 14 Eliz. In the Common Pleas.

In debt brought against Christmas, who shewed forth a protection, quia profecturus with the Lord Hunsdon to Barwick: Dyer doubted, if the protection did lie: but said, it should be rather moraturus, then profecturus: for a protection quia profecturus to Calleis, was never good, but super victitation. Calicii. Harper, contrary; for Barwick is out of the realm: and he said, that he was once of counsel, where a bill was exhibited in Parliament, to make Hexham part of England: and he said, that in the time of the Queen that now is, one Carre struck a man, who thereof died at Barwick; and in an appeal thereof, brought here by the wife, Carre was dismissed.

Hill. 14 Eliz. Rott. 938. In the Common Pleas.

XLIX. Cranmers Case.

Thomas Cranmer, Archbishop of Canterbury, having a reversion in fee of certain lands upon a lease for years, granted the reversion to the use of the grantor himself for his life; and after his decease, to the use of the executors and assignees of the grantor for 20 years next after the death of the grantor; and after to the use of Thomas his son in tail, and afterwards to the use of the grantor in fee: the grantor is attainted of treason, and the Queen gave the said term of 20 years to the wife of the grantor, who took to husband Ed. White-Church, who let the land to A. Thomas the son entred, and leased the same land to one Kirk, who upon an ouster, brought ejectione firmæ. This case was argued by the justices; Manwood, the puisne justice, conceived, that the plaintiff ought to be barred, and that the lessee of White-Church, who claimed by the grant of the Queen the said term of 20 years, ought to hold the land against the son of the grantor; for the remainder limited to the son, is not yet

begun in possession. And he insisted much in his argument upon this point, that uses limited upon any conveyance, are governed and directed according to the rules of the common law: as if a feoffment in fee be made unto the use of another for life, the remainder to the use of the lessee for life, and the heirs of his body, &c. now the party hath an estate tail executed in possession, and that is according to the rule of the common law. And he cited the case of 40 E. 3. 20. Where land was given by fine to A. B. and C. and to the heirs of the body of C. and for default of such issue, the remainder to the right heirs of A. C. died without issue; B. dyed, and afterwards A. died; his heir brought a scire facias out of the said fine: and by judgment of the Court, the scire facias did not lie, for the fee was vested in the father of the demandant, although that ex vi verbi, the remainder was limited not to the father, but to his heirs; but where uses are limited in other **[21]** manner than according to the rules of the common law, there they shall not be ruled and governed by the rules of the common law: as if lands be given to the use of one for life, and to the use of such lessees to whom the tenant for life shall demise the same for years or life, rendring rent, the remainder over to a stranger in tail, and afterwards the tenant for life makes a lease for years, or life, and dieth; such a lease shall bind him in the remainder, although that the lessor had not but for life, and be now dead: for the use limited here to the lessees, which would be, was limited contrary to the rules of the common law. For by the common law, such leases made by tenant for life, are determined by his death: and in this case, this lease for 20 years, after the death of the grantor, was limited according to the rules of the common law, and therefore it shall take effect accordingly, as if it had passed in possession, and not in use, as if the conveyance had been of the land it self, and that land had been granted to the grantor for 20 years after his death, that interest had been vested in him to sell, forfeit, or otherwise to dispose at his pleasure, and shall not accrue to the executors as a purchase. 19 E. 2. Fitz. Covenant 25. Land was leased to one for life, and after his decease, to his executors and assigns for 10 years; the lessee assigned the term; and, by Herle, it is a good assignment; for it is in the election of the lessee to devise that interest, or to assign it in his life-time. And see 39 E. 3. 25. A lease was made to one for life, and a year over. 17 E. 3. 29. Lessee for life, so as after his death, the land remain to his executors for 8 years; lessee for life died; he who had the freehold of the land was impleaded, who rendred the land, and the executors of the lessee for life prayed to be received; scil. (where as executors do hold the term;) which proves, that they had the term as executors to the use of the testator, and so assets, therefore the same was before in the lessee for life. But by Dyer, in his argument, that case doth not prove it, and certainly it is not assets; for although the executor have the same term by purchase, yet they have it as executors, for that is a good name of purchase, which Harper concessit: and Manwood argued further, and he cited 19 E. 3. Fitz. Covenant, 24. Land was let for life, and if the lessee died within 12 years, that his executors should hold the same until the end of the 12 years; the lessee for life died, and the executors entred, and the executors of the lessee for life brought actions of covenant, which proved, that the executors had the term as a chatel vested in the testator, and not in their own rights as purchasors, by the name of executors. See 22 Ass. 37. Land demised to A. ad totam vitam suam; et ulterius concessit, that if the lessee objerit infra 20 annos proxime sequent, the said lessee potuit legare & dare prædict. tenementa alicui personæ usq; ad terminum prædict. 20 annorum, &c. And Dyer cited the case, 16 E. 3. Quid juris clamat, 22. Land was leased to one for **[22]** life, and if the lessee died within the term of 20 years, that his executors or assigns should have it until the end of the said 20 years, and a quid juris clamat was brought against the lessee for life without any mention of any other estate. To which the defendant pleaded the special matter, and demanded judgment upon that fine, if he should be driven to attorn, where he is supposed tenant for life only; and it is there said, that that special matter is but a protestation to save the term to his executors. And upon such a fine, such tenant hath been driven to attorn: and by Dyer, if the lessee doth not make such protestation, yet his special interest is not impaired by it; yet it is but reason that it be entred for the more manifestation of it. 32 E. 3. Quid juris clamat, 5. A lease to W. for life, and 20 years over, he may grant the same term or any part of it: and he cited the case between Parker and Gravenor, 3 & 4 Mar.

Dyer 150. Where a lease for life was made, and by the indenture of lease provisum fuit, that if the lessee died within the term of 60 years, that then his executors and assigns should have and enjoy the said lands pro termino totidem annorum, which did amount to the number of 60 years, to be accompted from the date of the indenture. And it was the opinion of the Court, that that was not any lease: but they all agreed, that a lease for years in remainder might be upon a lease for life in the same person. See 40 E. 3. A lease was made for life, and half a year after; the lessee died, and waste is brought against the executors, supposing that the testator held for years; and the writ was holden good: and there it is said by Kirton, that the executors could not have that term, unless it were in the testator; and there the term is not limited to any person. And see 11 H. 4. 187. Annuity granted to one for life, and 20 years after. And 50 E. Ass. 1. A lease for life, and 3 years over to his executors. And then here in our case, this use being limited in order, according to the rules of the common law, shall vest in the grantor to give or forfeit, and then by the attainder it was forfeited to Queen Mary: and if so, then the plaintiff shall be barred. Harper, Justice, to the contrary; And that the interest in the remainder for years limited to the executors and assigns of the grantor is in abeyance, and not in the grantor, and then it cannot be forfeited: but if this use had been limited to the grantor himself, then all had been in him to give, &c. But here in our case, the remainder for years is limited and appointed to the executors, &c. Also, uses shall not be ruled in such manner as lands; but the law shall rule the possession obtained by use in another manner, than the possession obtained by the order of the common law: as in the case of Amy Townsend, Plow. Com. 111, 112. Where the husband seised in the right of his wife, made a feoffment in fee to the use of himself and his wife for life, with divers remainders over; now is not the wife remitted, as she should be by conveyance at common law: as if the husband discontinueth the land in the right **[23]** of his wife, and the discontinuee giveth the lands to the husband and wife, and to a third person, she is remitted to the whole, and the third person hath not any thing. Dyer, to the same intent; And here we ought to intend and consider, that it was the purpose of Cranmer, to advance his executors with this term unto their own use and benefit, and not to leave the same in himself. And I do conceive, that the use is in abeyance until the executors are made, or an assignee appointed; for he may make an assignee who shall have the term: for assignee may be made two ways, 1 By grant of an estate which is in the grantor before; 2 A person nominated and appointed by another to take any thing, &c. And it shall be also intended, that Cranmer was purposed to make other provision to leave to his executors assets to perform his will; and not that that term should be applyed to that purpose, for then he would have shewed it in the conveyance by words; scil. as to pay his legacies, and perform his last will: and the cases put by my brother Manwood, do not go to the point: for I agree, where lands are given to one for life, the remainder for years, and doth not say to whom, it cannot be intended to any other but to the lessee for life; or otherwise it shall be void. And also where land is given to one for life, and for two years after to his executors or assigns, or heirs, all is in the lessee, for all is as one gift: but where it is given to one for life, and after his death, the remainder to his executors, I do not see any reason that that remainder should be any assets in the hands of the executors; or that if the lessee dieth intestate, that his administrator should have it; and therefore the executors shall have the same as a purchase: but Cranmer might have given the same, or appointed one in the mean time to receive it, and in the mean time it shall be in abeyance. Also if lands be leased to B. for life, the remainder for years to his heirs, the same remainder for years is in abeyance until the death of the lessee, and then it shall vest in the heir as a purchasor, and as a chattel, and shall go to the executor of the heir, &c. and the tenant for life cannot meddle with it, for it is not in him: also, uses shall not be raised as lands; i.e. at the common law, but shall be raised by the statute, and as uses were raised in the Chancery before the statute. And therefore if this conveyance had been before the statute, he could not have compelled the feoffees to dispose of that interest at his pleasure, &c. And then Cranmer the son shall have the land by force of the entail limited unto him; for the estate for years is gone, because no assignment of it is made, nor any executors who can take it, and the estate for life is determined by the death of Cranmer; and the feoffee to an

use cannot have it, for there is not any consideration whereof he should have any use; for by the limitation, nothing was left in the feoffee: and so I conceive, that the plaintiff shall recover. See the case, 14 Eliz. in Dyer.

Dyer 309, 310. 2 Len. 5. 1 Len. 196. 1 And. 19. More Rep. 100. Office of Executors, 118. 119.

[24] L. MICH. 15 ELIZ. IN THE COMMON PLEAS.

TOTTENHAM AND BEDINGFIELDS CASE.

In an accompt by Tottenham against Bedingfield, who pleaded, that he never was his bailiff to render accompt, the case was, that the plaintiff was possessed of a parsonage for term of years, and the defendant not having any interest, nor claiming any title in them, took the tythes being set forth, and severed from the 9 parts, and carried them away, and sold them. Upon which, the plaintiff brought an action of accompt: and by Manwood, Justice, The action doth not lie, for here is not any privity; for wrongs are always done without privity: and yet I do agree, that if one doth receive my rents, I may implead him in a writ of accompt, and then by the bringing of my action there is privity: and although he hath received my rent, yet he hath not done any wrong to me; for that it is not my mony until it be paid unto me, or unto another for my use, and by my commandment: and therefore notwithstanding such his receipt, I may resort to the tenant of the land, who ought to pay unto me the said rent, and compel him to pay it to me again; and so in such case, where no wrong is done unto me, I may make a privity by my consent to have a writ of accompt: but if one disseiseth me of my land, and taketh the profits thereof, upon that no action of accompt lieth; for it is meerly a wrong. And in the principal case, so soon as the tythes were severed by the parishioners, there they were presently in the plaintiff, and therefore the defendant by the taking of them, was a wrong doer, and no action of accompt for the same lieth against him, And upon the like reason was the case of Monox of London lately adjudged; which was, that one devised land to another, and died; and the devisee entred, and held the land devised for the space of 20 years; and afterwards for a certain cause, the devise was adjudged void, and for that he to whom the land descended, brought an action of accompt against the devisee: and it was adjudged, that the action did not lie. Harper, contrary; for here the plaintiff may charge the defendant as his proctor, and it shall be no plea for the defendant to say, that he was not his proctor, no more than in an accompt against one who holdeth as gardian in socage, it is no plea for him to say, that he is not prochein amy to the plaintiff. Dyer, The action doth not lie; if an accompt be brought against one as receiver, he ought to be charged with the receipt of the mony: and an accompt doth not lie, where the party pretends to be owner, as against an abater or disseisor; but if one claimeth as bailiff, he shall be charged, and so it is of gardian in socage. And it was agreed, that if a disseisor assign another to receive the rents, that the disseisee cannot have an accompt against such a receivor.

Owen Rep. 35, 83. Hob. 322. 1 Len. 266. Latch 8.

[25] LI. 15 ELIZ. IN THE COURT OF WARDS.

Note: that this case was ruled in the Court of Wards; that where tenant of the King, of lands holden by knight's service, in chief, made a feoffment in fee of the same lands to the use of himself for life, and afterwards to the use of his younger son in tail, the remainder to the right heirs of the feoffor, and died, his eldest son within age, that the Queen should have the wardship of his body, and of the third part of the land; and when the eldest son comes of full age, that the younger son should sue livery, and pay primer seisin according to the rate and value of the whole land, viz. of the third part as in possession, and of the two parts as a reversioner: for the remainder to the right heirs of the feoffee, is in truth a reversion; for the fee simple was never out of him, because there is not any consideration as to that, nor

any use expressed And because livery shall not be sued by parcels, the younger son shall not be suffered to sue livery of the third part presently, and respite the residue as to the two parts in reversion, until the reversion fall; but he shall sue livery presently as well of the two parts in reversion, as of the third part in possession: and if the eldest son had been of full age at the time of the death of his father, the younger son should pay primer seisin as to the third part, the whole value of it for one year as in possession; and as to the two parts, the moiety of the value of a year, as of a reversion.

15 ELIZ. IN THE COURT OF WARDS.

LII. OLIVER BREERS CASE.

Oliver Breer, who was tenant in chief by knights-service, made a feoffment in fee to the use of himself for life, and afterwards to the use of A. his eldest son and heir for life, and after to the use of the first begotten son of the said A. in tail; and afterwards to the use of the second son of the said A. &c. and for default of such issue, to the use of the right heirs of the feoffor; Oliver died, the said A. his son being of full age; it was holden by the council of the Court of Wards, that he should pay for his first primer seisin, a third part as in possession; and two parts as a reversion. See the case before.

LIII. MICH. 15 ELIZ. IN THE KINGS BENCH.

Note: this case was moved to the justices in the Court of the Kings Bench: a man had issue two daughters by divers women; and being seised of lands in fee, he made his will, and by the same devised, that his wife should have the moyety of his **[26]** lands for years, and that his eldest daughter at the day of her marriage, should enter into the other moyety; his eldest daughter married and died without issue: and the question was, whether her uncle should have that moyety or the fourth part of the whole land. Catline conceived, and said, that when the devise which was made to the eldest daughter, that she might enter after certain years, is not the inheritance in her presently, and the other words void? So he said here, that it is not a purchase in the eldest daughter, but both the daughters should enter in common as one heir to their father, until the marriage; and then the inheritance which was once settled in them, should not be removed. Southcote, Justice, said, There are no words of limitation of any estate that the daughter should have after the marriage, and therefore the devise was void; and if he had limited, that the daughter after marriage should have it for life, the fee-simple is vested in her before, and then she cannot have it for life. And he said, that if a lease be made to the eldest daughter for years by the father, and afterwards the land descends to her and her sister, as unto one moyety of the land, the lease is determined, but not as to the other moyety. Whiddon, Justice, Where a devise is for the benefit of a stranger, there the heir shall take by the devise, and not by descent. As if a lease be made for years, the remainder to the heir, there the heir shall take the land by the devise. Catline, She hath it by descent, and not by the devise. But if he deviseth the land to the heir in tail, with this, that he shall pay a certain sum of mony unto another, there the heir shall take by the devise, for the benefit which may accrue to the stranger, and not by descent, for otherwise the will should not be performed: but where the estate of the heir is altered by the will, nor any benefit doth accrue unto another after that the lands come to the hands of the heir; in that case he shall have the land by descent: and so here in this case for as much as the devise is, that the daughter shall enter, they both being but one heir to their father, shall have the land by descent; and the words of the will, that he shall enter into the moiety, shall be void; as, if the devise had been to the heir for life, there the same is void, because the fee-simple which descendeth to her, doth drown the particular estate for life. And therefore in the principal case here, the uncle shall have but the moyety of the moyety which is so devised, and the other

sister shall have the other moyety of the land; and as to that moyety which is devised to the wife for years, the same shall enure according to the common law, that the uncle shall have the moyety of that; and the other sister the other moyety.

1 Roll. 626.

[27] LIV. MICH. 15 ELIZ. IN THE COMMON PLEAS.

This case was moved to the Court by Lovelace, Serjeant; A man covenants with another to make and execute an estate of such lands as should descend to him from his father and grandfather by a certain day, the same lands to be of the clear yearly value of 40 marks: and the question which he moved to the justices, was, that if the party had more lands which came to him from his grandfather and father, than did amount to the yearly value of 40 marks, if he was to make assurance of all the lands, or of so much thereof only as amounted to the value of 40 marks? And Manwood, Justice, conceived, that he should make assurance of lands only which were of the value of 40 marks per annum: for the words (such which) do not go so largely as if he had said, all my lands which shall descend, or to me be descended; for then the yearly value were but a demonstration, and all his lands ought to be assured. But here the intent of the indenture cannot be taken otherwise, than to have but an assurance of so much land; as if he had said, of such lands and tenements as were my grandfathers, and fathers, amounting to 40 marks by the year: for there by those words, he shall have but 40 marks by the year. Lovelace, It hath been taken, that where the Queen made a lease of all her lands in such a town, amounting to the yearly value of 40l. that that valuation is not a demonstration, and shall not abridge the grant precedent, to have all in the town which should be of the value of 40l. but her grant shall be taken and construed according to the words precedent. Manwood, The common case of assurance upon a settlement of marriage is, that he shall stand seised of so much of his land as shall be of the clear yearly value of 40 marks; if the marriage take effect, the question hath been, if they to whom the assurance is made, may enter into any part of the land at their election, and take that which is the best land, to the value of 40 marks per annum, and hold the same in severalty, or if they shall be only tenants in common with the other? And also it hath been a question, whether they may choose one acre in one place, and another acre in another place, and so through the whole land where they please, because the grant shall be taken strong against him that granteth: but I conceive, that it should be a hard case to make such election of acres. But it was said by some serjeant at the Bar, that if a man granteth to another to take 20 trees in his lands, that the grantee may cut down one tree in one place, and another in another place: Manwood agreed that case: but of the other case, the Court doubted of it. The principal case was adjourned.

[28] MICH. 15 ELIZ. IN THE COMMON PLEAS.

LV. VERNON AND VERNONS CASE.

Note; that in the case of dower between Vernon and Vernon, and the argument of it, the plaintiff would have been nonsuit. Dyer, Justice, said, it should be an ill president, if a nonsuit should be after demurrer: and therefore he said, that for his part he would not agree, that any nonsuit should be upon it; but he said, he would be advised, and take better consideration of it, if the nonsuit should be awarded, or not. And afterwards at another day, Manwood and Dyer took a difference, where the nonsuit is the same term, and where in another term; and said, it is like unto the case, where a man would wage his law, and is present ready to do it, that there the plaintiff cannot be nonsuit, because it is in the same term, but he shall be barred: but in another term afterwards he might be nonsuit, if the defendant take day over to wage his law until another term; and so they said it should be in this case.

MICH. 15 ELIZ. IN THE COMMON PLEAS.

LVI. SIR PETER PHILPOTS CASE.

This case was moved by Meade, Serjeant to the Justices of the Court of Common Pleas, viz. that Sir Peter Philpot Knight, seised in fee of divers mannors and lands, suffered a recovery, and made a feoffment thereof unto divers persons, to the use of himself for life, the remainder to his right heirs: and after the Statute of 32 H. 8. of Wills, he devised all his said mannors and land to his wife for life; and it was expressed in his will, that he could not devise all his lands, by reason of the statute of 32 H. 8. that his will was, that his wife should have so much which might be devised by the laws of the land: and there was another clause in the said will, that his feoffees should stand seised of the same mannors and lands after the death of his wife, to the use of one Hurlock and others for years, for the payment of his debts, and for the raising of portions for the preferment of his daughters in marriage: and further by his said will he willed, that if the law would not bear it, that Hurlock and the others should have the interest, then he willed that his son should have all his mannors and lands, and should pay his debts, and should give certain sums of monies for the marriage portions of his daughters; and the question which was moved to the Court, was, whether the first part of his will, that is to say, that Hurlock and the others should have his lands, &c. were void, or not, by the later words of his will? Dyer, Justice, said, that the last words of the will did well expound the meaning of **[29]** the first words, and that the will should be performed as it might be: and afterwards Harper said, that upon this matter, Hurlock and the others had had a decree in the Court of Wards, to have the whole lands during the years, and not two parts of the lands only. Dyer, Justice, said, that the will of Sir Tho. Umpton, which was made mean between the statutes of 32 H. 8. and 34 H. 8. and which is excepted by the same statute, that it should not be construed in other form than according to the first statute was, of all his lands. And upon a demurrer argued, it was adjudged, that the will was good of two parts, although that by the will it was not divided: for where a man hath a warrant to do a thing, and he doth it, and more, so as he exceeds his warrant, yet it is good for that part for which it is warranted, and void for the rest: as if a man makes a warrant of attorny to make livery and seisin of the mannor of Dale, and he makes livery of the mannors of Dale and Sale; it is good for the mannor of Dale, and void for the mannor of Sale. The case was, in a writ of partition: and afterwards the record was removed by a writ of error, supposing that this Court had erred; and the judgment was affirmed by three of the Justices of the Kings Bench. But because there was a discontinuance in the record, which was erronious, for that the first judgment was reversed, but not for any other cause. And such was the meaning and intent of the statute of 32 H. 8. before the making of the Statute of 34 H. 8. of Explanation of Wills. And therefore here in the principal case, it was holden, that the will was good for two parts, both to the wife, and also to Hurlock and the others. And it was holden, that by the intent of the will, that the son was to pay such sums of monies a Hurlock was to have paid, so as the will was not for the advantage of the heir, but to be construed according to the meaning of Philpot, that if Hurlock could not have the lands, &c. that then the son should have them, but with such charge as aforesaid: and it was no intent to subvert the first part of the will, if the same might stand with the law. And so it was adjudged.

LVII. MICH. 15 ELIZ. IN THE COMMON PLEAS.

The case was this; A man makes a lease for 30 years; and bargains and sells the woods in and upon the premisses to the lessee, and that he might carry them off the lands during the time of 30 years: the lessee cut down all the woods; and afterwards other wood grew up from the stocks, and the lessee cut them also within the term; and the lessor brought an action of waste for cutting of the new wood. And it was

moved by Meade, Serjeant, if the action of waste would lie, or not? Harper, Justice, Is the bargain, de bosco & subbosco, growing in and upon the premisses? Meade, No; but all his woods in and upon the premisses. Harper, The grant is in the present tense in præsenti; so as he can-**[30]**-not have that which shall grow there, after: and if he would grant all his woods which should grow in time to come, the grant should not be good, because it is not of a thing in esse. And if a man will grant all his wood growing upon Black-Acre, and there be then no wood, he cannot have any thing, although that afterwards, woods grow there; and if his meaning had been, that he should have the wood which should there after grow, he would have expressed the same in another form. Mounson, If a man grants all his hay growing upon his land; shall he have that which is growing there, after? No truly; and if he grant all the wooll which is growing upon his sheep, shall he have more than that which groweth this year? Meade, No truly: but if he had granted all the wooll growing upon the sheep for 20 years, then the same is like to our case; for he hath granted, that he may carry the wooll during the 30 years. Harper, The same is but a liberty to sell the trees which were growing at the time of the sale, and to carry them when he pleaseth, and not to give other trees or wood, which should there after grow.

More Rep. 94. Post. 55. Winch. Rep. 5. Hob. Rep. 132. Hob. 132.

LVIII. Mich. 15 Eliz. In the Common Pleas.

Lovelace, Serjeant, moved this case to the Court, that an assise was brought of the office of registership in the county of Devon: and he shewed, how that the Bishop of Exeter granted the office, and shewed the name of the bishop: and that after William Alley bishop there, granted the same office after the death of the first grantee to the plaintiff: and further he shewed, that the bishop might grant the office ad idoneam personam: and because he doth not say in his plaint, that the person to whom it was granted, is idonea persona, I conceive, that the plaint is not good; for if there be no such person which can exercise the office, he shall not have it: for that is a condition which is annexed to the office, that he be a fit person who shall take it: and the prothonotaries of this place ought to have skill in that which appertaineth to their office; for if such an office should be given to a courtier who hath not skill in that which appertaineth to the office, nor knowledge how to execute, he shall not have it. Also he said, that he hath not shewed, that the first bishop is dead, or that he hath resigned; or whether that he be deprived; and therefore it shall be intended, that he continueth, unless the contrary be shewed: and then the grant made by Alley to the plaintiff, cannot be good. And for these causes, and for others, he prayed to know the opinion of the Court. Dyer, Justice, The matter is not before us; and wherefore should we give our opinions to serve the fancy of every person, and to resolve the doubts of every Court? But if the matter laid come before by adjournment for difficulty, because the justices of assise are of divers opinions, or that they doubted of any thing upon such difficulty and adjournment, we use to shew our opinions, and to take some pains to search our books **[31]** to resolve the doubts; but when we have not any thing before us; but are moved for the pleasure of the parties, what resolutions shall we make by speaking at random? Manwood, As to the first exception, I, nor my brother Jeffery, do not doubt of it, but that the plaint was good, notwithstanding that it is not shewed, that he was idonea persona, for the law shall intend him so to be, until the contrary be shewed. And so it is of a grant of an annuity, as long as he se bene gesserit, the law shall intend that he carrieth himself well, until the contrary be shewed. But as to the other point, that he doth not shew the death of the first bishop, my brother Jeffery doubted of it, but I make no doubt of it, for that is but a recital, and the plaintiff makes his title but from Bishop Alley, and therefore that is not material, nor parcel of his plaint, whether the predecessor of Alley be alive, or not; for he doth not derive any title from him, but from Alley. Dyer, Can a bishop grant an office in reversion, without title of prescription, that they have used so to do time out of mind? And here no prescription is laid, that the bishop might so do. And then, as I conceive, the reversion of the office cannot be granted, for there is not any reversion of it: and it is not like unto an advowson, which may

be granted, that the grantee may present when it shall be next void. And as I conceive, no reversion of any office can be granted, if not by the King who hath a special prerogative; for he reciting, how that such an one hath such an office for life, he may grant that such a person shall have the same office after the death of the first grantee. And so the Queen may grant the reversion of such an office; as if she recite, that such an one is keeper of such a park, there she may grant the keepership of it after the death of another: but if a common person will grant the stewardship of his courts after the death of such a person as is now steward, or the reversion of it, the same is not good: for of offices, there is not any fee, or reversion, but a nomination which the party hath to name what person he pleaseth when the same shall become void. Manwood, It is the order in the Arches, and in the Prerogative Court, and of all the Courts of Pauls, to grant the offices in reversion, as in the case of Doctor Drury and others, who have the reversion of every office which doth belong to the Spiritual Courts. Dyer, I do not care, nor regard what they do, but what they ought to do; and I do not respect the person of any one in relating the law; but it may be, that by words of covenant, such a covenant may be good: and of late time here a case hath been adjudged, that where one prescribed, that such an one might grant an office, cuicunq; personæ idoneæ voluerit, and the grant was made to two, and because the prescription did not warrant this manner of grant, it was adjudged void; for when the prescription is to grant alicui personæ, and not quibuscunq; personis, by that he cannot grant it but to one person, and not unto divers, because the prescription doth not extend so far. Manwood, I conceive there is a difference betwixt such per-**[32]**-sons who have offices for life, as the Admiral of England, the Lord Treasurer, the Justices of the two Benches, which have offices incident to their Courts, they cannot grant any of those offices in reversion; but a bishop hath a fee, and therefore the cases are not alike. Dyer, He hath not prescribed in the person of the bishop here; but he hath said, that the custom is, that the bishop may grant the said office, whereas in truth, if there were a prescription, he ought to prescribe, that the bishop for the time being might grant the said office in possession or in reversion: and so as I conceive here, no office shall be granted in reversion, unless by prescription; which ought to be alledged. And in the time of this Queen, an office of this Court was granted to Fry and his son by the King; and the patent was shewed here in Court, and rejected: and it was said, there was no place in Court for two to sit there, and the office might be exercised as well by one, as by two; and therefore the patent was disallowed. And although that offices are granted to two, as now in the Kings Bench of late time, there is not any president to warrant the same; and therefore, as I conceive, such a grant is not good, nor warranted by the law; for I do not regard in this case, against what persons I speak. Mounson, In the Chancery, a patent was granted to Bagot and Swirenden, of an office in the Chancery by King Henry the 6th, and in 9 E. 4. it is disputed, whether the grant were good, or not, &c.

LIX. Mich. Eliz. In the Kings Bench.

The case was; A man mortgageth his lands, to pay to the mortgagee his heirs, executors, or assigns, a certain sum of mony at a day certain: the mortgagee dieth, and maketh his heir within age his executor; and the mortgagor pays the mony at the day to the heir: it was holden, the same shall be assets in the hands of the heir as executor, and that he hath not the mony as heir, and he shall be charged with it, within age.

LX. Mich. 15 Eliz. In the Common Pleas.

The case was this; A man had made a lease for 40 years to one by indenture, if the lessee should so long live; and afterwards by another deed he demised the same lands and tenements to the same lessee, to have to his executors and assigns for 40 years after the expiration of the first lease. And Lovelace, Serjeant, demanded the opinion of the Court, (the Lord Dyer being then in the Star-Chamber) whether in this case, the lessee should have the interest in the second lease, or his executors; or whether

it was a void lease? Harper, Justice, said, that in every lease there are 3 things incident to make it good, 1. That there be a lessor to make the lease. 2. That there be a lessee to take the lease. And, 3. That there be a thing which should **[33]** be let: and then he said, that here, although that there be a lessor, and a thing which should be leased, yet here there was not any lessee: for executors are not until after the death of the testator: but he said that if a lease be made for years, or for life, and that the executors shall have the same for certain years after his death, the same is good; for there is an interest of the term. And if a man maketh a lease to begin at the month of Easter, his executors may have this term, because the same was an interest of a term in the lessee, and the term shall be executed at Easter: but here in this case, there is no person to take it, and therefore he conceived, that the lease was void. Mounson, Justice, The case is as it is recited: and he said, that the premisses of a deed, is to limit the person who shall have the lease, and the habendum shall not declare the person who shall have it, or the lease, but to declare the estate which shall be in the lease; and it is but a limitation of the estate: and if the premisses do not limit the person who shall have it, the habendum shall not give any thing to the person, unless it be expressed in the premisses what person shall have it: and therefore when he saith, habendum to his executors and assigns, these words (executors and assigns) are void: but when a man makes a lease to one, habendum to his executors and assigns, the same is not void; for if livery be made, his heir shall take it after his death. Harper, By the lease of the same land by a new deed, as the case is here, nothing shall pass without an habendum: and if a lease be made to the lessee, habendum to his executors, he himself hath no estate; and when no estate is limited, the person in the premisses gains not any thing, and without the habendum he cannot have any thing. Lovelace, If I may declare my opinion, this new lease shall be a lease in possession as a confirmation of the first lease, and shall be taken to be a lease for life, and the habendum shall be void; and therefore he prayed the opinion of Manwood, Justice, therein: who said, that in every lease there are 3 principals, as he had said, of lessor, lessee, and thing let: and by the premisses, the lessor and lessee are expressed; and by the habendum, the interest which the lessee shall have, ought to be set forth; and if no habendum be in the deed to express any certainty of time, the lessee by the same shall be tenant at will, unless that livery be made: and therefore I am not of your opinion, Brother Lovelace, that the same shall be a lease for life, unless that in the second deed the words had been, that he leased and granted; by which word, grant, it might enure and amount to a lease for life: but if the deed had been, demise and grant, that cannot be intended for the life of the lessee; and as I have said before, by apt words it might enure to a confirmation, and make it a lease for life; but by the premisses it is not so, and by this deed it is not expressed, that the lessee shall take a freehold; for by the habendum, his mind appeareth to be otherwise by agreement betwixt the parties, that his executors and assigns **[34]** should have it for a certain time after his death, and that he himself would not have it, for he hath sufficiently provided for himself, to have it for 40 years, if he liveth so long, although it cannot be intended, that he should live beyond the term which he hath, so as it cannot be taken to be the meaning of the parties, that he should have it as a lease for life: and when by the premisses of the deed, the parties are not named, the habendum shall never bring in a strange person: as, where a lease is made to the husband, habendum to the wife, the habendum to her is void, because it shall not introduce one who is a stranger to the premisses of the deed. And as my brother Mounson hath said, the office of the premisses of a deed is to limit the persons who shall have it, and the office of the habendum is to limit the estate of the thing which is granted; and therefore when the habendum is to such a person as was not named in the premisses of the deed, it is but a nugation: as if he had leased to J. S. habendum to the moon for certain years, there the habendum to that thing is a nugation, and void; and therefore then if the words be in the premisses, that he leaseth to J. S. for 20 years, and doth not say, that he shall have it for 20 years, it shall be intended that the person named in the premisses shall have it, for the habendum waits upon the grant before; and when he gives an estate in the habendum without limiting of the person in it, then the person named in the premisses shall have it; and then when he names a strange person who was not named before in the premisses, or

which hath no capacity, as the moon, or such like who are not in rerum natura, as his executors of the lessee, or his assigns, these persons or things named in the habendum, are but nugations, and void; and then it is like unto the case where no person is limited in the habendum: and where apt words are, there the law shall construe them strong against the grantor; and therefore the law couples the habendum and the premisses together, that the intent of the parties may (if by any means it may) have a reasonable construction. And therefore if a man maketh a lease to two, habendum to one of them and a third person, there as to the third person he gets nothing by the habendum, because he was not named in the premisses, and therefore the naming him in the habendum is but a nugation. And so here, the naming of the executors and assigns by the habendum, is but a nugation, and so there is no person named in it. But I conceive, that the habendum, when the years are expressed, and the estate limited by it, shall have reference to the person who is named in the premisses of the deed, and so the lease shall be good to him to begin after the first term expired. Harper, It appeareth that it was the meaning of the parties, that he himself would not have any thing, but that his will was, that his executors should have it, and the law shall frame his intent and meaning, and shall not subject the law to his intent; and when he doth not so, but overthwarts the law, and frames such an instrument, the law shall be first served, and not their meanings, **[35]** when the same doth not agree with the law. And therefore as to the case which my brother Manwood hath put, where no person is named in the habendum, by construction of law, he who is named in the premisses shall have it: but when the habendum makes express mention of his intent what person shall have it, and another than was named in the premisses, then if those cannot have it, the estate limited shall not be carried over to him who was named in the premisses. And as to the case put, where a lease is made to two, habendum to one of them, and a third person, there I well agree, that as to the third person it is but a nugation; and the other two who are named with him in the habendum, and have a capacity to take it, shall have it, although the other getteth nothing; but that is not like to the case at Bar, for no person is named there. Manwood, If a lease be made to J. S. except Green-Close, to J. D. who is a stranger, the exception is good, and J. D. shall have it. The principal case was adjourned.

Mich. 15 Eliz. In the Kings Bench.

LXI. The Lord Windsors Case.

Upon an evidence given to a jury in the Kings Bench, in an ejectione firmæ, the case appeared to be thus; that Sir Roger Lewknor, knight, being seised in fee of the mannor of South Myms, made an indenture, anno 11. H. 8. by which indenture, he leased the said mannor to 20 persons, to the use of Andrew Windsor, afterwards Lord Windsor, and Henry his son, and the survivor of them, as long as any of the said persons named in the said indenture should live: and further covenanted by the same indenture, to stand seised of the said mannor, to the use of the said Andrew and Henry, and the survivor of them, during the lives of any of the said feoffees named in the same indenture; which deed was made without livery and seisin; and reserved upon it an yearly rent: and afterwards the son died. And in 22 H. 8. a fine was levied by a stranger upon a release to Andrew Lord Windsor; and afterwards, 34 of Henry 8 Andrew Lord Windsor made a lease to one for years, and died; and made William and Edmond his sons his executors: and afterwards William his eldest son being Lord Windsor, 2 & 3 Phil. & Mary, made a lease of the same land unto another, to begin after the first lease ended: which William died, and the Lord Windsor that now is, accepted the rent, and of late time agreed with one Vaughan, who had married the heir of Sir Roger Lewknor, for the reversion in fee; and afterwards the lease made by Andrew Lord Windsor, 34 H. 8. ended in the 4th year of the reign of the Queen that now is; whereupon, the second lessee, that is to say, the lessee of William Lord Windsor, entred; and being ousted, he brought the ejectione firmæ. And then, and yet one of the 20 feoffees of Sir Roger Lewknor is alive: so as the estate of cestuy que vie, is **[36]** not as yet determined. And now the question upon the first part of the

evidence is, if this later lease made by William Lord Windsor, be a good lease or not? And who shall be said occupant? For when the Lord Andrew died, then the lessee (as Catline said) shall not be said in otherwise than according to his lease, when his occupation by lease was lawful before: and he who shall be said occupant, shall have a freehold; and if he should be occupant, he should be in by a new title. Then we are to see, if the executors of the lord which have the rent, and to whom the same is paid by the lessee, shall be said occupant? And he conceived, that they should not, although that they enter, unless they claim the freehold at the time of their entry; for if they enter generally, it shall be intended according to the will, as executors; and if he had granted his estate to another, there after his death, the grantee shall be said to be in by reason of his grant, and not as occupant; and so if he would devise his estate, the devisee shall be in by reason of the devise, and not as occupant; which case of devise, Southcote denyed, that he should not be in by reason of the devise, when his estate determines with his death: but if the devisee entreth by force of the devise: he shall be in as an occupant. And also Southcote denyed that which had been said, that the lessee for years who holdeth the lands after the death of Andrew Lord Windsor, should not be an occupant: for, as he said, the lessee being in possession after the death of the Lord Andrew, should be said occupant, and no other; for the executors of the lord could not be occupant by the having of the rent, because they had not the possession of the land; for none shall be occupant, but he who is in possession. Whiddon said, that if the first lease be made by Andrew Lord Windsor, was now in esse, and that an ejectione firmæ was brought upon that, that the lessee ought to aver, that some of the feoffees for whose lives, &c. were then living. Southcote, If a præcipe quod reddat shall be brought, against whom shall it be brought, against him in the reversion, or against him in possession? And if it shall be brought against the tenant in possession, then he ought to have the freehold; for it cannot be brought, but against one who hath a freehold at the least: and then if the Lord William Windsor had nothing in the land, then how could he make this lease to the plaintiff that now is, when the first lessee continueth occupant after the death of the Lord Andrew, during the life of cestuy que vye? And as to the fine, the question did further arise, if the Lord Andrew Windsor should have a feesimple by that fine? for being levied, (as Catline said) it cannot be to the first uses, because a fine upon a release, cannot be intended to the use of any other but to him to whom it is levied, unless an use be expressed in the fine, or by another deed: and upon a fine levied upon a release made unto tenant life by a stranger, the same is not a forfeiture of his estate; but if tenant for life taketh a fine **[37]** sur conusans de droit come ceo, &c. the same is a forfeiture. And although a fine levied by those who have not any thing in the lands, be void, yet here it is not so; and it ought to be pleaded specially, and shewed, that he had not anything in the land at the time the fine was levied, as Anderson said. And Catline said, that this fine was not without good advice, for the Lord Brook and others who were learned in the law, were of counsel with the Lord Windsor in the levying of this fine, so as the intent was to settle the feesimple in himself by the fine, and not that the first uses should stand after that: and thereupon he put the case of Putnam and Duncomb, which hath much resemblance to this case, which he argued when he was serjeant, and held the same opinion as he holdeth now; and therefore he said, that although the purchase was but of late time of Vaughan and his wife, yet the fee was in the Lord Windsor before, and this manner of purchase was to no other end, but to discharge the lands of incumbrances, as appeareth by the small sum which was paid, the land being of a great yearly value. And, as Vaughan confessed, he took this sum of mony, because that his council informed him, that the feesimple was in the Lord Windsor before, and that otherwise he would not have sold it at such a price. And he said, that before that agreement, the Lord Windsor told him, that he had the feesimple in himself. Whereupon Vaughan asked him, wherefore he paid the rent? To whom the Lord Windsor answered, that he paid the same during the lives of the feoffees, but after their deaths, he paid nothing; but notwithstanding that payment, that the feesimple remained in him, and that his counsel advised him to pay the rent to the heirs of Lewknor, who was the wife of the said Vaughan. And Catline said, that if a fine be levied upon a release, in a scire facias against the conusor, he shall not plead, that the conusor had not any thing in the land at time of the fine levied. And

he said further, that if a disseisor be, and the disseisee levieth a fine upon a release, that thereby his right is gone.

And note; that as to the principal case, Southcote was of opinion, that the fee was not gained by the fine levied by a stranger to him who had the use before the statute of 27 H. 8. and that if no feesimple was in the Lord Windsor, at the time of the lease made by him, that the lease could not be good, nor the action maintainable. And because the Court was divided in opinions in both points, Catline commanded the jury to find a special verdict.

[38] LXII. Mich. Eliz. In the Kings Bench.

Note: that it was said by the whole Court, that if a man delivereth mony to another man to buy cattel, or to merchandise with, although that the mony be sealed up in a bag, yet the property of the mony is to the bailee, and the bailor cannot have an action for the mony, but only an accompt against the bailee, although that he never buyeth the cattel or other things, for the auditors upon the accompt shall allow him the sum and such other allowances as they shall think fit. And that a stranger takes away the mony, after the death of the bailee, or in his life-time, the bailor shall not have an action against the stranger, but the executors of the bailee, or the bailee himself during his life: and yet if the bailee dieth, no action of accompt lieth against his executors, because the testator had the property of the monies. And therefore if he, who takes the mony from the bailee, promiseth the bailor, to pay him the like sum of mony as the bailee had received of him in his life, and as should be truly proved by the bailor; there, upon that promise, an action upon the case doth not lie against him who took away the mony, as Catline said, in an action upon the case brought by the Master of the Rolls, and another, who supposed, that they delivered 100l. to one Moore, and that he is dead, and that the mony came unto the hands of the defendant, and that thereupon he promised to pay the like sum which might be proved that Moore had of the plaintiffs. It was holden, that the action upon the case did not lie. Southcote, Justice, said, that although the property of the mony be changed as before, and that no accompt lieth against a stranger; yet when he hath the mony, and for that cause promiseth to pay it as before, it is reason, that an action upon the case should lie upon his promise, although the law will not charge him nor the executor upon an accompt.

Mich. 15 Eliz.

LXIII. The Lord Cromwells Case.

Jeffery recited, that a replevin was brought by Franklin; the defendants made conusans as bailiffs of the Lord Cromwell; because, that the said lord was seised of the mannor of North-Elmes; and that the custom of the said mannor is, that the homagers have used to make by-laws (when necessity shall be) within the same mannor, and upon a pain and forfeiture, and that the lord of the mannor for the time being, might distrain in the land of any for the forfeiture. And further saith, that in anno 6 of Ed. the 6th, the homage then (whereof Franklin the plaintiff was one) made a by-law, that none should put his sheep to feed in the pasture or lands of the lord upon a pain, &c. And that the said Franklin, in the 13th year of the reign of the Lady [39] the Queen that now is, had put his sheep into the pasture and lands of the lord to feed; and for that they avow the taking in the right of the Lord Cromwell, for not payment of the said forfeiture: and Jefferies of council with the plaintiff, said, that the avowry, nor the conusans were not good; for the custom is, as they themselves have shewed, that the by-law shall be made when necessity required (and without necessity a by-law cannot be:) and it is not alledged here, that there was a necessity at the time of this by-law made; and then if there be no necessity, they cannot make the by-law. Also, it is not alledged, that there were any sheep there; and when a custom is pleaded, it shall be pleaded stricti juris. And at the common

law, you may see divers cases, that when a man is to have one thing for the cause of another, that he must alledge the thing for which he must have it: as in 9 H. 6. Where an abbot had granted to one, that he should have common, wheresoever the cattel of the abbot should go; there if the commoner will justifie or make avowry for his common, he must aver that the beasts of the abbot went then in such a place, field, or pasture; for if they did not go there at the time that he justifieth or avoweth, his justification or avowry shall not be good: and there it was said by Babbington, Chief Justice, that if a man grants common whensoever his cattel shall go in such a pasture, if the grantor doth never put his cattel into the pasture, the grantee shall not have common there: and therefore he must say, that he put his beasts into the pasture. And in 15 H. 7. in the case of an annuity granted until he be promoted to a benefice, in a writ of annuity brought, he must say, that he is not promoted, &c. And if an obligation be made to you, to you my lord, for mony, when J. S. shall return from Rome; you shall not have an action upon the bond for not payment of the mony, without alledging, that J. S. is returned. See 33 H. 6. Hilary's case; and before the Statute of Quia Emptores Terrarum, if a man had made a feoffment to hold by fealty, and the guarding of his castle, in an avowry for the castle guard, that there was then war, and so cause of necessity; for in time of peace he shall not be bound to guard it. And so it appeareth, 34 H. 8. where a feoffment was made before the statute, to hold by fealty, and every year to marry a poor maiden within the mannor, if he doth avow for not marriage, he ought to alledge, that there was a poor maid that year within the mannor. So, if the tenure be to repair a bridge that is for the common wealth, and he and all others are to have advantage of it, yet the lord shall not avow for not repairing of it, without alledging, that the bridge was in decay. And so when the tenure is to cover his hall, he shall not avow, without alledging, that his hall needed reparations. And so in the principal case, here he ought to alledge, that there was a present necessity for making of the by-law; for it may be, that there was not any sheep within the mannor when the by-law was made, and then there was no **[40]** cause that it should be made. And in the like manner as it hath been said of the common law, that certainty ought to be shewed, so shall it be by the statute laws. As if tenant for life makes default, if one prayeth to be received for the default of the tenant for life, he ought to shew that he hath the reversion, and that he bringeth his action by reason thereof: and as it hath been said of the common law, and statute law, so it shall be said of custom; as in 44 E. 3 where the parishioners prescribe to make by-laws, and that they made such an ordinance, that for every acre of land, or for every beast, every one should pay for the reparations of the church, &c. there it may be said in avowry, that the church wanted reparation. And so where a tax and levy is to make a wall against the sea, there if the party will justifie the levying of the tax or levy, he must say, that there was need of it, otherwise the same cannot be levied: but as to the ability of a person, he shall be enabled by intendment. As if an obligation be made by a man or a woman, in an action brought upon the bond, he shall not be compelled to say, that the man was of full age, or that the woman was a single woman, for that shall be intended, until the contrary be shewed: but by statute law, if a man pleads a grant, it shall be otherwise. As upon the statute of 1 R. 3. if he plead a feoffment or a grant of cestuy que use, he must plead, that he was of full age, out of prison, of sound memory, and within the 4 seas. And so where a pardon was made in the time of King Ed. the 4th, to all, but to those who were with Queen Margaret; there, if he will take advantage of the pardon, he must plead, that he was not with the said Queen. And if a man plead a feoffment of J. S. at the common law, it shall be good; and if he were within age, it shall be shewed on the other side: but if a man pleadeth a feoffment by custom; and the other saith, that the feoffor was within age, and the plaintiff replyeth, that an enfant by the custom may make a feoffment; the same is not good, but a departure: for he ought to have shewed that at the beginning in his declaration. And in 37 H. 6. where a man pleaded a devise, and it was shewed, that the devisor was within age; there the plaintiff need not say, that the custom is, that an enfant may devise; for that is a departure. Another matter of the custom which they have alledged, is, that they may make by-laws for the better ordering; and they have not taken averment, that this ordinance was either better or worse:

and if it be not better, then they have no cause to make the by-law. If a feoffment be made causa matrimonii præloquuti, it shall not be intended, that the feoffment was for any other cause than marriage: and if a woman brings a writ of dower, and the defendant pleads a lease for life made by the husband, it shall not be intended that that lease was in allowance of her dower according to the statute, if it be not expressly shewed. And so, if cestuy que use in tail makes a lease for life, it shall not be intended that cestuy que vie **[41]** is alive, unless a special averment be taken, that he is yet alive: and so here it doth not appear; that this is the better order, nor that the lands are several, or lie in common, so as by no means or circumstance it can appear if it be the better or not. Another cause wherefore the pleading is not sufficient, is because he saith, upon a pain of forfeiture to the lord for the time being; and he hath not alledged in fact, that the Lord Cromwell, who was lord of the mannor in anno 6 E. 6. was lord in the 13th year of the reign of the Queen that now is; and, without shewing, that shall not be intended. As in 7 H. 7. a man pleads a feoffment, and that J. S. was seised, and did enfeoffe him, that is not good; but he ought to plead, that he being so seised, made the feoffment; for it shall not be intended, that his seisin continued until the time of the feoffment, without shewing of it. And so where a man pleads, that J. S. was seised of a reversion, granted it; he ought to plead, and that he being so seised, granted it: and so where an attornment is pleaded; for if he was not seised at the time of the attornment, the attornment was not good. And so where a man will plead a surrender, he shall shew, that he who surrendreth, and he to whom a surrender is made, were seised. Quære, if the one or the other were not seised, one of the term and the other of the reversion, whether the surrender be not good. And 31 H. 6. if a man will plead a lease by feoffees to use, he shall say, and that so seised, they made the lease. And see 6, 7, 10, 11 H. 7. Where cestuy que use makes a feoffment, averment shall be taken, that at the time of the lease that the feoffees were seised to the use of the lessor. And because that here it is not shewed, nor alledged, that the Lord Cromwell is now lord of the mannor, it shall not be so intended: also, for divers other causes, I conceive, that the avowry is insufficient: for he hath shewed, that a by-law was made, but doth not shew when it was made, nor for what time it was to continue; and it is not shewed, whether the same were made for the better ordering of the lands which the lord held joyntly, or in common with others, or which he held in his own right alone: and as to the prescription, I conceive that the same is not good; because it is against reason, and not ex rationabili causa: for if one man keeps the law, and another man breaks the law, yet according as they have alledged this custom to be, he may be distrained who hath not offended, and his cattel taken for the offence done by the cattel of another man; and it is against reason, that any one should be punished for the default or offence of another: but the custom of borough English is good; and so is the custom of gavelkind, because that every son is as good a gentleman as the eldest; and therefore those customs stand with reason. And so in 5 H. 7. where a man prescribes, that for the pasture which the beasts of the tenant have taken in his lands in the day-time; that he have the foldage of them upon his said lands in the night to manure his lands, is a good prescription, **[42]** because the party hath for it quid pro quo. And so where a man prescribes to have a farthing of every one who passeth over his land, the same is called toll traverse, and is good. And so in 7 H. 4. where a man prescribes in common by reason of vicinage, it is good; for though it cannot be of common right, yet because each hath quid pro quo, it is good. And so is the custom for fishermen to dry their nets upon the banks of the lands of other men lying upon the sea coasts, because it is for the common wealth; and every man hath an advantage by it, but if a man should prescribe to fowle there upon the lands of another, that were not good. Meade, contrary, That case is, as it hath been put; and divers cases of the common law, custom, and statute laws, have been shewed: and by common intendment, it is intended, that need doth require the making of the by-law; for otherwise, they would not have made it; and there needs not any averment, that there was need of it, for that shall be taken by intendment: as 19 E. 4. A man counts of the grant of the next avoydance, and the count is good, without shewing, that that was the next avoydance, but yet it would have been better, if it had been expressed. And 21 H. 7.

in trespass, the first day of May, the defendant pleads the licence of the plaintiff; without shewing, that it was for the same trespass: and yet it shall be intended, when he pleads a licence for the same day, that it was for the same trespass. And as to the case put upon the statute of 1 R. 3. it hath been ruled otherwise; for it shall be shewed on the other side, that he was within age, as it appeareth by 10 & 13 H. 7. Also he said, that the Court here shall intend, that there was a necessity sufficient, without expressing of it; and if there was not, then it ought to be alledged on the other side; as 15 H. 7. An annuity is granted until he was advanced to a benefice, the plaintiff shall not need to shew it, but that shall come on the defendants part; and the statute which is, that no cattel of the plough shall be distrained where the party hath other cattel of which a distress may be taken, there the party needs not to alledge, that he had other cattel, or other goods. And as to that which hath been said, that it was the better order, that needs not, for the defendant himself was one of the makers of the order; and when by-laws are made, they shall not extend but to the tenants within the mannor where they are made, and to such only as have lands there, and not to the lands of others which are out of the mannor: and the defendant in this case shall not be received to say, but that this is a good custom and order, because he is a party to it, and was the maker of it, and that there was then a necessity for the making of it, for the better ordering of the lands; and that especially when as the defendant himself was a party to it: and as to that which is said, that seisin is alledged in the Lord Cromwell in 6 E. 6. and it is not alledged, that the seisin did continue in him until 13th of this Queen; it **[43]** shall be intended, that he continued seised until the contrary be shewed. As in 11 H. 7. a man prescribed to have common by reason of the house, &c. The avowant doth not say, that he was seised of the house at the time, &c. of the disseisin of the common, because he once alledged seisin of the house, and that seisin shall be intended to continue unto the time of the disseisin. And so 10 H. 7. a prior domus & ecclesiæ de C. brought waste, and supposed, that it was to the disenheresin of the house, and did not say, prædict. domus; and yet it was good, and shall be referred to the said priory: and so here, when he saith, that he was lord, and that the by-law was made as before, and a penalty imposed, and a distress taken by the bailiff of the Lord Cromwell, for not observing the by-law, and payment of the sum assessed, all being put together, makes a sufficient certainty, and that the Lord Cromwell continued his seisin of the mannor and land: and as to that which hath been said, that the by-law made, and the custom alledged to distrain in the lands of any man for the offence of another, is not reasonable, and against the law; to that he said, that the tenants here had authority to make by-laws, and by their consents have bounden themselves to the observing and performance of them, and therefore shall not now be received to say, that the by-law made by themselves was against the law. And he said, that the customs in some places are, where there are waste lands, that they may make by-laws, that if any tenant or person dig turfs in the same waste, that the lord may distrain for such offence within any place of the mannor, and the cattel of any person. Quære of it. The principal case was adjourned.

Dyer 321, 322. 2 Roll. 560, 561.

Mich. 15 Eliz. In the Common Pleas.

LXIV. Mountford and Catesbys Case.

An action upon the case was brought by Mountford against Catesby; and the plaintiff declared, that the defendant covenanted, assumed and promised in consideration of a certain sum of money to him paid; and in consideration of the payment of a rent of certain lands demised to the lessee, that he should peaceably and quietly enjoy the same, without interruption of any person, and he was ousted by a stranger; and the matter aforesaid was found by special verdict: and it was argued by Lovelace, Serjeant; and he prayed judgment for the plaintiff: and he said, that there is a difference, when it is said, that a man shall hold and enjoy peaceably and quietly; as in case where one warrants land, there if he be ousted by a stranger who hath not any title to the land, he shall have an action of trespass against him: but a man by

word, or covenant, may bind himself to that which he is not bound to do by the law. As, if the covenant and **[44]** promise be, that he shall leave the houses in as good plight as he found them: there, although the law doth not bind the party to re-edifie the houses in case they be overthrown by tempest of wind; or that they be destroyed by enemies; yet by his special covenant he shall be bound to re-edifie them. Meade, contrary, and that this promise shall not be taken strictly against the lessor, that he shall enjoy it against all persons, but only against all persons who have title, and not against those who have not any title, because against them he may have his remedy. And if a man makes a feoffment of his lands with warranty, and covenants, that it is discharged of all rents, there it shall not extend to rent services which are incident to the lands of common right: in 3 H. 7. 4. the case was, The condition of an obligation was, that the obligor should make appropriation of the church of Dale such a day to such a house, at his costs and charges discharged of incumbrances; there, although there was a pension granted thereout to another, it was holden, that the obligee was not bounden to discharge it of that pension; no more than if a man be bounden to make a feoffment of his land, there, although that he charge the land, yet he shall not forfeit his bond: but if it were, that he should make a feoffment of his land discharged, &c. it is otherwise; but yet he shall not be bounden to discharge it of such things with which it is charged by the law. Barham, The words are precisely, that he shall enjoy it without interruption of any person, so as he be interrupted by one that hath title, or no title, the plaintiff hath cause of action. Manwood, What if the words were, that he should enjoy it without suit in law? Meade, That shall be intended of a lawful suit: and in the principal case, although the contract be by words, yet it is upon a good consideration; that is to say, of a fine and income, and upon the payment of the rent: and therefore as Dyer said, when Catesby the son leased the lands to Mountford, the now plaintiff, and it appeared that his father, or a stranger, made claim to it, and thereupon he made the promise as before, shall it be intended, that he should hold and enjoy the lands peaceably without interruption of them only who had title? and that he should not have his remedy against the defendant upon his promise, if a stranger who had not title did interrupt him? Truly, he shall have his remedy against him: as if the son had promised that he should enjoy it against his father; or else that in truth if it were the land of the father, shall it not be intended, that the son did presume that his father should not interrupt his lessee? and that he would so deal with his father, that he should not interrupt him: and it may be, that upon the presumption of the good will of his father, or that he had treated with him, or compounded with him; that for these, or the like causes, the son made the promise aforesaid: and if the father had not any right or title to the land, should not the lessee have his action against the defendant, if the father did inter-**[45]**-rupt him, for this unlawful interruption? Truly, yes; for by the words it is to be supposed, that the son would so deal with his father, that the lessee should enjoy and hold the lands without any manner of interruption. Mounson, You have well tasted the opinion of the Court upon this matter before, and now you hear our opinions again. Manwood, As I said the other day, cannot an hostler take upon him, that the goods of his guests which are within his inn, shall be safe, and charge himself further therewith, than he is chargeable by the custom of the realm, and to be chargeable against every one that taketh them away? Truly, I conceive he may. Harper, The common making of assurance is, that he shall enjoy them without any lawful interruption: and if the law, upon the general words of enjoying without interruption, should be intended but of lawful interruptions, it were in vain to have this word (lawful) in the deed, &c.

Dyer 328. Vaugh. Rep. 120. Hob. Rep. 35. 1 Roll. 434. 1 Inst. 389. a. 1 Len. 29. Roll. Tit. Conditions. 1 Roll. 429.

LXV. Mich. 15 Eliz. In the Common Pleas.

An action of debt was brought against one upon an obligation: it was upon an apprentice bond; the condition of which was, that if such a one did become the apprentice of the obligee; and transport his merchandises beyond the seas, and make a retorn of them, and maketh an accompt unto the obligee, and payeth the monies

upon his accompt within a certain time, that then, &c. And afterwards, the obligee doth release by deed to the servant the apprentice, and not to the obligor: and in debt brought against the obligor, he pleaded the release. And it was said by the Lord Dyer, and by the whole Court, that by the release to the servant, the obligation was saved, if the release were made before any forfeiture; or that the servant or apprentice had broken any of the conditions, or any point according to the covenants: but if it was made after any of them was broken, then such a release to the servant, did not dispence with the obligation which was made by the stranger, because an obligation once forfeited, cannot be saved by any act or release made or done to a stranger.

LXVI. Mich. 15 Eliz. In the Common Pleas.

In a quare impedit brought by the patron against the Archbishop of York, and the incumbent, who was in by the collation of the archbishop, after the death of the incumbent of the patron. It was said by the Lord Dyer, that of an avoydance by resignation, or deprivation, the patron shall have 6 months time, after notice thereof given unto him, to present his clerk, because it may be done secretly, in the Chamber of the Ordinary; and therefore in such case the law is, that the bishop is to give notice of it to the patron, before he be bound to that knowledge of **[46]** such a presentment; as it appeareth by the case in 1 H. 7. 4. And Lowe, the Prothonotary said, that so is the roll of the same year, where the issue was, whether the patron had 6 months after the notice? And then the Lord Dyer said to the prothonotary, Shew me the roll at another day, that I may compare it with my book. But if the church become void by death of the incumbent, there the patron is to take notice of it at his peril, without any other notice thereof to be given him by the Ordinary: and he said, that if the patron doth present his clerk a week before the 6 months be ended, and the Ordinary doth refuse the clerk for inability, because he is unlearned, and then the six months pass before he presenteth another, after the six months after the death of the incumbent; in such case, the bishop shall have the collation of the clerk, because it was the folly of the patron, that he did not present his clerk before, so as the Ordinary might examine him; and that thereupon if he be found to be unable, that he might present another clerk to the Ordinary within convenient time, and for that cause is the six months given to the patron, that he provide another clerk in the mean time. And there is a good case in 14 H. 7. which was long debated, where the Ordinary commanded the clerk to come to him afterwards to be examined, because the Ordinary had then other business. And there the better opinion of the book is, that it was a good plea for the Ordinary, that he did not refuse the clerk, but that the clerk did not return to him again, and that the 6 months passed, so as he made the collation, and that the patron made his presentation too late, so as he had not convenient time to examine him. Then in the case at Bar, it was moved, that when the ability and disability of the clerk came in question, by whom the same should be tryed; because in the case here, the Bishop of York was a party to the suit, whether by the metropolitan of York, or by the metropolitan of Canterbury. And he said, that as he conceived, the tryal of the ability should be by the metropolitan of York, and not of Canterbury: but he said, that if the party in whom the disability was alledged was dead, so as he could not be examined, the tryal of his ability or disability should be by the country, as it appeareth in the book of 39 E. 3. Manwood, Justice, The cure of souls is to be regarded, and therefore if an enfant be to make a presentation, the same shall not be stayed for his nonage; and therefore if in such case he doth surcease, and shall not present his clerk, the law which regardeth more the cure of souls that the enfacy, will permit that the Ordinary shall collate to the church, if a presentment thereto be not made within the six months. And he said, that if the patron should present one but a week before the end of the six months, and the Ordinary should refuse him for disability: if the patron should have other six months then next after, he might then likewise present an enfant or other disabled person to the Or-**[47]**-dinary, and so detract the time by fraud, and so the lapse by such great fraud should never devolve to the Ordinary, and so the cure should be unserved; and so the issue would be and arise upon the conveniency of the time. And as to that

which hath been said, concerning the ability and disability of the clerk, I conceive the same shall be tryed by the metropolitan of Canterbury, and not by the metropolitan of York. Mounson, to that intent; and he said, There is a good case in 14 H. 7. 21. which is a short case, and not the case which has been vouched; by which it appeareth, that the presentment that shall be within 6 months, shall be accompted from the time of the avoydance, and not from the time of the presentment, by the whole Court: and there it is said, that the Ordinary shall give notice to the patron, if he be a lay man, of the disability of the clerk, but not if he be a spiritual person: but if the party presentee be criminous, of that the patron shall take as well notice as the Ordinary. And afterwards, the Lord Dyer caused the record to be read, and it did not appear therein, at what day the presentment was made to the Ordinary: which ought to have been shewed: for the great point of the case doth rest here upon the time of the presentment, if it were before a week that the six months were ended or not. Also the Ordinary saith in his bar, that the clerk was insufficient, and that he gave notice to the plaintiff, and that nullam idoneam personam præsentavit: and the Court said, that that was no good manner of pleading; but it had been better, if it had been nullam etiam personam idoneam præsentavit, and the first form would be a jeofail. Manwood said that the time of the notice given to the patron, ought to be alledged, because if the patron sends his clerk within a month after the avoydance, and the Ordinary will not give notice to the patron in the meantime; the same shall not be any default in the patron: and as to the notice given to the patron, he said the same was well pleaded, and it shall be intended that it was given to the person of the patron. And as to the words in the declaration, scil. tunc vacantem, they are but void words, because nothing is spoken before of any time. And the incumbent pleaded the same plea, as the Ordinary pleaded. And Dyer asked, if the incumbent were person impersonee, for that none should plead that plea, but he who is parson in fact, and incumbent.

Dyer 327.

[48] LXVII. Mich. 15 Eliz. In the Common Pleas.

The case was, that an information was exhibited into the Court of Common Pleas, for the Queen and the party, upon a penal law; and a subpœna issued forth against two: one of them was served with the writ, and the other not; and now, a new subpœna was prayed against him who was not served: and Dyer, Justice, conferred with his companions and the prothonotary, and demanded of them, if the plaintiff might exhibit an information in this Court? who answered, that he might; for this is a Court of Record, and the statute law limiteth, that it may be exhibited in any of the Queens Courts of Record. Then he demanded of them, if a subpœna lay out of this place? and Whetley, Prothonotary, said, that it did. Dyer said, It is a strange thing to have an attachment at the first day. Manwood said, In this Court it is the common usage, upon an audita querela, to award a venire facias against the conusee. Dyer, said to the prothonotaries, Advise with your selves against the morrow, what process hath been used to issue forth upon the presidents of information which have been before this time, if a subpœna shall be awarded. And afterwards it was said by Gawdy, who moved for it, that he might have a subpœna upon this matter.

LXVIII. Mich. 15 Eliz. In the Common Pleas.

Note: a special verdict was found at the Bar, and the issue was taken upon a traverse; and Dyer, Justice, said, that a special verdict could not be taken upon a traverse, but precisely according to the issue, and so it was agreed by the whole Court here; but some serjeants at the Bar did doubt of it.

LXIX. Mich. 15 Eliz. In the Common Pleas.

In an ejectione firmæ, the case was thus: King Henry the 8th was seised of certain lands, and by his letter patents granted the same to Thomas Holt for life, the remainder to John Holt his son, who in truth was a bastard; and the letters patents were, ex certa scientia, & mero motu, &c. And because the plaintiff did suppose, that the same was not a good purchase, he tooke a lease from the Queen, of the lands, intending to make void the letters patents, because the defendant was nullius filius. And what difference there was in such a case, in case of the King and a common person, was moved to the Court by Lovelace, Serjeant. Dyer, Justice, I conceive, that it is a good purchase in law as well in the case of the King, as in the case of a common person. And see to that purpose, 39 E. 3. and in this case, if the King had granted the land to John Holt without na-**[49]**-ming him son, the same had been a good purchase: but if the King had called him John, the son of Thomas, without giving him a sirname, there such a purchase should not be good, if he were a bastard; because he hath not nomen cognitum, as where he hath a sirname: and a man cannot purchase by the name of John only; and then if he be called John, the son of Thomas, when he is not his son, it cannot be good. And such case hath here lately been adjudged, where the Lord Powis gave certain lands to Thomas Gray his son, by him begotten upon the body of Jane Orwell; and in truth the said Thomas was a bastard of the said Lord Powis, (and the name of Jane was not Orwell, but the daughter of one Punt; and the mother of Jane, who was first married to Punt, betwixt whom Jane was begotten, married with one Orwell;) and yet notwithstanding that wrong name, and that the said Thomas Gray was not the son of the Lord Powis, born of Jane Orwell, but of one Jane Punt; yet it was a good purchase and gift to Thomas Gray, because it was his known name. Manwood, As I take it, the letters patents are ex certa scientia, & ex mero motu; and then the Kings grant shall not be taken in such plight as the grant of a common person, void for incertainty, because that the King takes notice of the person, of what degree he is; and in the Kings case, where he takes knowledge, by the words, ex certa scientia, there all matter of uncertainty shall be avoided and made good; but not matter which is not true: and for uncertainty, he said, where a thing may be taken two ways, there without the words, ex certa scientia, &c. the best shall be taken for the King, and strongest against the patentee. But by Dyer; by the words, ex certa scientia, &c. that incertainty is saved, and shall be taken strong for the patentee; and if it can any ways be taken for him, then the patent shall not be void: and then when in the principal case, there is the word (son,) and the word (son) may be taken two ways, either for a base son, or a true son; there by the words, ex certa scientia, the King taketh upon him to know in what manner he is son; and a base son is a son quodam modo, so as the letters patents shall not be false: but where the King, in his letters patents recites a thing which is false, that shall not make the patent good, although the words be, ex certa scientia, et mero motu.

LXX. Mich. 15 Eliz. In the Common Pleas.

Note; it was agreed by the Court, that if a man in a replevin pleadeth, and they are at issue, and the jury is charged, and gone from the Bar, and returns to give their verdict, and the plaintiff be non-suit, their retorn irreplevisable shall not be awarded, as in case if a verdict had been given; but the party may have a writ of second deliverance, as well as if he had been nonsuit before declaration or appearance.

[50] LXXI. Trin. 15 Eliz. In the Common Pleas.

The case was; The husband levied a fine of his land, and died, and his wife within the 5 years after the death of her husband, brought her writ of dower, but did not pursue her writ, until 6 years were past, and then she would have revived her suit.

And Meade, Serjeant, demanded the opinion of the justices, if the wife should be barred of her dower, or not: and by Manwood, Justice, it was moved again, if they at the Bar did agree, that if a fine be levied by the husband, and the wife doth not make her claim within the 5 years, if for that she shall be barred: and he conceived that she should not be barred; for he said, that he who hath title to the land at the time of the fine levied, if he doth not sue within 5 years after his title accrued, should be barred: but where the title accrues after the fine, there he who hath title shall not be barred by the 5 years; but he may come 30 years after, and make his title and claim. But in the principal case he said, that if the fine had been levied after the death of the husband, there the wife should be barred, if she did not pursue her right and claim within 5 years: and he agreed, that if the 5 years be a bar here, that then by the wives suffering of her writ of dower to be discontinued till after the 5 years were past, that she should be barred, because vigilantibus & non dormientibus subveniunt leges. Harper said, that the discontinuance should be no bar unto her; for he said, that if a gift be made to one in tail, the remainder over, and tenant in tail dieth without issue, and he in the remainder brings a formedon in the remainder within 5 years, and discontinueth it, yet it is no bar, but that after the 5 years ended, he may revive his suit: which Manwood denyed: and then Dyer came into the Court, and the case was moved to him: and he said, that the not prosecuting of the action by the wife, should be a bar unto her: and that the marriage which was before the fine, was the cause of dower, although she could not come to be endowed, until after the death of her husband: and he said, that the wife could make no other to have her dower, but only by bringing of her writ of dower; and therefore if she did surcease her time until the 5 years were past, that her new claim by her new writ, would not revive the ancient claim, and that therefore she should be barred; for she could not enter into the land to defeat the fine: and he said, that as to the principal case, that it was adjudged, anno 4 H. 8. And it was also said by the Court, that an assignment of dower made to the wife in the Court of Wards, was no sufficient claim of the wife; because she cannot have a writ of dower there; and there by this surceasing of her demand of her dower for the 5 years at the common law, that she should be barred.

[51] LXXII. Trin. 15 Eliz. In the Common Pleas.

The case was; A man made a lease for years, and the lessee covenanted to make reparations; the lessor granted the reversion to another, and the lessee for years made his wife his executrix, and died: it was holden in this case by the Court, that the grantee of the reversion should not recover damages, but from the time of the grant, and not for any time before: but yet the wife the executrix should be charged for the not reparations as well in the time of her husband, as in her own time. And if she do make the reparation, depending the suit; yet thereby the suit shall not abate, but it shall be a good cause to qualifie the damages according to that which may be supposed, that the party is damnified for the not repairing from the time of the purchase of the reversion, unto the time of the bringing of the action. And it was said by Manwood, that by the recovery of the damages, that the lessee should be excused for ever after, for making of reparations; so as if he suffer the houses for want of reparations to decay, that no action shall thereupon after be brought for the same; but that the covenant is extinct.

LXXIII. Easter Term. 15 Eliz. In the Common Pleas.

Lovelace moved the Court, that in the Kings Bench this case was argued upon a demurrer there; a feoffment was made by one Coxley, who took back an estate for life, the remainder to him who should be his heir at the time of his death, and to the heirs males of his body begotten: and afterwards, the tenant for life after the statute of 32 H. 8. suffered a recovery to be had against him, that that recovery was good as it was at the common law, because the statute doth not speak but that it shall not

be a bar to him who hath the reversion at the time of the recovery, but this remainder was in abeyance until the death of the tenant for life; and that in the same Court it was adjudged accordingly in an ejectione firmæ; and because the same was a discontinuance, the plaintiff had here brought his formedon in the remainder; and therefore Lovelace prayed, that they might proceed without delays (because the plaintiffs title appeareth) without essoigns, and feigned delays: which Dyer, Justice, conceived to be a reasonable request, and that it should be well so to do; because, as he said, this Court is debased and lessened, and the Kings Bench doth encrease with such actions which should be sued here, for the speed which is there: and he said that the delays here were a discredit to the Court; so as all actions, almost, which do concern the realty, are determined in the Kings Bench in writs of ejectione firmæ, where the judgment is, quod recuperet terminum, and by that they are put into possession; and [52] by such means, no action is in effect brought here, but such actions as cannot be brought there; as formedons, writs of dower, &c. to the slander of the Court, and to the detriment and loss of the serjeants at the Bar. And Lovelace shewed, that divers mean feoffments were made, &c.

LXXIV. Mich. 15 Eliz. In the Common Pleas.

Note: this case was in Court: An heir female was in ward of a common person, who tendred to her a marriage, viz. his younger son; and she agreed to the tender, and the guardian died; the heir married the younger son according to the tender; the executors of the guardian brought a writ de valore maritagii, supposing the tender by the lord to be void by his death. But the Court was of a contrary opinion, because the tender of their testator was executed.

Mich. 15 Eliz. In the Common Pleas.

LXXV. Riches Case.

Elizabeth Rich brought a writ of a dower against J. S. who pleaded, and judgment given for the defendant, and afterwards the judgment was reversed. And she brought a new writ of dower, and the tenant pleaded, that he always was ready, and yet is, &c. Against which the demandant pleaded the first record to estop the tenant. To which the tenant pleaded, nul tiel record. It was the opinion of the Court, that here the demandant cannot conclude the tenant by that replication, to plead nul tiel record; for the judgment is reversed, and so no record, and it cannot be certified a record. But if the tenant had taken issue upon the plea of the tenant absq; hoc, that he was ready; the same might well have been given in evidence against the tenant.

Note: that the case was, that the demandant after the death of her husband entred into the land in demand, and continued the possession of it 5 years; and afterwards the heir entred; upon which she brought dower. It was agreed in that case, that the tenant needed not to plead, tout temps prist. after his re-entry; for the time the demandant had occupied the same, is a sufficient recompence for the damages.

[53] Mich. 15 Eliz. In the Common Pleas.

LXXVI. Vavasors Case.

Nicholas Ellis, seised in fee of the mannor of Woodhall, leased the same to William Vavasor, and E. his wife, for the life of the wife, the remainder to the right heirs of the husband; the husband made a feoffment in fee to the use of himself and his wife for their lives, the remainder to his right heirs: the husband died, the wife held the land, and did waste in a park, parcel of the mannor: it was moved to the Court, if the writ of waste should suppose, that the wife held ex dimissione Nicholai Ellis, or ex dimissione of her husband: it was the opinion of the Court, that upon this matter,

the writ should be general, viz. that she held de hæreditate J. S. hæredis, &c. without saying any more, either ex dimissione hujus, vel illius. For she is not in by the lessor nor by the feoffees, but by the Statute of Uses; and therefore the writ shall be ex hæreditate: it was also the opinion of the justices, that the wife here is not remitted, but that she should be in according to the term of the feoffment. Note in this case, the waste was assigned in destroying the deer in the park. And Meade, Serjeant, conceived, that waste could not be assigned in the deer, unless the defendant had destroyed all the deer: and of that opinion also was Dyer. Manwood said, If the lessee of a dove-house destroyed all the old pigeons, but one or two couple, the same is waste. And if a keeper destroy so many of the deer, so as the ground is become not parkable, the same is waste; although he doth not destroy them all. See 8 R. 2. Fitz. Waste 97. If there be sufficient left in a park, pond, &c. it is enough.

LXXVII. Mich. 15 Eliz. In the Common Pleas.

An action upon the case was brought against executors; they were at issue, upon nothing in their hands: it was given in evidence on the plaintiffs part that a stranger was bound to the testator in 100l. for performance of covenants; which were broken; for which the executors brought debt upon the obligation, depending which suit, both parties submitted themselves to the arbitrament of A. and B. who awarded, that the obligor should pay to the executors 70l. in full satisfaction, &c. and that the executors should release, &c. which was done accordingly. And it was agreed by the Court, that by the release, it shall be taken in judgment of law, that the executors have assets to the value of the whole 100l. And although the executors were compelled by the award to make the release; yet it was their own act to submit themselves to the arbitrament.

[54] LXXVIII. Mich. 15 Eliz. In the Court of Wards.

Note: it was ruled by Kellaway and Wilbraham in the Court of Wards, that where the Kings tenant of lands holden by knight service in capite, made a feoffment of the same land to the use of himself for life, and after to the use of his younger son in tail, the remainder to the right heirs of the feoffor, and died, the eldest son within age, that the Queen should have the wardship of his body, and of the third part of the land; and when the eldest cometh at full age, the younger shall sue livery, and pay primer seisin according to the rate of the value of the whole land, viz. of the third part, as in possession; and of the two parts as a reversion: for the remainder to the right heirs of the feoffor, is in truth a reversion. For the fee-simple was never out of him, because there was not any consideration as to that, nor any use expressed. And also because that livery shall not be by parcels, the younger son shall not be suffered to sue livery of the third part presently, and respite the residue as to the two parts in reversion, until the reversion fall, but shall sue livery presently, as well of the two parts in reversion, as of the third part in possession: and if the eldest son had been of full age, at the time of the death of his father, the younger son should pay primer seisin as to the third part of the full value of it for one year as in possession; and as to the two other parts, the moyety of the value of a year as a reversion. And at that time Breers case was vouched; which was, Oliver Breers, tenant in chief by knights service made a feoffment in fee to the use of himself for life, and after to the use of A. his son and heir for life, and after to the use of the first begotten son of A. in tail, and after to the use of the second son of A. &c. and for default of such issue, to the right heirs of the feoffor: Oliver died, the said A. his son being of full age: it was ruled by the said council of the said Court of Wards, that he should pay for his primer seisin, a third part of the land in possession, and two parts as a reversion.

LXXIX. Mich. 15 Eliz. In the Common Pleas.

The case was; A man was seised of a pasture, in which was two great groves and a wood, known by the name of a wood; and also in the same pasture were certain hedge-rowes and trees there growing sparsim, leased the same by indenture for years. And by the same indenture bargained and sold to the lessee all woods and underwoods in and upon the premisses: and further, that it should and might be lawful to the lessee to cut down and carry away the same at all times during the term. Harper, Justice, The hedge-rowes did not pass by these words, Hedge-rowes sparsim. Dyer, The hedge-rowes shall pass, for **[55]** the grant is general, all woods. Mounson, contrary; for the words of the grant may be supplyed by other words. It was moved further, if by these words, the lessee may cut them oftner than once? and by Harper, Manwood, and Mounson, He can cut them but once. Dyer, contrary; And so it should be, if the words had been, Growing upon the premisses. And this word (growing,) although it sounds in the present tense, yet it shall be also taken in the future tense, if the word (tunc) had not been alledged; for it is a word of restraint. The case which was argued in the Chancery, 27 H. 8. where I was present, was such, The prior of St. John of Jerusalem leased a commandry; provided, that if the said prior, or any of his brethren there being commanders, will dwell thereupon, then the said lease to be void. It was doubted, if that did extend to the successors, for the word (being) is in the present tense. And yet it was holden by Fitzherbert, that it should be taken in the future tense, and so extend to the successors: otherwise, if the words had been (nunc) being.

Post. 56.

LXXX. Mich. 15 Eliz. In the Common Pleas.

A man seised of lands in fee, devised, that his wife should take the profits of his lands, until Mary his daughter, and heir came to the age of 16 years; and if the said Mary died, that J. S. should be her heir. Manwood, The daughter after she hath attained the age of 16 years, shall have the land in tail; for devises ought to be construed according to the intent of the devisor, so far forth as any certainty with reason may be collected, but no intent shall be taken against all reason and certainty. It is certain, that the daughter shall not have the land in fee; for that shall descend to her without any devise: and these words (if she dieth) cannot be intended a condition; for it is certain she shall die. But if the words had been, that after the death of Mary, J. S. should be his heir; in such case, Mary had had but an estate for life, for there it is limited what estate she should have. And when it is said, J. S. shall be his heir, it shall be meant his collateral heir, so as the estate tail remains in the daughter. Mounson and Harper, to the contrary, and that she shall have but for life. And by Mounson, If Mary had been a stranger to the devise, she should take nothing. And this case was put by Barham, Serjeant, A man deviseth 100l. to his youngest daughter, 100l to his middle daughter, and another 100l. to his eldest daughter; and that all these sums shall be levied of the profits of his lands. It was holden by the better opinion of the Court in this case, that the youngest daughter should be first paid, and then the middle, and then the eldest daughter; and that was said to be Coniers case.

1 Len. 101.

[56] LXXXI. Mich. 15 Eliz. In the Common Pleas.

The case was; The King granted to the Bishop of Salisbury, that he should have catalla felonum & fugitivor', and fines and amercements of all tenants and resiants within the mannor of D. which mannor, the bishop leased for years, and that the lessee should have all profits and hereditaments within the same mannor. Manwood, Justice, conceived, that the lessee should have the post fines: for all things have a being somewhere, although they be not visible; as rents, fines, have their being in

the lands out of which they are issuing, and that is in the son, of a fine levied of the land within the mannor, which is due by land of him who ought to pay the fine. And this fine is due be reason of the land, therefore it is in the land, or within the land; i.e. the mannor. For the King may distrain for the fine as well in the same land, as in the land of him who ought to pay it. Dyer doubted of it, and said, that the bishop could not distrain in the land for this fine, but should have it by allowance in the Exchequer upon the estretes; and if the party would not pay it, the lessee should have a subpœna against him out of the Exchequer. And some were of opinion, that the lessee could not have this fine, for that they were not hereditaments within the mannor, but rather in the Exchequer, or Court where the record is.

2 Len. 179. 4 Len. 234.

LXXXII. Mich. 15 Eliz. In the Common Pleas.

The case was; A man seised of a pasture, in which are two great groves, and a wood, known by the name of a wood; and also in the same pasture there are certain hedge-rowes and trees there growing sparsim; leased the same by indenture for years: and by the same indenture, bargained and sold to the lessee, all woods and underwoods in and upon the premisses: and further, that it shall and may be lawful to the lessee to cut down and carry away all the same at all times during the term. Harper, The hedge-rowes do not pass by these words, for they are not known by the name of woods, 14 H. 8. 2. contrary by Manwood, for by such words, hedge-rowes pass. Mounson, contrary; for the words of the grant may be supplyed by other words. Dyer, The hedge-rowes shall pass, for the grant is general, all woods. It was moved further, if by those words, the lessee might cut them a second time, or but once? Harper, Manwood, and Mounson, He may cut them but once. Dyer, contrary; and so it should be, if the words had been, Growing upon the premisses. And this word (growing,) although it sounds in the present tense, yet it shall be also taken in the future tense, if not that the word (tunc) had been there; for that is a word of restraint. The case was argued in the Exchequer Chamber, where **[57]** I was present; which was, the prior of St. John's, leased a commandry; provided, that if the said prior, or any of his brethren there being commanders, will dwell thereupon, then the said lease to be void. It was doubted, if that proviso did extend to the successors; for the word, being, is in the present tense: and yet by the opinion of Fitzherbert, it shall be taken in the future tense, and so extend to the successors: otherwise, if the words had been, now being.

LXXXIII. Mich. 15 Eliz. In the Common Pleas.

A. made B. his executor, and died; B. to the intent to defraud the creditors, refused to take upon him the executorship, but caused a stranger to take upon him letters of administration; which stranger fraudulently gave the goods of the testator to B. Dyer, If the gift be fraudulent, then by the statute of 13 Eliz. the gift is void; and then B. by the occupation of the goods, shall be charged as executor of his own wrong. Manwood, I conceive there is a difference, if one makes an executor, and another takes the goods, but doth no act which concerns the office of an executor, as paying of debts; he is not executor of his own wrong, but a trespassor to him who is executor in right: but if he doth any act which belongs to the office of an executor, then he is executor of his own wrong. Dyer, That case hath been adjudged against you: and although the books of 9 E. 4. & 22 H. 6. were vouched; yet judgment was given against the opinion of Manwood. It was the case of one Stoke.

Vid. le stat. 43 Eliz. cap. 8. Office of Executors, 261.

MICH. 16 ELIZ. IN THE COMMON PLEAS.

LXXXIV. JACKSON AND DARCYES CASE.

In a writ de partitione facienda, between Jackson and Darcy, the case was; Tenant in tail, the remainder to the King, levied a fine, had issue, and died; in that case, it was adjudged, that the issue was barred, and yet the remainder which was in the King was not discontinued; for by that fine, an estate in feesimple determinable upon the estate tail, did pass unto the conusee.

[58] HILL. 17 ELIZ. IN THE COMMON PLEAS.

LXXXV. STROWDS CASE.

In a replevin, the case was, that lands holden of a subject, came to the possession of the King by the Statute of 1 E. 6. of Chauntries, and the King granted the lands over: in that case, it was holden, that the grantee shall hold the lands of the King according to the patent, and not of the ancient lord: but the patentee shall pay the rent by which the said land was before holden, as a rent seck distrainable of common right to the lord only and his heirs; scil. to him of whom the said lands were before holden.

MICH. 17 ELIZ. IN THE KINGS BENCH.

LXXXVI. TRESHAM AND ROBINS CASE.

Tresham brought an action of debt upon a recognizance against Robins; the condition of which recognizance was, to stand to the arbitrament of A. and B. who made award, that Robins should have the land, yielding and paying 10l. per annum; and that Tresham in further assurance, should levy a fine to Robins of the same land, and upon that, Robins should grant and render to Tresham; which is done accordingly: the rent is behind, Tresham brought debt upon the recognizance: the defendant pleaded the special matter, with this perclose, unde petit Judicium, if the plaintiff should have execution against him. And by the opinion of the whole Court, the conclusion of the plea is not good; for here is not any execution of the same debt, but an original action of debt brought; in which case, he ought to have concluded judgment si actio. It was further moved, if these words, yielding and paying, make a condition? and it was agreed, that the words do amount to as much as, so as he pay the rent: and if a man makes a feoffment in fee, reddendo & salvendo 10l. for years, the same is a condition. But in the principal case, it is not a condition; for it is not knit to the land by the owner itself, but by a stranger; i.e. arbitrator: but it is a good clause to make the same an article of the arbitrament, which the parties are bound to perform, upon pain of forfeiture of the recognizance: which Wray concessit; and that this rent should not cease by eviction of the land.

[59] HILL. 18 ELIZ. IN THE COMMON PLEAS.

LXXXVII. THE EARL OF WESTMERLANDS CASE.

The Earl of Westmerland seised of a mannor, whereof the demesnes were usually let for three lives by copy, according to the custom of the mannor, granted a rentcharge to Sir William Cordell, pro consilio impendendo, for the term of his life, and afterwards conveyed the mannor to Sir William Clifton in tail. The rent is behind, Sir William Cordell dieth; Sir William Clifton dieth, the mannor descended to Sir John Clifton, who granted a copy-hold to Hempston; the executors of Sir William Cordell distrain for the rent: and it was agreed by the whole Court, that

the copyholder should hold his copy-hold charged. Vide inde, 10 Eliz. Dyer 270. Windham, It hath been adjudged, that the wife of the lord shall not be endowed against the copyholder, which Periam granted, and shewed a reason thereof; for the title of dower is not consummated before the death of the husband, so as the title of the copyholder was compleated before the title of dower; but the title of the grantee of the rent is consummated before the dower. Fenner conceived, that the executors could not distrain upon the possession of the copyholder; and he argued, that this case is not within the statute of 32 H. 8. For by the preface of the said statute, he conceived, that the statute extended but to those cases, for which by the common law, no remedy was provided; but in this case the executors by the common law might have had an action of debt, ergo. But Periam and Windham held the contrary; for this statute intends a further remedy for that mischief, viz. not only an action of debt, but also distress and avowry. See the words of the statute, viz. distrain for the arrearages, &c. upon the lands, &c. which were charged with the payment of such rents, and chargeable to the distress of the testator so long as the said lands continue, remain, and be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent so being behind to the said testator; or in the seisin or possession of any other person or persons claiming the said lands only by and from the said tenant by purchase, gift, or descent, in like manner and form as their testator might or ought to have done in his life-time. It was moved by Fenner, that here the land charged, doth not continue in the seisin or possession of the tenant; and here Sir J. Clifton was issue in tail, and therefore he doth not claim only by the father, but per formam doni, and therefore he is not lyable, ergo, nor his heir. Shuttleworth contrary, Sir J. Clifton was chargeable, and he claims only from them who immediately ought to have paid the rent. And the copyholder claims by purchase from Sir J. Clifton, so he claims from Sir [60] William Clifton the tenant, although he doth not claim immediately. For if the tenant ought to have paid it, and he dieth, and the land descendeth to his heir, and the heir maketh a feoffment, the feoffee shall be charged within this statute; although he doth not claim immediately: so where land discharged descends from the tenant who ought to have paid it; and so from heir to heir. The statute of 1 R. 2. is, that all grants, &c. shall be good against the donor, &c. his heirs, &c. claiming the same only as heirs to cestuy que use; yet if cestuy que use grants a rent-charge, and his feoffees are disseised, the grant shall be good against the disseisor, and yet he doth not claim only by cestuy que use. And although Sir J. Clifton be tenant in tail, and so claims per formam doni, yet forasmuch as the estate tail comes under the estate of him who grants the rent, he shall be subject to the charge: and this statute extends not only to him who claims by the tenant, but also to the heir of him, &c. And by Windham, and Rhodes, The copyholder doth not claim only by the lord, but he claims in also by the custom; but the custom is not any part of his title, but only appoints the manner how he shall hold. The possession here is continued in Sir J. Clifton, for the possession of his copyholder is his possession; so as if the copyholder be ousted, Sir J. Clifton shall have an assise; and so the strict words of the statute are observed, for the seisin and possession continue in Sir J. Clifton, who claims only by Sir William Clifton, who was the tenant in demesne who ought to pay the rent. But Fenner said to that, that the seisin and possession intended in the statute, was the very actual possession, i.e. pedis dispositio, and such a possession in which a distress might be taken, and that could not be taken in a freehold, without actual possession.

2 Len. 152. 2 Brownl. 208.

Hill. 18 Eliz. In the Common Pleas.

LXXXVIII. Owen and Sadlers Case.

A lease was made to A. for life, the remainder to B. in tail, the remainder to the right heirs of B. who bargains and sells all his estate, or levies a fine with proclamations of it to D. A. commits waste: it was holden by the Court, that D. shall not punish him in an action of waste, for nothing passeth to him but during the life of

the grantor; scil. as to the remainder in tail, in respect of which estate, the action of waste is only maintainable: for although that the feesimple passeth to the grantee, or conusee, yet in respect of that, an action of waste is not maintainable, until the estate tail be spent.

10 Co. 96.

[61] LXXXIX. MICH. 18 ELIZ. IN THE COMMON PLEAS.

The King seised of a mannor, to which an advowson is appendant; a stranger presents, and his clerk is in by 6 months; the King grants the mannor with all advowsons appendant to it, to B. The incumbent dieth: in this case, it was holden by the Court, that the grantee might present; for the advowson was always appendant, and the inheritance of the same passed to the grantee; for it was not made disappendant by the usurpation: but the patentee shall not have a quare impedit of the first disturbance, for that presentment *did not pass unto him, being a thing in action*, without mention of it in his grant: and if the plaintiff brings a quare impedit of the second avoydance, he shall make his title by the presentment of the King, not making mention of the usurpation; yet if the bishop present by lapse in the case of a common person, he ought to make mention of it.

2 Cro. 53, 123. Yel. 90, 91. 1 Cro. 240. 2 Roll. 371. Hob. Rep. 242.

XC. MICH. 18 ELIZ. IN THE KINGS BENCH.

In an ejectione firmæ, upon an evidence, the case was this; The Bishop of Rochester, 4 E. 6. leased to B. for years, rendring rent; and afterwards granted the reversion to C. for 99 years, rendring the ancient rent; habendum from the day of the lease, without impeachment of waste; which grant was confirmed by the dean and chapter, but B. did not attorn. And in default of attornment, it was holden by the whole Court, that the lease was void: for it was made by way of grant of the reversion, and to pass as a reversion. But by Catline, If the bishop had granted the reversion, and also demised the land for 99 years, it should pass as a lease to begin first after the former lease determined. And as to the attornment, it was given in evidence, that B. after the notice of the grant to C. had speech with C. to have a new lease from him, because he had in his term but 8 years to come; but they could not agree upon the price. And it was the opinion of the justices, that the same was an attornment, because he had admitted the said C. to have power to make to him a new lease. Also the said B. being in company with one R. and seeing the said C. coming towards him, said to the said R. See my landlord, meaning the said C. Bromley, Sollicitor, The same is no attornment, being spoken to a stranger. Barham, contrary; Because that C. was present. And it was holden to be a good attornment: but if that attornment was not before that the bishop was translated to Winchester, the lease should be void. And although the confirmation of the dean and chapter was before the attornment, so as no estate was vested in C. yet it was good enough; for an assent of the dean and chapter is suffi-**[62]**-cient, be it before or after; as it was holden by Catline, Southcote, and Whiddon. But Wray contrary.

TRIN. 18 ELIZ. IN THE KINGS BENCH.

XCI. NORWICH AND NORWICH'S CASE.

Henry Norwich was bound by obligation to Symon Norwich, upon condition, to stand to the award of J. S. who awarded, that the said Henry should pay to Symon 150l. at such a day. And that the said Henry should find 3 sureties to be bounden with him to the said Symon for the payment of another sum of mony to the said Symon. In debt, upon this obligation, Henry pleaded, as to the 150l. payment; and as to the other point, that he was always ready to become bounden, &c. And as to

the finding of sureties, he demanded judgment; for that, as to that, the arbitrament is void. See 22 H. 6. 45. 17 E. 4. 5. 21 E. 4. 75. It was holden, that in such a case of such award to find sureties, the defendant is not to find sureties, but is only to tender his obligation. And of that opinion, was the whole Court, because it was an act to be done by a stranger to the award. But if the award had been of an act to be done to a stranger, by him who was party to the award, then the award had been good: but if the stranger will not accept of the monies awarded, his obligation is saved. So if the award be, that one of the parties to the award shall discontinue a suit, which he hath against another; if the Court where the action is depending, will not suffer the discontinuance of it, the award is performed: and in the principal case, it was ruled accordingly.

Note; The same day another case was in the same Court, between Dudley and Mallery: the condition was, to perform an award, &c. The defendant pleaded performance of the award. The plaintiff assigned the breach of the award in this, because the award was, that the servant of Mallery should pay to the servant of Dudley 5l. which the defendant had not paid. It was the opinion of the Court, that the bond was not forfeited, for the servants utriusq; are strangers to the submission. But if the award had been, that Mallery should pay to the servant of Dudley 5l. it had been good, for that Mallery is a party to the submission, &c.

[63] HILL. 19 ELIZ. IN THE KINGS BENCH.

XCII. RIVERS AND PUDSEY'S CASE.

John Rivers, alderman of London, brought a writ of accompt against Pudsey; who said, that at the time, &c. and now, he is the plaintiffsa pprentice; and demanded judgment, &c. And it was holden by Wray, Justice, that it is no plea: for although an apprentice cannot be charged by this action, for ordinary receipts upon his masters trade; yet upon collateral receipts, which do not concern the ordinary trade of his master, he shall be charged as well as another. See 8 E. 3. tit. Acc. 94. And, F. N. B. 119.

HILL. 19 ELIZ. IN THE KINGS BENCH.

XCIII. POTKINS CASE.

In debt upon an obligation by Potkin; the defendant pleaded, that he himself borrowed of one Watson a certain sum of mony, paying for the forbearance thereof excessive usury; and that the plaintiff was bound with the said defendant to the said Watson, for the payment thereof; and that he himself by this obligation upon which the action is brought, was bound to the said plaintiff to save him harmless against the said Watson, &c. And because that this bond was a counter-bond for the payment of excessive usury, &c. And it was holden by Manwood, that the same was a good bar; for here, the plaintiff when he was impleaded upon the principal bond, might have discharged himself upon this matter, and therefore his lachess shall turn to his prejudice; and therefore the issue was joyned upon the excessive usury.

HILL. 19 ELIZ. IN THE COMMON PLEAS.

XCIV. ABRAHALL AND NURSE'S CASE.

John Abrahall brought a writ of right-close against John Nurse, in the Court of George Earl of Shrewsbury, and made protestation to prosecute that writ in the form and nature of the writ of the Lady the Queen, of assise of novel disseisin, at the common-law, and made his plaint accordingly. And afterwards the assise was taken, who spake for the plaintiff; whereupon Abrahall had judgment to recover. After which, Nurse brought a writ of false judgment, and assigned error in this, that

whereas the said writ of right-close was directed to the bailiffs of George Earl of Shrewsbury of his mannor, &c. that the said bailiffs should do full right, &c. that it appeareth by the record, that the plea was **[64]** holden before the suitors, and not before the bailiffs of George Earl of Shrewsbury. For all the precepts in the plea aforesaid, are, quod sint hic ad proximam Curiam coram sectatoribus tenend. An other error was in this, and false judgment was given therein, because that the roll is, præceptum est ministro Curiæ prædict. that he cause to come 12 free and lawful men, &c. videre illud tenementum, &c. & nomina eorum imbreviare, &c. and the minister of the Court retorned 12 recognitors of the assise aforesaid; whereas by the law of the land, 24 recognitors in a plea of land ought to be retorned. But notwithstanding that these exceptions were taken; yet upon due consideration of the Court, notwithstanding these exceptions, the judgment was affirmed. See the record, Mich. 17 & 18 Eliz. Rot. 1301.

HILL. 15 ELIZ. IN THE COMMON PLEAS.

XCV. THE MASTER AND SCHOLARS OF LINCKFORDS CASE.

In an ejectione firmæ, the case was; That the master and scholars of Linckford were seised of the mannor of Haldesley in the town of Laberhurst; which town extended into the county of Sussex, and also in the county of Kent; and they made a lease to one Clifford of all their lands in the town of Laberhurst, except the mannor of Haldesley; whereas in truth they had not any lands in the said town, but the said mannor: and the ejectione firmæ was brought of that mannor in Kent; and from thence the visne came, and all the special matter aforesaid was found by verdict: and exception was taken to the verdict, because they have found generally, that the master and scholars had not any thing in the said town of Laberhurst, but the said mannor: whereas, they ought to have said, that they had not any thing in the said town in the county of Kent: for they could not take notice what lands the master and scholars had in that part of the town which was in the county of Sussex. And of that opinion the whole Court seemed to be. But quære of it; for it was adjourned.

MICH. 19 ELIZ. IN THE COMMON PLEAS.

XCVI. HINDE AND LYONS CASE.

In debt by Hinde, against one as son and heir of Sir John Lyon, who pleaded, nothing by descent, but the third part of the mannor of D. The plaintiff replyed, assets; and shewed for assets, that the defendant had the whole mannor of D. by descent: upon which they were at issue. And it was given in evidence to the jury, that the said mannor was holden by knights-service; and that the said Sir John the ancestor of, &c. by his will in wri-**[65]**-ting, devised the whole mannor to his wife, until the defendant his son and heir should come to the age of 24 years; and that at the age of his son of 24 years, his wife should have the third part of the said mannor for her life, and his son should have the residue: and if that his said son do die before he come to his said age of 24 years without heir of his body, that the land should remain to J. S. the remainder over: the devisor died, the son came to the age of 24 years. The question was, If the son had an estate in tail, for then for two parts he was not in by descent. And it seemed to Dyer and Manwood, that here was not any estate in tail; for no tail shall rise, if not that the son die before his said age, and therefore the tail shall never take effect: and the fee-simple doth descend, and remain in the son, unless that he dieth before the age of 24 years; and then the estate vests with the remainder over: but now having attained to the said age, he hath the fee, and that by descent of the entier mannor, and then his plea is false, that but the third part descended. And a general judgment shall be given against him as of his own debt; and an elegit shall issue forth of the moyety of all his lands, as well those which he hath by descent from his ancestor, as his other lands; and a capias also lieth against him. But Manwood, Justice, conceived, that if a general judgment be given

against the heir by default, in such cause, a capias doth not lie, although it lieth in case of a false plea. Dyer, contrary, And the writ against the heir is in the debet & detinet; which proves, that in law it is his own debt. And he said, that he could shew a president, where such an action was maintainable against the executors of the heir.

Post. 70. Dyer 124. 2 Len. 11.

XCVII. Mich. 19 Eliz. In the Common Pleas.

The case was; A. seised of lands in fee, by his will in writing, granted a rent-charge of 5l. per annum out of the same to his younger son, towards his education and bringing up in learning: the question was, if in pleading, the devisee ought to aver, that he was brought up in learning? And it was holden by Dyer, Manwood, and Mounson, Justices, that there needs no such averment; for the devise is not conditional: and therefore although he be not brought up in learning, yet he shall have the rent: and the words of the devise are, Towards his bringing up. And the devisor well knew, that 5l. per annum, would not and could not reach to maintain a scholar in learning, diet, apparel, and books. And this rent, although it be not sufficient to such intent, yet the son shall have it. And by Dyer, Three years past, such case was in this Court, scil. Two were bounden to stand to the award of certain persons; who awarded, that the one of them should pay unto the other 20s. per annum during the term of 6 years, towards the education and bringing up of [66] such an enfant; and within two years of the said term, the enfant died, so as now there needed not any supply towards his education: yet it was holden, that the said yearly sum ought to be paid for the whole term after: for the words, Towards his education, are but to shew the intent and consideration of the payment of that sum; and are not the words of a condition.

2 Len. 154. Hob. 285. Dyer 329.

XCVIII. Mich. 19 Eliz. In the Common Pleas.

In a quare impedit; the plaintiff declared, that the defendant was seised in fee of the mannor of Orchard, alias Lydcots-farm, to which the advowson is appendant, and presented such a one, &c. And afterwards leased to the plaintiff the said mannor per nomen of the mannor of Orchard, alias Lydcots-farm, with the appurtenances for 21 years, and the church became void, &c. And the truth of the case was; that there is the mannor of Orchard, and within the said mannor, the said farm called Lydcots farm, parcel of the said mannor, and the lease was of the said farm; and not of the said mannor, and so the advowson remained to the lessor, as appendant to the mannor; in this case, it was moved, what thing the defendant should traverse: Dyer, He shall say; that the advowson is appendant to the mannor of Orchard, absq; hoc, that it is appendant to the farm of Lydcots: but it seemed to Manwood, that the defendant shall say; that the advowson is appendant to the mannor of Orchard, and that the farm of Lydcots is parcel of the said mannor, and that he leased to the plaintiff the said farm, with the appurtenances, absq; hoc, that the mannor of Orchard, and the said farm, are all one; for if he traverse the appendancy to the farm of Lydcots, then he confesseth, that the mannor and farm are all one, &c. But Dyer doubted of it.

Mich. 19 & 20 Eliz. In the Common Pleas.

XCIX. Kirlee and Lees Case.

In action upon the case upon assumpsit, the plaintiff declared, that the defendant in consideration, that the plaintiff would marry the daughter of the defendant, did promise to find to the plaintiff and his said wife convenient apparel, meat and drink for themselves and two servants, and pasture also for two geldings,

by the space of 3 years, when the plaintiff would require it; and further shewed, that licet the plaintiff had married the defendants daughter, and that he had required the defendant to find, ut supra, &c. the defendant refused, &c. The defendant said, that he promised to find meat, drink, and apparel for the plaintiff and his wife for 3 years, absq; hoc, that he promised to [67] find meat and drink for two servants, and pasture for two geldings: the plaintiff replicando, said, that the defendant did promise to find, &c. for 3 years next following. Upon which they were at issue, and found for the plaintiff. It was moved in arrest of judgment, that here is no issue joyned; for the plaintiff hath declared upon a promise to find, &c. for 3 years, when the plaintiff will that require. The defendant hath pleaded a promise to find apparel, meat and drink for the plaintiff and his wife for 3 years, absq; hoc, that he promised for two servants, and two geldings; and now the plaintiff replicando, saith, that the defendant assumed for 3 years next following; so here is another assumpsit in the replication, than that whereof the plaintiff declared, and so the plaintiff hath not joyned issue upon the assumpsit traversed by the defendant, and so there is no issue joyned, for the defendant denyeth the assumpsit whereof the plaintiff hath declared. And the plaintiff in his replication hath affirmed another assumpsit than that whereof he hath declared; and that is not helped by the Statute of Jeofails; for it is not a mis-joyning of issue, but a not joyning of issues; and that was holden by the Court, to be a material exception. And the Lord Dyer conceived, that here is a departure; for the plaintiff in his replication hath alledged another promise, than that whereof he declared. Another exception was, because that the plaintiff had not averred in facto, that he had married the daughter of the defendant, but by an argument implicative (licet;) but that exception was disallowed; for that the word (licet) is not a bare implicative, but it is an express averment; and so it was said, it had been ruled before. See 2 Mar. Plow. Com. 127, 128. Buckley and Thomas case.

Plow. 127.

C. HILL. 19 ELIZ. IN THE COMMON PLEAS.

A lease for years was, upon condition, that the lessee should not grant over the land at will, or otherwise: he devised the same to his executors, who accepted the same only as executors, and not as devisees: and yet it was the opinion of the justices, that the condition was broken, because he had done as much as lay in him, to have devised the land. See 31 H. 8. 45.

Dyer 45. 1 Roll. 214. 1 Len. 3.

HILL. 19 ELIZ. IN THE KINGS BENCH.

CI. HODGSON AND MAYNARDS CASE.

Note: it was said by the justices in this case, that if an executor promiseth to pay a debt when he hath not assets, no action upon the case lyeth against him upon such promise: but contrary, if he hath assets. And so it was holden, that if the [68] heir hath nothing by descent, an action upon the case will not lie against him upon such a promise made.

2 Roll. 684. 1 Roll. 24. 9 Co. 94. Stiles Rep. 304, 305, 405. Hutton Rep. 27. Clayton Rep. 85. 1 Len. 113. 1 Cro. 126. Owen 94.

CII. MICH. 20 ELIZ. IN THE KINGS BENCH.

An action upon the Statute of 5 Eliz. of Perjury, was brought by three; and they declared, that the defendant being examined upon his oath before commissioners, if a surrender was made at such a court of such a mannor of a copyhold, to the use of A. and B. two of the defendants swore, that no such surrender was made, &c. Exception was taken to the declaration, because that the certainty of the copyhold did not appear upon the declaration: for the statute is, that in that case the party grieved

shall have remedy; so as it ought to appear in what thing he is grieved, quod fuit concessum per totam Curiam. Another exception was taken, because that the action in such case is given to the party grieved. And it appeareth upon the declaration, that the surrender in the negative deposing, of which the perjury is assigned, was made to the use of two of the plaintiffs only; and then the third person is not a party grieved; for he claims nothing by the surrender; and therefore, and because the two parties grieved have joyned with the third person not grieved, it was the opinion of Wray and Southcote, Justices, that the writ should abate.

Co. 3 Inst. 1. Stat. 5 Eliz. 2 Len. 12.

CIII. Mich. 20 Eliz. In the Common Pleas.

Note: it was said by Dyer and Manwood, Justices, If one be condemned in an action upon the case or trespass, upon nihil dicit, or demurrer, &c. and a writ issueth to enquire of the damages, and before the retorn of the writ, the defendant dyeth; the writ shall not abate for that; for the awarding of the said writ is a judgment. And Manwood said; In a writ of accompt, the defendant is awarded to accompt, and the defendant doth accompt, and is found in arrearages, and dieth; the writ shall not abate, but judgment shall be given, that the plaintiff shall recover, and the executor shall be charged with the arrearages; and yet accompt doth not lie against them.

1 Len. 263.

CIV. Mich. 20 Eliz. In the Common Pleas.

In an action upon escape, the plaintiff is nonsuit. It was holden by the justices, that the defendant in that case shall not have costs, by the statute of 23 H. 8. Note, the words in the statute, upon any action upon the statute, (for any offence or wrong personal supposed to be done immediately to the plaintiff) notwithstanding this action is, Quodam modo an action within the statute; scil. by equity of the Statute of Westm. 2. which **[69]** give expresly against the warden of the Fleet; yet properly it is not an action upon the statute: for that in the declaration in such action, no mention is made of the statute. Which, see the Book of Entries 169, 171. And also here there is not supposed any immediate personal offence, or wrong to the plaintiff: and an action upon the case, it is not, for then the writ ought to make mention of the escape, which it doth not here; and yet at the common law before the Statute of Westm. 2. An action upon the case lay upon an escape; and so by the opinion of Dyer, Manwood, Mounson, Justices, costs are not given in this case; and Manwood said; that upon nonsuit in an action upon the statute of 8 H. 6. The defendant shall not have costs, for that the same is not a personal wrong, for the writ is disseisivit, which is a real tort.

2 Len. 52. 2 Len. 282. Post. 92. 1 Len. 282.

CV. Mich. 20 Eliz. In the Common Pleas.

In debt upon an obligation to perform certain covenants, in a pair of indentures; the plaintiff assigned the breach in one of the covenants; scil. that the defendant should do all reparations of such a house demised to him; and that he had not repaired, but suffered the same to decay. To which the defendant said, that the plaintiff had acquitted and discharged him of the reparations. Upon which the plaintiff demurred in law. Manwood, The same is an acquittal and discharge of the reparations as well for the time past, as for the time to come, by force of the said covenant, and amounts to as much as if he had released the covenant. And it was moved, if the covenant being broken for want of reparations, if now that acquittal and discharge, or release of the covenant, should take away the action upon the obligation which was once forfeited before? and it was the opinion of Manwood, that it should not; for if one be bound in an obligation for the performance of covenants, and before the breach of any of them, the obligee releaseth the covenants, and afterwards one

of the covenants is broken, the obligation is not forfeited, for there is not now any covenant which may be broken, and therefore the obligation is discharged: but if the release had been after the covenant broken, otherwise: all which, Dyer and Mounson concesserunt.

CVI. Mich. 20 Eliz. In the Common Pleas.

Husband and wife, seised in the right of his wife of certain customary lands in fee, he and his wife by licence of the lord, make a lease for years by indenture rendring rent, have issue two daughters: the husband dieth; the wife takes another husband, and they have issue a son and a daughter: the husband and wife die, the son is admitted to the reversion, and **[70]** dieth without issue. It was holden by Manwood, that this reversion shall descend to all the daughters, notwithstanding the half-blood; for the estate for years which is made by indenture by licence of the lord, is a demise and lease according to the order of the common law; and according to the nature of the devise, the possession shall be adjudged; which possession cannot be said, possession of the copyholder; for his possession is customary, and the other is meer contrary, therefore the possession of the one shall not be said the possession of the other; and therefore there is no possessio fratris in this case: but if he had been guardian by the custom, or this lease had been made by surrender, there the sister of the half-blood should not inherit. And Meade said, that the case of the guardian had been so adjudged. Mounson to the same intent; And if the copyhold descend to the son, he is not copyholder before admittance; but he may take the profits, and punish trespass, &c.

1 Len. 174, 175.

Hill. 20 Eliz. In the Common Pleas.

CVII. Hinde and Lyons Case.

Debt by Hinde, against one as son and heir of Sir John Lyon, who pleaded, nothing by descent, but the third part of the mannor of D. The plaintiff replyed, assets; and shewed for assets, that the defendant had the entire mannor of B. by descent; upon which they were at issue; and it was given in evidence to the jury, that the mannor was holden by knights-service, and that the said Sir John the ancestor of the defendant by his will in writing devised the whole mannor to his wife, until the defendant his son and heir should come to the age of 24 years; and that at the age of the son of 24 years, his wife should hold the third part of the said mannor for the term of her life, and his son should have the residue: and if his son do die before he come to the age of 24 years without heir of his body, that the land should remain over to J. S. the remainder over to another; the devisor died, the son came to the age of 24 years; Dyer and Mounson, Justices, conceived, that here was not any estate tail, and then for two parts he is not in by descent; for no estate tail shall rise unless that the son dieth before his said age, and therefore the tayl never took effect, and the feesimple descends and remains in the son, if not that he dieth before the age of 24 years, and then the whole vests with the remainder over; but now having attained the said age, he hath a fee, and that by descent of the whole mannor; and then his plea is false, that but the third part descended. And a general judgment shall be given against him as of his own debt; and an elegit shall issue forth of the moyety of all his lands, as well those which he hath by descent from the same ancestor, as of his other lands; and a capias lieth **[71]** also against him. But Manwood, Justice, conceived, that if a general judgment be given against the heir by default, in such case a capias doth not lie, although in case of a false plea it lieth: but Dyer held the contrary. And the writ against the heir is in the debet & detinet: which proves, that in law it is his own debt. And he said, that he could shew a president where such an action was maintainable against the executor of the heir.

2 Len. 11. Dyer 124. Ante 64.

CVIII. HILL. 20 ELIZ. IN THE COMMON PLEAS.

A. seised of lands in fee, devised them to his wife for life; and after her decease, she to give the same to whom she will; had issue two daughters, and died; the wife granted the reversion to a stranger, and committed waste; and the two daughters brought an action of waste: it was holden by the justices, that by that devise, the wife had but an estate for life, but she had gained authority to give the reversion by his will to whom she pleased. And such a grantee should be in by A. and his will: for A. had given expresly to his wife for life, and therefore by implication she should not have any further estate: but if an express estate had not been appointed to the wife; by the other words, an estate in fee-simple had passed.

Latch 9, 39.

CIX. HILL. 20 ELIZ. IN THE COMMON PLEAS.

The lessor covenanted with his lessee, that the lessee should enjoy the lands demised without any lawful eviction: and afterwards upon a suit depending in Chancery by a stranger against the lessor for the land demised; the Chancellor made a decree against the lessor, and that the stranger should have the land. It was moved, if that decree were a lawful eviction by which the covenant was broken? It was holden by the Lord Dyer, that the same was not any eviction: for although that in conscience it be æquum, that the said stranger have the possession; yet the same is not by reason of any right paramount the title of the lessor; which was in the party for whom it was decreed.

HILL. 20 ELIZ. IN THE COMMON PLEAS.

CX. THE MARQUESS OF NORTHAMPTONS CASE.

Parre, Marquess of Northampton, took to wife the Lady Bouchier, the heir of the Earl of Essex, who levied a fine of the land of the said lady, sur conusans de droit, &c. with a grant and render to them for life, the remainder to the right heirs of the body of the lady: and afterwards by Act of Parliament, 35 H. 8. it was enacted, that the said lady should hold part of **[72]** her inheritance, and dispose of the same as a feme sole, and that the marquess should have the residue, and that he might lease the same by himself without his wife for 21 years or less, rendring the ancient rent, being land which had been usually demised, &c. The marquess leased for 21 years, and afterwards durante termino prædict. leased the same land to another for 21 years, to begin after the determination of the first lease. It was moved in this case, that this last lease was void, and that for 3 causes; 1. because the marquess had but an estate for life, and then it could not be intended that the statute did enable one who had but such an estate determinable, to make such a lease, which peradventure might not commence in his life-time. 2. The letter of the statute is, 21 years, or under; and the word (under) strongly expounded the meaning of the statute to be, not to extend to such an estate; for here upon the matter is a lease for 40 years. 3. Because the land demised, is the inheritance of the wife: and in this case it was said, that in the case of one Heydon, such a private act was strictly construed; which was, that it was enacted, that all copies for 3 lives, granted by the Lord Admiral of the lands of his wife, should be good. The admiral granted leases in reversion for 3 lives: and it was holden, that that grant was not warranted by the statute. Dyer said, The words are general, omnes dimissiones, and therefore not to be restrained unto special leases; scil. to leases in possession. Manwood said, A feme covert by duresse, joyns in a lease with her husband, the same shall bind her.

1 Roll. 430.

HILL. 20 ELIZ. IN THE KINGS BENCH.

CXI. THE QUEEN AND SIR JOHN CONSTABLES CASE.

A quo warranto was brought by the Queen against Sir John Constable, who claimed certain wreck in the county of York; the defendant pleaded, that Edward Duke of Buck. was seised of such a mannor, to which he had wreck appendant, and that he was de alta proditione debito modo attinctus, and that found before the escheator; and shewed further, that the said mannor descended to Queen Mary, who granted the same to the Earl of Westmerland, who granted the same to the defendant: upon which, it was demurred. And exception was taken to the plea, because the attainder is not fully and certainly pleaded. It was argued by Plowden, that the attainder was certainly pleaded, scil. debito modo attinctus; and it is shewed, that the wreck is appendant to the mannor, and then if the defendant hath the mannor, he hath the wreck also; and if he hath the mannor, it is not material as to the Queen how he hath it, for the Queen doth not claim the same, but impeacheth the defendant for using there such a liberty; but if the heir of the said duke **[73]** had demanded the mannor there against him, the attainder ought to have been pleaded certainly. And it was said by him, that the interest of the Queen in the sea, extends unto the midst of the sea betwixt England and Spain; but the Queen hath the whole jurisdiction of the sea between England and France, because she is Queen of England, France, &c. And so it is of Ireland.

5 Co. Constables Case.

CXII. HILL. 20 ELIZ. IN THE COMMON PLEAS.

Tenant for life made a feoffment of White-Acre, of which he was seised for life, and made a letter of attorny to deliver livery and seisin secundum formam chartæ; before livery, the tenant purchased the fee; and afterwards livery was made: it was resolved by the Court in this case, that all passed: but if the feoffment had been of all his lands in D. and the letter of attorny accordingly; and before livery made, the feoffee had many lands there; if he purchased one acre after, the livery should not extend to that acre, because the authority was satisfied by the other acre.

MICH. 21 ELIZ. IN THE KINGS BENCH.

CXIII. BANKS AND THWAITS CASE.

In an action upon the case, the case was, that A. had pawned an indenture of lease for years, of a messuage and lands to Banks; Thwaits, intending to purchase the same, required Banks to deliver him the said lease, and he would give Banks 10l. whether he bought it or no, at what time he would request the 10l. And Banks delivered the same to Thwaits accordingly. And afterwards brought an action upon the case, and declared upon the whole matter; and concluded, licet sæpius requisitus, &c. without alledging a request express in certain, and the day and place of it. It was said by Cook, that here the monies did not grow due before request, nor is payable before request, and therefore a request ought to be made in facto; and so, he said, it was ruled in this Court, in an action upon the case, betwixt Palmer and Burroughs; and he said, that the mony was not due by the promise, but by the request. And it was the opinion of the whole Court, that although it be a duty, yet it is not a duty payable before request; and the request makes a title to the action: but if A. selleth to B. a horse for 10l. there is a contract, and a request in facto, need not be layed. And the opinion of the Court was also, that upon this matter the plaintiff could not have an action of debt; for there is not any contract, for the thing is not sold, but it is a collateral promise grounded upon the delivery: and by Clench, Here the request

is traversable: and afterwards judgment was given against the plaintiff. And it was said, it was so ruled in Alderman Pullisons case, in the Exchequer.

Post. 200, 201.

[74] MICH. 21 ELIZ. IN THE COMMON PLEAS.

CXIV. SEGAR AND BOYNTONS CASE.

In trespass, the case was this; King Henry the 8th, anno 27 of his reign, gave the manor of D. to Sir Edward Boynton, knight, and to the heirs males of his body; Sir Edward Boynton had issue Andrew his eldest son, and C. the defendant his younger son, and died: Andrew Boynton covenanted by indenture with the Lord Seymore, that the said Andrew Boynton would assure the said mannor to the use of himself for life, the remainder to the said lord and his heirs: the said Lord Seymore in recompence thereof, should assure other lands to the use of himself for life, the remainder to the use of the said Andrew Boynton in tail; who 37 H. 8. levyed a fine of the said mannor without proclamations to two strangers, to the uses according to the said agreement; and before any assurance made by the said lord, the said lord was attainted of treason, and all his lands were forfeited to the King: and afterwards the said Andrew Boynton made a suggestion to Queen Mary, of the whole matter; and upon his humble petition, the said Queen by her letters patents reciting the said mischief, &c. et præmissa considerans, et annuens petitioni illius, granted to him the mannor aforesaid; and further de ampliori gratia sua, released to the said Andrew Boynton all her right, possession, &c. which came to her ratione attincturæ prædict', vel in manibus nostris existant, vel existere deberent: after which, viz. 5 Eliz. Andrew Boynton levied a fine to the plaintiff with proclamations, and died without issue. And, the defendant as issue in tail entred. Puckering, Serjeant; It is to see, 1. If by the words of the letters patents of Queen Mary, viz. de ampliori sua gratia, &c. the reversion in fee which the Queen had, passed or not. 2. Admitting that the reversion did not pass, then if the fine levied by Andrew Boynton, 5 Eliz. to the plaintiff, the reversion being in the Queen, be a bar to the issue; for when the first fine was levied 37 H. 8. which was levied without proclamations, the same shall not bind the issue in tail, neither as to the right, nor to the entry, for it is not any discontinuance, because the reversion is in the King, as of things which lie in discontinuance, rent, common, &c. for such fine is a fine at the common law, and not within the statute of 4 H. 7. And such a fine is void against the issue: but if such a fine without proclamations be levied of a thing which lieth in discontinuance, then such a fine is not void, but voidable by a formedon: and therefore this fine, in the case at Bar, being levied without proclamations of lands entailed, whereof the reversion is in the King at the time of the fine levied, shall not bind the issue; and by such fine the conusee hath fee, **[75]** which fee was forfeited to the Queen by the attainder of the Lord Seymore, and that the Queen immediately restored to Andrew Boynton, because the Lord Seymore had not according to agreement betwixt them, assured his lands to the said Andrew Boynton in recompence; for the indentures themselves were not sufficient to raise any use. See acc. 1 Mar. Dyer, 96. As to the point he conceived, that nothing passed of the reversion, for the grant hath reference to the words, All his right, possession, &c. which came to her ratione attincturæ, and all the residue of the grant, ought to have reference to that, to the ratione attincturæ prædict. which was the foundation of the whole grant; and here the intent of the Queen was not to other intent, but only to restore Andrew Boynton to the said mannor, and to his ancient estate in it; and nothing appears in the said letters patents by which it might appear, that the Queen was apprised of her reversion which she had by descent, and therefore the same cannot pass by general words: if the King grants the goods and chattels of all those who have done any trespass for which vitam amittere debent, the goods of him who is attainted of treason, shall not be forfeited or granted by such general words: 8 H. 4. 2. The King grants omnia catalla tenentium suorum qualitercunq; damnatorum,

the same doth not extend to the goods of him who is condemned for treason. See 22 Ass. 49. So in our case, the patent shall not serve to two intents, and not to pass two interests by these general words, and then nothing passeth but the fee determinable which was conveyed to the Lord Seymore, and forfeited by the attainder. Then it is to be considered, how after the said grant, the said Andrew Boynton is seised; and he conceived, that he should be in of the said fee determinable, and not of an estate in tail, against his own fine; and then if he be not seised by force of the tail at the time of the fine levied, 5 Eliz. the same fine cannot bind the entail: but admitting, that at the time of the second fine levied, that he was in of an estate in tail, yet that fine shall not bar the issue; for first, this fine cannot make any discontinuance, because that the reversion in fee is in the King, which is not touched by the fine. See the case of Saunders, where A. makes a lease for years, to begin at a day to come, and afterwards levies a fine to a stranger with proclamations, and the 5 years pass, and afterwards at the day of the beginning of the said lease, the lessee enters; his entry is lawful, and he shall not be bounden by the nonclaim; and so it was adjudged in Saunders and Starkies case. Vide inde Saffins case, 3 Jac. Cook 5 Part, 123, 124. After the making of the Statute of 4 H. 7. of Fines, it was much doubted, if the issues of common tenants in tail should be bound by a fine with proclamations, because upon the death of their ancestors, they are as new purchasors per formam doni. And therefore it was provided by 32 H. 8. that the said statute of 4 H. 7. should extend to such common entails; but there was **[76]** no doubt of an estate tail of the gift of the King. And see Mich. 15 & 16 Eliz. Rot. 1474. between Jackson and Darcy, in a partitione facienda, the case was, tenant in tail, the remainder to the King, after the statute of 32 H. 8. levied a fine with proclamations, and it was adjudged, that the same should bind the issues; the Act of 32 H. 8. doth not extend but where the reversion is in the King, but no mention is there of a remainder, because that the words of the said Act are general of all tenants in tail; the makers of the Act perceiving, that it might be doubted, that the generality of the words might include all estates tails of the gift of the King, they restrained the words in a special manner; as appeareth by the last proviso of the same Act, nor to any fines heretofore levied or hereafter to be levied by any person or persons of any mannors, &c. before the levying of the said fine, given, granted or assigned to the person or persons levying the said fine, or to any of his or their ancestors in tail by letters patents, or Act of Parliament, the reversion whereof at the time of the levying of such fine was in the King: and so such estates are excepted, and that in such cases, where such fines are levied, they shall be of such force as they should be if the said Act had not been made. And therefore it seemed to the said Parliament, that such estate tails of the gift of the King were not bounden by the statute of 4 H. 7. for otherwise, the said proviso or exception had been frivolous. Walmesley, Serjeant, to the contrary; and he agreed, that the first fine was not any discontinuance; and yet he conceived it is not altogether void against the issues before that they entred; for no right remains in the conusor against his fine: and also he conceived, that this clause, ex uberiori gratia, did extend to pass more than passed before; for he conceived, that the Queen intended more liberally, viz. the reversion; for this is not any matter of prerogative, but the same is a matter of interest, which might also in the Kings case pass out of the King by general words. **See 3 H. 7. 6 & 7 Br. Patents, 48.** A grant of the King ex insinuatione, doth not hinder the force of the words, ex mera motu. And it was the opinion of the whole Court, that the reversion which was in the King did not pass by that grant; for the whole scope of the patent was, as he conceived, to grant only that which the King had then ratione attincturæ. Anderson conceived the patent insufficient, because the petition was not full and certain; also he said, that ex speciali gratia, &c. would not help this case; for the estate tail is not recited, but only that he was seised de statu hæreditario, &c. so the Queen was deceived, &c. Periam contrary, The Queen was advised of the mischief, and granted such estate with which he parted by the fine. And as to the other point, Walmesley conceived, that the fine with proclamations should bind the tail: and as to the objection which hath been made, that the conusor at the time of the fine levied, was not seised by force of the entail; the same had been a **[77]** good matter to have alledged to avoid a common recovery in the tenant to the præcipe, but not to this

purpose: for if there be tenant in tail, and he levieth a fine, although he was not seised at the time of the fine levied by force of the entail, yet such a fine shall bind the issue; so if tenant in tail discontinueth, and disseiseth the discontinuee, and so levies a fine. And he conceived, that the issue in tail is bound by the statute of 4 H. 7. even of the gift of the King. See 19 H. 8. 6 & 7. Where it is holden, that the issue in tail is bound by the statute of 4 H. 7. and where it hath been objected, that it doth not extend but to such fines which make discontinuance at the common law, the same is not so: for if tenant in tail of a rent, or common, levieth a fine with proclamations, it is clear, that the issues shall be barred by it. And he much relyed upon 29 H. 8. Dyer, 32. Tenant in tail of the gift of the King levieth a fine, or suffereth a common recovery, although it be not a discontinuance, because that the reversion is in the King; yet it is a bar unto the issue. But note, that that was before the statute of 34 H. 8. See Wisemans case, 27 Eliz. Cook 2 Part. And see the Lord Staffords case, 7 Jac. Cook 8 Part, 78.

2 Len. 156. Vid. Roll. Tit. Prerogat.

CXV. Mich. 21 Eliz. In the Common Pleas.

A man seised of lands called Hayes, which extended into two towns, A. and B. devised Hayes-Land in A. to his wife for life, and after to his son; and if the son die without issue, then Hayes-Land shall remain to his 3 daughters, &c. The son died without issue; it was the opinion of Anderson and Periam, Justices, that all Hayes-Land should not pass by the said devise, but only that which was in A.

3 Cro. 674. 2 Cro. 21, 22.

Mich. 21 Eliz. In the Common Pleas

CXVI. Henry and Brode's Case.

In an action of trespass, the plaintiff declared, that the defendant simul cum J. S. and another clausum suum fregit; and exception was taken to it, because here it appeareth upon the plaintiffs own shewing, that the trespass whereof, &c. was made by the defendant and another; and therefore the writ brought against Brode only, was not good. But if it had been simul cum aliis ignotis personis, it had been good enough. But here the plaintiff hath confessed another person trespassor with the defendant. See 2 H. 7. 15. 8 H. 5. 5. 14 H. 4. 22. Yet afterwards in the principal case, judgment was given for the plaintiff.

1 Len. 41.

[78] Mich. 21 Eliz. In the Common Pleas.

CXVII. Barker and Taylers Case.

The case was; A woman tenant in tail within the statute of 11 H. 7. accepted a fine sur conusans de droit come ceo, &c. and by the same fine rendred the land to the conusor for 1000 years: it was moved, if this conveyance and disposition was within the penalty of the statute: for the statute speaks of discontinuances, &c. And it was the clear opinion of the Court, that the same is within the statute, for by such practice, the meaning of the statute might be defeated: and if such render for a 100 years should be good, by the same reason for 1000 years, which is as great a mischief and as dangerous to those in reversion, as discontinuances. And by Rhodes, Justice, It hath been adjudged, that if a woman who hath title of dower, if before she be endowed, she will enter and levy a fine, the same is within the said statute, and yet she is not tenant in dower. See 5 Mar. Dyer 148. Penicocks case. And 36 Eliz. Cook 5 Part. Sir George Brown's case.

3 Co. Sir George Brown's Case.

CXVIII. MICH. 21 ELIZ. IN THE KINGS BENCH.

A. by his last will, willed, that his lands should descend to his son; but willed, that his wife should take the profits thereof until the full age of his said son of 21 years to maintain, and bring him up, and died: the wife took husband, and died, during the nonage of the son: it was the opinion of Wray and Southcote, Justices, that the second husband should not have the profits until, &c. for nothing is devised to the wife but a confidence; and she is as a guardian or bailiff, to aid the enfant, which by her death is determined, and cannot accrue to the husband; but if the husband had devised the profits of the land to the wife, until the age of the enfant, for to bring up and educate, ut supra. Wray said, the same amounted to a devise of the land and so a chattel in the wife, which should accrue to the husband.

2 Len. 221. Ante 9.

MICH. 24 ELIZ. IN THE COMMON PLEAS.

CXIX. STAMPS CASE.

The case was: John Stampe being possessed of a term for years granted the same to Thomas Stampe his brother 12 May 20 Eliz. And afterwards, 8 Octob. 21 Eliz. he himself being in possession of it, mortgaged the same to one P. who suffered him to continue his possession: Thomas Stampe granted his **[79]** estate to John Stampe, who mortgaged the same to one G. who suffered the said John Stampe to continue in possession until 10 December, 22 Eliz. G. entred, John Stampe came to the said P. and requested him, that he would grant all his estate to B. and C. to whom the said John Stampe was endebted for security of their monies; to whom the said P. said, that if he would find him any other surety for his debt, he is contented so to do. And John Stampe offered to the said P. the said B. and C. and he accepted the same, and at the request of the said John Stampe, granted his interest to them 2 Feb. 22 Eliz. P. having notice of the grant before made to the said G. upon which G. enformed against P. upon the statute of 32 H. 8. It was holden in this case by Periam and Meade, Justices, that P. was not within the penalty of the statute: for P. granted his interest to B. and C. at the suit and at the request of John Stampe, who was the mortgager, for assurance of his debt which he ought to them; and therefore it shall not be intended, that that grant was made for any maintenance, or for any unlawful cause against the statute. And also John Stampe who granted unto P. had possession, and received the issues and profits of the said lands for a whole year before the grant, notwithstanding that he was not in possession by a whole year next before the day of the date of the grant. As if a man be in possession, or hath received the issues and profits for a whole year, and afterwards a stranger enters upon him, and hath the possession for the space of a quarter of a year, or half a year; yet he who was in possession by a year before, may grant his interest without danger of the statute, &c.

Godb. 450.

CXX. PASCH. 24 ELIZ. IN THE KINGS BENCH.

Note: per totam Curiam; A man made his will in this manner; scil. I will and bequeath my land to A. And the name of the devisor is not in the whole will; yet the devise is good enough by averment of the name of the devisor. And for proof that the same is his will, if one lying in extremis, having an intent to devise his lands by word, makes such devise, but doth not command the same to be put in writing, but another without the knowledge or commandment of the devisor, putteth it in writing in the life-time of the devisor, the same is a good devise; for it is sufficient, if the devise be reduced into writing during the life of the devisor.

2 Len. 35.

[80] Pasch. 25 Eliz. In the Common Pleas.

CXXI. Pepy's Case.

Waste was brought by F. and his wife against Pepy; and declared, that the said Pepy was seised, and enfeoffed certain persons to the use of himself for life, and afterwards to the use of the wife of the plaintiff, and her heirs: the defendant pleaded, that the said feoffment was to the use of himself and his heirs in fee, &c. absque hoc, that it was to the uses, as in the count; upon which they were at issue: and it was found by verdict, that the said feoffment was to the uses contained in the count; but further found, that the estate of the defendant by the limitation of the use was priviledged with the impunity of waste; scil. without impeachment of waste. It was moved, if upon that verdict, the plaintiff should have judgment. Anderson and Rhodes, Justices, conceived, that he should, for that the matter in issue is found for the plaintiff; and that is, the feoffment to uses contained in the count, and this impunity of waste is a foreign matter not within the charge of the jury; and therefore the finding of the same is but matter of surplusage: as if I plead a feoffment of J. S. to which the other pleads, that he did not enfeoff, and the jury find a conditional feoffment, the Court shall not respect the finding of the condition, for it was not in issue, and no advantage shall be ever had of such a liberty if it be not pleaded, 30 H. 8. Dyer 41. In dower, the tenant pleaded, ne unq; seisi que dower, &c. The tenant pleaded, that before the coverture of the demandant, one A. was seised, and gave the land whereof dower is demanded to the husband of the demandant in tail, who made a feoffment; a stranger took the demandant to wife, took back an estate in fee, and died seised, having issue inheritable: now although upon the truth of the matter she is not dowable de jure, yet forasmuch as the parties were at issue upon a point certain, no forrein, nor strange matter not in question betwixt the parties shall be respected in the point of judgment: but if the defendant had pleaded it in bar, he might have foreclosed the demandant of her dower. See 38 Ass. 27. 47 E. 19. In a præcipe quod reddat upon the default of the tenant, came one and shewed, how that the tenant who made default, was but tenant for life of the lands in demand, the reversion in fee to himself, and prayed to be received: the demandant counterpleaded the resceit, dicendo, that the tenant had fee, &c. upon which, issue was taken: and it was found, that neither the tenant, nor he who prayed to be received, had any thing in the land. And in that case, the Court did not regard the matter which was superfluous in the verdict: for [81] they were at issue upon a point certain; scil. whether the tenant was seised in fee: for it is confessed of the one side, and of the other, that he had an estate for life, and of that matter the jury was not charged, and they are not to enquire of that; and so it is found against the demandant, by which the resceit was granted. See 7 H. 6. 20. The parties were at issue upon a dying seised; which is found by verdict; but the jury find further, that the other party made continual claim: the said continual claim shall not be respected in point of judgment, because it was not pleaded in avoidance of the discent, &c. Windham, Justice, to the contrary, because it appeareth to us upon the verdict, that the plaintiff hath not cause of action, and therefore he shall not have judgment: as in detinue, the plaintiff declares upon a baylment by his own hands; the defendant pleads, ne detinue pas, the jury find the detinue but upon baylment by another hand: in that case notwithstanding that the detinue be found; yet the plaintiff shall not have judgment. But Anderson, Rhodes, and Periam conceived, that in the principal case judgment should be given for the plaintiff: for in no case the party shall have advantage of that liberty of impunity of waste, if he doth not plead it; and the jurors are not to meddle with any matter which is not in issue; and if they do, it is but matter of surplusage, and to no purpose; and afterwards, judgment was given for the plaintiff. See the number roll, Pasch. 25 Eliz. Rot. 602.

PASCH. 20 ELIZ. IN THE COMMON PLEAS.

CXXII. SKIPWITH'S CASE.

In an action of trespass: it was found by a special verdict; that the lands were copy-hold lands. That the custom of the mannor was, that quælibet fœmina viro co-operta poterit devise lands, of which she was seised of an estate of inheritance in fee simple according to the custom to her husband, and also surrender the same in the presence of the steward and 6 other of the tenants. And it was further found, that one J. S. was seised of the copy-hold lands, wherein the trespass was; and that he had issue 2 daughters and died seised of the said lands: and that after his decease his two daughters entred into the said lands, and afterwards, they both took husbands: and that afterwards, one of the said daughters made a will in writing, and by her said will, in the presence of the steward, and six of the tenants, she devised her part of the said copy-hold lands to her husband and his heirs; and at the next court, surrendred the said copy-hold lands in the presence of the steward and six other of the tenants, to the uses in her will expressed, and shortly after she died; and that after her death, **[82]** her husband was admitted to the said part of her lands: who continued the possession thereof; and the husband of the other daughter and his wife entred upon him: upon whom, he re-entred; and the husband brought trespass. This case was argued at the Bar, by Rhodes: and he said, that the custom was not good; neither for the devise, nor for the surrender. First, for the incertainty of the estate, what estate she might devise, for that is not expressed in the custom; but generally that she might devise her copyhold lands of inheritance, without expressing for what estate. And secondly, the custom is not good; for that it is against reason, that the wife should surrender to the use of her husband; and that a custom to devise is not good where it is incertain, he vouched many cases; as 13 E. 3. tit. Dum Fuit infra Ætatum. 3. The tenant said, that the lands lay in the county of Dorset, where the custom is, that an enfant might make a grant or a feoffment when he could number 12d. and because it is incertain when he could do it, it was holden to be a void custom. So 19 E. 2. tit. Gard. 127. In a ravishment of ward, it was alledged, that the custom was, that when an enfant could measure an ell of cloath, or number 12d. that he should be out of ward; and it was holden to be a void custom for the incertainty: also he said, that in the principal case, the custom was void; for that it was against reason, that the wife should surrender to her husband; for every surrender is a gift; and a woman cannot give unto her husband; for the wife hath not any disposing will, but the will of her husband only. And therefore the case is in 21 E. 3. that if the husband be seised of lands in the right of his wife; and he maketh a feoffment in fee of the lands, and the wife being upon the lands doth disagree, and saith, she will not depart with the land during her life; yet the feoffment is a good feoffment, and shall bind the wife during the life of the husband. And see 3 E. 3. Br. tit. Devise, 43. that a feme covert cannot devise to her husband, for that should be the act of the husband to convey the lands to himself. And whereas the case in 29 E. 3. was objected against him, where the case was, that a woman being seised of land devisable, took a husband, and had issue by him; and the wife devised her lands to her husband for his life, and died; and a writ of waste was afterwards brought against him: and it was there holden, that the writ did lie. He said, that that case did make rather for him than against him, for that case proves, that the husband did not take the land by vertue of the devise in his own right; but that he held the lands having issue by the wife as tenant by the courtesie, and so under another title; and therefore it appeareth, that the writ of waste was there brought against him as tenant by the courtesie. Also he said, that the devise was void by the statute of 34 H. 8. cap. 5. where it is enacted, that wills and testaments made of any lands, tenements, &c. **[83]** by women coverts shall not be good or effectual in the law; and he said, that that statute did extend to copyhold lands: but as to that, all the justices did agree, that copyhold lands were not within the words of that statute. But Anderson said, that the equity of that Act did extend to copyholds: and further Anderson said, that the prescription or custom in the principal

case was not good; for it is layed to be, that quælibet fœmina viro co-operta poterit, and it ought to be potest; and by the custom have used to devise to the husband: and a prescription must be in a thing done, and not in posse. Also he said, that the custom if it were good, is not well pursued; for the custom is, that she may devise and surrender in the presence of the steward and six tenants, and that must be intended to be done all at one time; for the words of a custom are to be performed, if it may be: but in the principal case, the devise is laid to be at one time, and the surrender at another time, and so it is not in pursuance of the custom: but to that it was not answered. But then it was said, admit that the custom to devise, and the devise were not good; yet the action did not lie against the defendant, because that the husband was admitted, and his entry into the land was countenanced by a lawful ceremony; and also he was tenant in common with the other husband by such entry. It was adjourned.

Godbolt 14, 143. Co. of Copyholds 94.

MICH. 26 ELIZ. IN THE KINGS BENCH.

CXXIII. ROSSE'S CASE.

In trespass brought by Rosse, for breaking of his close, and beating of his servant, and carrying away of his goods: upon not guilty pleaded, the jury found this special matter; scil. that Sir Thomas Bromley, Chancellor of England, was seised of the land where, &c. and leased the same to the plaintiff and one A. which A. assigned his moyety to Cavendish; by whose commandment the defendant entred. It was moved, that that tenancy in common betwixt the plaintiff, and him in whose right the defendant justified, could not be given in evidence; and so it could not be found by verdict, but it ought to have been pleaded at the beginning. But the whole Court were clear of another opinion; and that the same might be given in evidence well enough. It was further moved against the verdict, that the same did not extend to all the points in the declaration, but only to the breaking of the close, without enquiry of the battery, &c. And for that cause, it was clearly holden by the Court, that the verdict was void; and a venire facias de novo was awarded.

Post. 94.

[84] MICH. 25 & 26 ELIZ. ROT. 479. IN THE KINGS BENCH.

CXXIV. ABSOLON AND ANDERTONS CASE.

William Absolon master of the Savoy, and the chaplains there, brought debt against Anderton; the case was, that the said master and chaplains leased lands to the defendant for certain years; and afterwards he accepted of them an indenture of bargain and sale to him and his heirs, by express words of bargain and sale, without other words; and one of the Masters of the Chancery within the 6 months came unto them into their chapter-house, and before him they acknowledged the said indenture to be their deed, and prayed that it be enrolled; which was done accordingly. It was moved, if that acknowledgment and enrollment were good or not; or if the master and the chaplains ought to have appointed one by their warrant, to be their attorny, to acknowledge the said deed? and it was also moved, if there needed any enrollment at all of it, because Anderton had then an interest in the land for years; in which case it is to be considered, if the words barganizavi & vendidi, shall be of such effect, as the words dedi & concessi? And it was said by the Court, that a warrant of attorny to acknowledge a deed were a strange thing. And it was agreed, that the indenture being once inrolled, it was not material by what means it was inrolled; but was good being done.

1 Len. 184.

MICH. 26 ELIZ. IN THE KINGS BENCH.

CXXV. SAVELL AND BADCOCKS CASE.

Savell brought an action of trespass against Badcock, and declared, that Edw. Savell was seised of the mannor of D. and leased the same for years to Henry Savell, who died, having made the plaintiff his executor, who entred, and was possessed until the first day of January, at which time the trespass was done. The defendant pleaded, not guilty. And it was given in evidence on the plaintiffs part, that the said Ed. Savell was seised, and leased to the said Henry Savell for years, who so possessed, reciting the said lease, demised the said manor to Sir William Cordell, Master of the Rolls, to have to him immediately after the decease of the said Henry for so many years of the said term which at the time of his death should be unexpired, if Dorothy the wife of the said Henry should so long live: Henry died, Sir William Cordell entred; Dorothy died within the term; the plaintiff the executor of Henry entred, and was possessed until the first day of Januarii, 23 Eliz. at which day the trespass was done. On the defendants part it was given in evidence, that [85] after the grant to Sir William Cordell, the said Henry and Edward joyned in a fine sur conusans de droit, &c. to a stranger, who granted and rendred the land to the said Henry and his heirs, who devised the same to the said Dorothy his wife for life, the remainder to Cordell Savell in tail, the remainder over, and died; Dorothy entred, and died; Cordell Savell, 22 Eliz. conveyed the mannor by fine to one Williamson, who entred; and afterwards and before the trespass aforesaid, viz. 14 January, 23 Eliz. leased to the defendant for years, by force of which the defendant entred. And upon this evidence, there was a demurrer in law. And it was argued by Shuttleworth, who was made serjeant the last term. And he said, that the demise made by Henry Savell is not in the inconveniency of the maxim, that Henry by the said grant should reserve a lesser estate to himself, than he had before; for here by this grant, no present interest passeth by Sir William Cordell, but the effect of the grant rests upon a contingency; scil. if he himself dieth within the term, &c. until which time the whole interest of the term doth remain, in the said Henry Savell subject to the contingency aforesaid, and amounts to so much; as if the said Henry had granted the same to Sir William Cordell, if he himself should die within the term: in which case, it is a limitation when the said grant shall take effect. As if I grant unto you my lease for so many years as J. S. shall name, the same is a good grant to take effect upon the naming of J. S. Then the case being so, when Henry Savell the lessee, and Edward Savell the lessor joyn in a fine, ut supra, now the possibility of the remnant of the term which upon the death of Henry Savell and Dorothy his wife within the term might accrue to the executors of the said Henry Savell, is not extinct by the fine, but doth remain quodam modo in Henry Savell, to vest in his executors, if it should happen; and here is not any conclusion by the fine in this case; for Henry at the time of the fine had not in him any interest, which is now claimed, and so cannot be bound by the fine: for the interest in respect of which the plaintiff hath cause of action, beginneth after the death of Henry who levied the fine; and first accrueth to his executors, and so shall not be touched by the fine: and therefore if such a lessee for years granteth his term to J. S. proviso, that if J. S. dieth within the term, that he himself shall have it again; and afterwards the grantor joyns with his lessor in a fine, and afterwards within the term J. S. dieth, now the grantor notwithstanding the fine shall have the residue of the term; then when the conusee by the fine regrants the land to Henry in fee, that possibility to have after the death of the donor cannot be drowned in the fee-simple for the reason aforesaid; and then when Henry deviseth the same to his wife, that possibility doth pass to Dorothy, because it was never in the devisor; and then when Dorothy dieth within the term, the residue of the said term shall accrue to the plaintiff as executor of [86] Henry. Cook, contrary, and he held, the grant to Sir William Cordell is utterly void; and he agreed, that grants although in themselves they be uncertain; yet if they may be reduced to certain, they are good: but here is no expectance of any certainty in the life of Henry; for the term limited to Sir William Cordell, is not to begin till the death of Henry, and

is to end upon the death of Dorothy, so as here is not any certain beginning, nor certain end; and here this grant cannot be reduced to any certainty during the life of the grantor, and so for that cause is void, see Plow. Com. 6. Eliz. Say and Fullers case, 273. by Weston, Justice, If A. makes a lease for so many years as J. S. shall name, if J. S. in the life of A. name a certain number of years, then the lease is good; but if the lease had been for so many years as my executors shall name, that can never be made good in my life; and upon that reason it is, that an attornment ought to be made in the life of the grantor, or else no reversion shall pass. So 33 E. 3. Entry 79. A bishop aliens, and after his death, the dean and chapter confirms, it is a void confirmation. And 7. E. 6. Br. Grants, 154. A man possessed of a lease for 40 years, grants so many of the said years which shall be to come at the time of his death, it is a void grant for the incertainty. Afterwards, Shuttleworth moved another point, viz. The plaintiff hath declared of a trespass done, 1 Januarii, 23 Eliz. The defendant shews in evidence, a lease for years to him made 14 Januarii, the same year, which is 13 days after the trespass whereof the plaintiff hath declared, and it shall not be intended that the plaintiff had another title than that which he hath alledged; and forasmuch as he hath not disclosed in himself any title tempore transgressionis the plaintiff should punish him in respect of his first possession without any other title. And although it may be objected, that where the defendant hath given in evidence, that Williamson leased to the defendant, that is not sufficient; and the words subsequent 14 Januarii, are void as a nugation and matter of surplusage; truly, the law is contrary; for rather those words ante transgressionem shall be void, because too general, and shall give way to the subsequent words after the videlicet, because they are special and certain: as the case late adjudged; the Archbishop of Canterbury leased three parcels of land, rendring rent of 8l. per annum; viz. for one parcel, 5l. for another, 50s. and for the third, 40, which amounts to 9l. 10s. It was adjudged, that the videlicet, and the words subsequent concerning the special reservation of the rent, was utterly void, because contrary to the premisses, which were certain, viz. 8l. and that the fermor should pay but 8l. according to the general reservation: but in our case, the words precedent are general, i.e. ante transgressionem, and therefore the words subsequent, which are special and certain, shall be taken, and the general words rejected; as in the trespass, the defendant pleads, that A. was seised of the land where, and held it of **[87]** the defendant; and that the said A. 1 die Maii, 6 Eliz. aliened the said land in mortmain, for which he (within a year after) viz. 4 Maii, anno 7 Eliz. entred, now the same is no bar; for upon the evidence it appeareth, that the lord hath surceased his time, and the words, (within the year) shall not help him, for they are too general; and therefore, at the subsequent words (viz. &c.) Cook on the defendants part took exception; for it appeareth here upon the evidence of the defendant, which is confessed by the demurrer of the plaintiff, that upon this matter the plaintiff cannot punish the defendant for this trespass; for he was not an immediate trespassor to the plaintiff; for the plaintiff hath declared upon a trespass done 1 Januarii, 23 Eliz. And it is given in evidence on the part of the defendant, and confessed by the plaintiff, &c. that 22 Eliz. Cordell Savell levied a fine to Williamson, by force of which the said Williamson entred, and was seised; and so seised, 14 Januarii, 23 Eliz. leased to the defendant: now upon this matter the plaintiff cannot have trespass, but the defendant; for Williamson was the immediate trespassor to him; for he entred 22 Eliz. And at length, after deliberation had of the premisses by the Court, the Court moved the plaintiff to discontinue his suit, and to bring de novo a new action, in which the matter in law might come into judgment without any other exception. But the plaintiff would not agree to it. Wherefore it was said by Wray, Chief Justice, with the consent of his companions, Begin again at your peril; for we are all agreed, that you cannot have judgment upon this action.

CXXVI. Mich. 26 Eliz. In the Kings Bench.

The case was; A. made a feoffment in fee to the use of his younger son in tail; and after to the use of the heirs of his body in posterum procreand. and at the time of the feoffment he had issue two sons; and after the feoffment had issue a third son:

the younger son died without issue, upon a motion at the Bar, it was said by Wray, Justice, that after the death without issue of the second son, the land should go to the third son born after the feoffment, for this word (in posterum) is a forcible word to create a special inheritance; without that, it had been a general tail.

[88] MICH. 26 ELIZ. IN THE KINGS BENCH.

CXXVII. SMITH AND SMITH'S CASE.

Lambert Smith executor of Tho. Smith, brought an action upon the case against John Smith, that whereas the testator having divers children enfants, and lying sick of a mortal sickness, being careful to provide for his said children enfants; the defendant in consideration the testator would commit the education of his children, and the disposition of his goods after his death during the minority of his said children, for the education of the said children to him, promised to the testator, to procure the assurance of certain customary lands to one of the children of the said testator; and declared further, that the testator thereupon constituted the defendant overseer of his will, and ordained and appointed by his will, that his goods should be in the disposition of the defendant, and that the testator died, and that by reason of that will, the goods of the testator to such a value came to the defendants hands to his great profit and advantage. And upon non assumpsit pleaded, it was found for the plaintiff: and upon exception to the declaration in arrest of judgment for want of sufficient consideration, it was said by Wray, Chief Justice, that here is not any benefit to the defendant, that should be a consideration in law, to induce him to make this promise; for the consideration is no other, but to have the disposition of the goods of the testator pro educatione liberorum: for all the disposition is for the profit of the children; and notwithstanding, that such overseers commonly make gain of such disposition, yet the same is against the intendment of the law, which presumes every man to be true and faithful if the contrary be not shewed; and therefore the law shall intend, that the defendant hath not made any private gain to himself, but that he hath disposed of the goods of the testator to the use and benefit of his children according to the trust reposed in him. Which Ayliffe, Justice, granted. Gawdy, Justice, was of the contrary opinion. And afterwards by award of the Court, it was, that the plaintiff nihil capiat per billam.

[89] MICH. 26 ELIZ. ROT. 495. IN THE KINGS BENCH.

CXXVIII. AMNER AND LUDDINGTON'S CASE.

A writ of error was brought in the Kings Bench by Amner against Luddington, Mich. 26 Eliz. Rot. 495. And the case was, that one Weldon was seised, and leased to one Peerepoint for 99 years, who devised the same by his will in this manner: viz. I bequeath to my wife the lease of my house during her life; and after her death, I will it go amongst my children unpreferred. Peerepoint died, his wife entred, and was possessed virtute legationis prædictæ, and took to husband one Fulsehurst, against whom Beswick recovered in an action of debt 140l. upon which recovery, issued a scire facias; and upon that a vendit' exponas; upon which the sheriff sold the term so devised to one Reynolds: Fulsehurst died; his executor brought error, and reversed the judgment given against the testator at the suit of Beswick; the wife re-entred, sold the term, and died; Alice a daughter of Peerepoint, unpreferred, entred: and upon this matter found by special verdict in the Common Pleas; the entry of Alice was adjudged lawful. Upon which judgment, error was brought in the Kings Bench: and it was argued upon the words of the devise, because here the lease is not devised, but all his interest in the thing devised: and it is not like to the case between Weldon and Elkington, 20 Eliz. Plow. Com. 519. where the case was, that Davies being lessee for years, devised, that his wife should have and occupy his land demised for so many years as she should live. Nor unto the case betwixt

Paramour and Yardley, 21 Eliz. Plow. Com. 539. for there the lessee devised, that his wife should have the occupation and profits of the lands, until the full age of his son; for in those cases, the land it self is quodam modo devised: but in our case, all the estate is devised; i.e. the lease it self. And also in those two devises, a certain person is named in the will, who should take the residue of the term which should expire after the death of the wife; but in the case at Bar, no person in certain is appointed, &c. but the devise as to that is conceived in general words, children unpreferred; ergo, neither any possibility, nor any remainder is in any person certain; therefore all the whole term is intirely in the wife, and then she may well dispose the whole. But the whole Court was to the contrary, and that in this case the possibility should rise well enough upon the death of the wife, to the daughter Alice unpreferred. Another point was moved; if the said term being sold in the possession of the wife of the devisor, by force of the execution aforesaid; if now the judgment being reversed, the sale of the term should be also avoided; for now the party is to be restored to all that which he had lost. And by Cook it was **[90]** argued, that notwithstanding the reversal of the judgment, the sale should stand; for the judgment for the plaintiff in a writ of error is, that he shall be restored to all that which he lost ratione judicii prædict. and the judgment was, that the plaintiff should recover 140l. and therefore by the judgment in the writ of error, he shall be restored to so much; but the mean act, scil. the sale of the lease shall stand, and shall not be defeated and avoided: as 7 H. 6. 42. A statute staple is bailed in Owel Mayn, the conusee brings debt against the bailee, and hath judgment to recover the statute, and upon that suit he had execution, and the bailee brought a writ of error to reverse the judgment in detinue, yet the execution shall stand, and an audita querela doth not lie for the conusor. And see 13 E. 3. Fitz. tit. Bar. 253. Accomptant found in arrearages, committed to the goal, escaped; and reversed the judgment given against him in the accompt ex parte talis: yet an action upon the escape did lie. And as to that point, the whole Court was of the same opinion with Cook: but that point did not come in judgment: for by the sale, nothing passed but the interest in præsenti which was in the wife of the devisor, but the possibility to the children unpreferred was not touched by it. And afterwards the judgment was affirmed.

2 Len. 92. 8 Co. 96.

HILL. 26 ELIZ. IN THE COMMON PLEAS.

CXXIX. BUNNY AND BUNNY'S CASE.

In an action of covenant between Bunny and Bunny, the plaintiff declared, that the defendant had covenanted to find unto the plaintiff, meat and drink at the house of the defendant. The defendant pleaded, that he was always ready to find the plaintiff meat and drink, if he had come to his house to have taken it, et de hoc ponit se super patriam: and it was found for the plaintiff; and in this case, the Court awarded, that the parties should replead; for in all cases where the defendant pleads matter of excuse not contained in the declaration as here, he shall say, et hoc paratus est verificare, in the perclose of his plea: but if the defendant had pleaded, that he had given the plaintiff according to the covenant, meat and drink, then the conclusion of his plea had been good, et de hoc ponit se super patriam, &c.

[91] CXXX. HILL. 26 ELIZ. IN THE KINGS BENCH.

In an action upon the case, supposing certain goods to have come to the hands of the defendant, and that he had wasted them, and shewed in what manner: the defendant pleaded not guilty; and it was found by verdict, that the goods, &c. came to the defendants hands, and that he had wasted them, but in another manner than the plaintiff had declared: it was the opinion of the whole Court, that upon this verdict, the plaintiff should not have judgment. As in an action of trespass, the plaintiff declared, that the defendant had distrained his horse, and travelled riding

upon him; and the jury found, that the defendant did distrain the horse, and killed him; in that case, it was holden, the plaintiff should not have judgment. So in an action upon the case, the plaintiff declares upon a promise upon one consideration, and the jury find the promise, but that it was upon another consideration; in such case, the plaintiff shall not have judgment. Adjudged for the defendant.

PASCH. 26 ELIZ. IN THE COMMON PLEAS.

CXXXI. MERRY AND LEWES'S CASE.

Merry brought an action upon the case against William Lewes, executor of David Lewes late master of St. Katherines juxta London; and declared, that the said David, in consideration, that whereas quædam pars domus fratrum & sororum Sanctæ Katherinæ fuit vitiosa & in decasu, the said Merry ad requisitionem dicti Davidis repararet eandem, promised to pay the said Merry all such monies as the said Merry expenderet in such reparations. And declared further, that eandem partem domus prædict. reparavit, &c. And upon non assumpsit, it was found for the plaintiff. It was objected in arrest of judgment, that the declaration is too general, quædam pars domus; for the plaintiff ought to have shewed especially what part of the house in certainty, as the hall, chamber, or other rooms: but the exception was disallowed. Another objection was, because he set forth in the declaration, that the plaintiff ad requisitionem dicti Davidis repararet; and the plaintiff declares, that reparavit generally, without saying, that ad requisitionem Davidis reparavit: and that is not the reparation intended in the consideration, i.e. reparatio ad requisitionem, &c. but a reparation of his own head, and at his pleasure. And for this cause, the judgment was stayed.

2 Len. 53. 2 Cro. 404.

[92] PASCH. 26 ELIZ. IN THE COMMON PLEAS.

CXXXII. WRENNAM AND BULLMAN'S CASE.

Wrennam brought an action upon the statute of 1 & 2 Phil. & Mar. against Bullman, for unlawful impounding of distresses; and was nonsuit; it was moved by Shuttleworth, Serjeant, if the defendant should have costs upon the statute of 23 H. 8. And it was adjudged, that he should not; and that appears clearly upon the words of the statute, &c. for this action is not conceived upon any matter which is comprised within the said statute; and also the statute upon which this action is grounded, was made after the said statute of 23 H. 8. which gives costs; and therefore the said statute of 23 H. 8. and the remedy of it cannot extend to any action done by 1 & 2 Phil. & Mary. And Rhodes, Justice, said, it was so adjudged in 8 Eliz.

2 Len. 52. 1 Len. 282.

CXXXIII. MICH. 26 ELIZ. IN THE KINGS BENCH.

In a formedon of a mannor, the tenant pleaded joynt-tenancy by fine with J. S. The demandant averred the tenant sole tenant as the writ supposed; and upon that it was found and tryed for the demandant: upon which a writ of error was brought; and error assigned in this, because where joynt-tenancy is pleaded by fine, the writ ought to have abated, without any averment by the demandant against it, and the averment had been received against law, &c. Shuttleworth, at the common-law, If the tenant had pleaded joynt-tenancy by deed, the writ should have abated, without any averment; but that was remedied by the statute of 34 E. 1. But joynt-tenancy by fine doth remain as it was at the common law; for he hath satis supplicii, because by his plea, if it be false, he hath by way of conclusion given the moyety of the land in demand to him with whom he hath pleaded joynt-tenancy: and the

law shall never intend that he would so sleightly depart with his land for the abatement of a writ. As in a præcipe quod reddat, the tenant confesseth himself to be a villein of a stranger, the writ shall abate without any averment free, and of free estate; for the law intends, that the tenant will not inthral himself without cause. Wray, to the same purpose; But the demandant may confess and avoid the fine; as to say, that he who levied the fine, was his disseisor, upon whom he hath before entred. And if the tenant in feesimple be impleaded, and he saith, that he is tenant for life, the remainder over to A. in fee, and prayeth in aid of A. the demandant shall not take averment, that the tenant at the time of the writ brought was seised in fee.

Note: in this formedon, joynt-tenancy was pleaded but as **[93]** to parcel; and it was holden by Wray and Southcote, that the whole writ should abate, the whole writ against all the defendants. And so where the demandant enters into parcel of the land in demand, if the thing in demand be an entire thing, the writ shall abate in all. In this writ, the demandant ought to have averred in his writ an especial foreprise of the land parcel of the land in demand whereof the joynt-tenancy by the fine is pleaded: for this dismembring of the mannor and distraction of the land of which the joynt-tenancy is pleaded, is paravail and under the gift whereof the formedon is conceived; and therefore in respect of the title of the demandant, it remains in right parcel of the mannor, and therefore ought to be demanded accordingly with a foreprise. But if A. giveth unto B. a mannor, except 10 acres in tail, there, if after upon any discontinuance, the issue in tail is to have a formedon; in such case, there needs not any foreprise for the said 10 acres, for they were severed from the mannor upon the gift: but if lands in demand be several, as 20 acres, except 2 acres, this foreprise is not good. See Temps E. 1. Fitz. Brief, 866. Præcipe, &c. unam bovatum terræ forprise, one sellion, and the writ was abated, for every demand ought to be certain: but a sellion is but a parcel of land uncertain as to the quantity; in some places an acre, in some more, in some less. Another point was, because the tenant hath admitted, and accepted this averment; scil. sole tenant as the writ supposeth and the question was, if the Court, notwithstanding the admittance of the tenant, ought without exception of the party ex officio, to abate the writ? And it was the opinion of Wray, Chief Justice, that it should: for it is a positive law, as if a woman bring an appeal of murder upon the death of her brother, and the defendant doth admit it without a challenge or exception, yet the Court ought to abate the appeal, 10 E. 4. 7. See the principal case there, non ideo puniatur dominus, &c. And if an action be brought against an hostler upon the common custom of the realm, and in the writ he is not named common hostler, yet the Court shall abate the writ ex officio. See 11 H. 4. and 38 H. 6. 42.

2 Len. 161. Dyer 291.

CXXXIV. Mich. 26 Eliz. In the Common Pleas.

A. seised of lands in the right of his wife for the term of the life of the wife, made a feoffment in fee to the use of his said wife for her life; it was holden in that case, that the wife was remitted. And it is not like Amy Townsends case, Plow. Com. 1 & 2 Phil. and Mar. 111. For in the said case the entry of the wife was not lawful, for she was tenant in tail; which estate was discontinued by the feoffment of her husband. And Periam, Justice, cited a case, Sidenham's case; Bacon seised in the right of his wife for the term of the life of the wife; they both surren-**[94]**-dred, and took back the lands to them and a third person: and it was holden, that the wife was not presently remitted, but after the death of her husband she might disagree to the estate.

Mich. 26 Eliz. In the Common Pleas.

CXXXV. Harper and Berrisford's Case.

In a writ of partition, the defendant demanded judgment of the writ, because the writ is quare cum A. teneat, &c. pro indiviso, &c. 4 mille acras; whereas it should be,

quatuor mille acrarum. And many grammarians were cited; all which agreed, that it was good both ways; viz. mille acras, or mille acrarum. And Rhodes, Justice, said, that Cowper, in thesauro suo linguæ Latinæ, saith, Quod mille fere jungitur genitivo, ergo non semper. Wherefore Anderson, with the assent of the other justices, ruled, that the defendant should answer over.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

CXXXVI. HERING AND BADLOCK'S CASE.

In a replevin, the defendant avowed for damage-feasant; and shewed, that the Lady Jermingham was seised of such a mannor whereof the place where, &c. and leased the same to the defendant for years: the plaintiff said, that long time before, King Henry 8th was seised of the said mannor, and that the place where, &c. is parcel of the said mannor demised and demiseable by copy, &c. and that the said King by such a one his steward, demised and granted the said parcel to the ancestor of the plaintiff, whose heir he is by copy in fee, &c. And upon that there was a demurrer, because by this bar to the avowry, the lease set forth in the avowry is not answered; for the plaintiff in bar to the avowry, ought to have concluded; and so was he seised by the custom, until the avowant prætextu of the said term for years, entred, &c. And so it was adjudged.

2 Len. 80.

MICH. 26 ELIZ. IN THE KINGS BENCH.

CXXXVII. ROSSE'S CASE.

In trespass brought by Rosse, for breaking of his close, and beating of his servant, and carrying away of his goods: upon not guilty pleaded, the jury found this special matter; scil. that Sir Thomas Bromley, Chancellor of England, was seised of the land where, &c. and leased the same to the plaintiff and one A. which A. assigned his moyety to Cavendish; by whose commandment the defendant entred. It was moved, that that tenancy in common betwixt the plaintiff, and him in whose right **[95]** the defendant justifies, could not be given in evidence; and so it could not be found by verdict, but it ought to have been pleaded at the beginning. But the whole Court were clear of another opinion; and that the same might be given in evidence well enough. It was further moved against the verdict, that the same did not extend to all the points in the declaration, but only to the breaking of the close, without enquiry of the battery, &c. And for that cause, it was clearly holden by the Court, that the verdict was void; and a venire facias de novo was awarded.

Ante 83.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

CXXXVIII. GURNEY AND SAERS CASE.

An ejectione firmæ was brought by Gurney against Saer; who pleaded, that Verney was seised, and leased the same to Baker for 21 years, 8 Eliz. Baker, 14 Eliz. assigned his interest to Rolls; who, 15 Eliz. leased the same to Topp for 10 years; and afterwards Rolls granted the residue of his term to A. Verney, 16 Eliz. leased the same land to Stephen Gurney for 21 years, to begin after the determination, surrender, or forfeiture of the first lease, rendring rent, with clause of re-entry; and afterwards Verney granted over the reversion in fee to Hampden; to which grant, A. and Topp attorned; Topp leased to B. at will; A. and Topp surrendred; B. held himself in by force of the tenancy at will: and the said surrender was made privily and secretly, without the notice of the said Stephen Gurney; the rent reserved upon the lease made to Stephen Gurney is demanded, as now begun by the said surrender. Hampden entred as for the condition broken for the non-payment of the said rent: and the lease made to the said Stephen Gurney was pleaded, quod prædictus Johannes Verney

per indenturam suam sigillo ipsius Stephani Gurney sigillat. demisit, &c. And that was holden a material exception; for here upon the matter doth not appear any lease made by Verney. For here upon the pleading it appeareth, that Verney had accepted a deed of Gurney, purporting a demise by Verney to Gurney, which Gurney had sealed; but there did not appear any such deed sealed by Verney, and therefore no lease ut supra. And although a condition may be pleaded by indenture sealed with the seal of the other party, yet a conveyance cannot be pleaded by deed as it is here, unless sealed with the seal of the party agent; scil. the feoffor, grantor, lessor: and for that cause, judgment was given for the plaintiff. Another exception was taken, because that after the grant of the reversion by Verney to Hampden, the surrender of A. and Topp is pleaded; whereas A. ought not to surrender; for his estate was not a reversion for years, but a lease in reversion, and a lease for years to begin at a day to come, which could not be surrendred. See [96]. 4 H. 7. 10. But if A. had granted his interest by way of reversion, where attornment had been, as one releaseth to him the reversion for years, it is good; contrary to him who hath a lease in reversion. But as to that, it was said by the Court, that this surrender by A. was good enough, for in as much as the interest which A. had at the time of the surrender was in Rolls a reversion after his grant to Topp, and there it remained and continued in its nature as to that point; notwithstanding that by the grant it passed in another manner, than as a reversion. Another exception was taken, because that in the pleading of the surrender, it is not alledged, that at the time of the surrender, Hampden was seised of the reversion. 7 E. 3. 3. He who claims by cestuy que use, ought to alledge the seisin and continuance of seisin to the said use at the time of the feoffment or grant, notwithstanding that seisin was alledged before. And 10 H. 7. 28. Hewbade's Avowry, he there pleaded, that A. was seised of a mannor, and thereof levied a fine to B. & that C. the tenant upon whom the avowry was made, attorned, &c. And exception taken, because it is not shewed in the avowry, that B. the conusee was seised of the mannor at the time of the attornment. And it was holden a good exception. On the other side it was said, and affirmed by the Court, that in all cases where an inheritance is once alledged in a man, the law shall presume the continuance of it there, until the contrary be shewed. See 1 Eliz. the case between Wrotesley and Adams, Plow. Com. 193. And 15 Eliz. between Smith and Stapleton, Plow. 431. Which Wray and Gawdy, Justices, granted: Ayliff, Justice, to the contrary. Another point was moved, if upon this secret surrender notice ought to have been given to Gurney, who had an interest for years to begin upon the said surrender; for some conceived, that Gurney, without notice given him of the said surrender, should not be prejudiced by the condition aforesaid. And of that opinion clearly was Wray, Chief Justice.

Note, in this case, that Saer, the defendant, presently after the judgment entred, cast in a writ of error into the Court; and assigned an error in fact; scil. that Gurney the plaintiff in the first action within age, appeared by attorny; whereas he ought by gardein or prochein amy. And it was the opinion of the justices upon the first motion, that that matter could not be assigned for error; for it is not within the record, and we cannot reverse our own judgment, but only for matter of process. See for that, Fitzh. Na. Br. 21. f.

[97] PASCH. 26 ELIZ. IN THE KINGS BENCH.

CXXXIX. PARTRIDGE AND POOLES CASE.

Trespass of battery was brought by Partridge against Poole, and supposed the battery at D. in the county of Middlesex; the defendant justified by reason of an assault at S. in the county of Gloucester, absq; hoc, that he beat the plaintiff at D. in the county of Middlesex: upon which traverse, the plaintiff did demur in law. It was argued by Popham the Queens Attorny General, that the traverse of the county is good: and he put the case of 21 H. 6. 8 & 9. In trespass of battery at D. in the county of York; the defendant justified by an assault at London in such a place in such a parish, &c. absq; hoc, that he was guilty de aliqua transgressione in comitatu

eborum. Upon which issued a venire facias into Yorkshire; and, as the book is, this traverse as to the county was taken with great deliberation. See also 22 E. 4. 39. And this traverse de jure ought to be allowed; for the jury in Middlesex are not bound to find the assault in the county of Gloucester. See 2 Mar. Br. Jurours, 50. In actions upon transitory matters, although they be layed in forreign counties, yet the jurors if they will, may thereof give their verdict, but they are not bound to do it. Egerton, Sollicitor General, to the contrary: and he put a difference, where the justification is local, and where transitory: as in false imprisonment, the defendant justifies as sheriff the taking of the plaintiff by force of a capias directed to him at D. within his county of G. Where the plaintiff declareth of an imprisonment in another county; there the traverse of the county is good, for the defendant cannot take the plaintiff by force of the said process in any other county than where he is sheriff; and so the justification is local, 11 H. 4. 157. But in our case, the matter of the justification is meerly transitory. And at last, after many motions, it was adjudged for the plaintiff. Gawdy, Justice, being of a contrary opinion: and by Wray, Chief Justice, clearly, The jurors upon pain of attaint, are to take notice of such a transitory thing done in another county. See 2 Mar. Br. Attaint, 104. 9 H. 6. 63.

2 Len. 79. 1 Cro. 842.

[98] PASCH. 26 ELIZ. IN THE COMMON PLEAS.

CXL. GERRARD'S CASE.

Gerrard, Master of the Rolls, presented Chatterton Bishop of Chester, to the church of Bangor; to which church also, one Chambers presented his clerk; by which several presentments, the same church became litigious: the Archbishop of York being Ordinary of the place, awarded jure patronatus, &c. depending which, the archbishop admitted the said bishop; upon which, the said Chambers libelled in the Spiritual Court, against the said bishop; for that the said archbishop prædicto episcopo plus æquo fidens, admisit dictum episcopum, pendente the jure patronatus; in which case by the law of the church, the admittance is void; for, pendente lite nihil movetur. And now came the said bishop, and upon this matter prayed a prohibition; and he had it, because that the right of the patronage came in debate. After which came the said Chambers, and prayed a consultation, because he medled not with the right of patronage, but only with the wrongful admittance. To whom it was said by the Court, that the awarding of the jure patronatus, is not a thing of necessity, but at the will of the Ordinary, and for his better instruction: but if he will at his peril take notice of the right of the patronage, he may receive which of them he will, without a jure patronatus awarded. And it may be, in this case, that after the jure patronatus awarded, and before any verdict given upon it, the archbishop was satisfied of the right of the now plaintiff in the prohibition to the patronage, and thereupon admitted the clerk; and by the clear opinion of the Court, the consultation was denyed.

2 Len. 168. 4 Len. 7.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

CXLI. RAMPSTON AND BOWMER'S CASE.

In an action upon the case, the plaintiff declared, that whereas the plaintiff occupied a brew-house; and whereas one Gilbert Bowmer was the beer-clark of it, and had the government and disposition of the beer brewed there, by reason whereof he became indebted to the plaintiff in such a sum; for which the plaintiff procured the said Gilbert to be arrested, and put into the prison of the Marshalsey; and whereas the said Gilbert in dicta prisona existente, the defendant tunc & ibidem in consideration that the said plaintiff would let the said Gilbert out of prison, promised, that if the said Gilbert should not accompt with the plaintiff, and pay him all the arrearages,

which upon such accompt should be found before such a day, that then the defendant would [99] pay it: upon which the said Gilbert was dismissed ad largum: and further declared, that no accompt had been made by Gilbert, or any other satisfaction. And upon non assumpit, the jury found, that the said Gilbert so endebted to the plaintiff, was arrested at the suit of the plaintiff; and that after, the defendant came unto the baily of the marshal who arrested the said Gilbert, and took upon him to the said baily, that the said Gilbert should be at the next Court holden for the said Marshalsey; by force and reason of which promise, the baily suffered the said Gilbert to go at large to his house, &c. and that after and before such Court, the defendant promised the plaintiff modo & forma, as the plaintiff had surmised in his declaration: and upon that verdict, the plaintiff could not have judgment; for here the consideration layed in the declaration is not found by the verdict; for Gilbert was discharged of the imprisonment before the promise of the defendant to the plaintiff: and the declaration is, that in consideration quod dictus Gilbertus ad largum dimitteretur, &c. And judgment was given quod querens nihil capiat per billam.

CXLII. Mich. 26 Eliz. In the Common Pleas.

One recovered certain copyhold lands in the court of the lord of the mannor by plaint in the nature of a writ of right: it was moved in the Common Pleas, if a precept might be made and awarded out of that Court for to execute the said recovery, and to put him in possession who recovered, with the posse manerii, as in such cases at the common law, with the posse comitatus. But it was clearly resolved, it could not be done; for force in such cases is not justifiable, but by command out of the Kings Courts.

Mich. 26 Eliz. In the Common Pleas.

CXLIII. Iplett and Williams's Case.

Iplett brought an action upon the case against Williams, and declared, whereas one J. had affirmed a plaint of debt against the plaintiff in the Queens court of her mannor of D. in the county of Cornwall; and demanded against him 100l. And whereas the defendant now plaintiff sued a corpus cum causa, &c. and delivered the same to the now defendant, being then under-steward of the said court, that notwithstanding that the now defendant proceeded to judgment, and awarded execution against the plaintiff and his sureties, by force of which the goods of the plaintiff and of his sureties were taken in execution; upon which declaration, the defendant demurred in law, because the judgment was given in a court-baron, which could not hold plea above the sum of 40s. And notwithstanding that [100] exception, and notwithstanding also that the action was brought against the under-steward, &c. the plaintiff had judgment to recover.

Pasch. 26 Eliz. In the Kings Bench.

CXLIV. Denton and Goddard's Case.

Debt was brought against Denton administrator of the goods and chattels of James Newton; and the plaintiff declared upon an obligation made to the intestate bearing date the 4th day of April, 24 Eliz. The defendant prayed oyer of the deed and condition; and then pleaded to the action: for he said, that the aforesaid James Newton, ante confectionem prædicti suppositi scripti, scilicet ultimo die Septembris 23 Eliz. apud N. obiit, and so non est factum, &c. The jury found, that the said deed was delivered by the intestate 3 July, 23 Eliz. in the life of the intestate, bearing date 24 Aprilis, 24 Eliz. before which day, the intestate died: and upon the whole matter, judgment was given for the plaintiff.

PASCH. 26 ELIZ. IN THE KINGS BENCH.

CXLV. LICHFIELD AND GAGE'S CASE.

In an ejectione firmæ the parties were at issue; and by order of the Court, the tryal was stayed: and yet the plaintiff against the order, obtained privily a nisi prius: upon which Gawdy, Justice, being informed of it after the term, awarded a supersedeas to the justices of assise, before whom, &c. And notwithstanding that, the enquest at the instance of the plaintiff, was taken, and found for the plaintiff. All this matter was shewed to the Court, in the Kings Bench, and there examined and proved; and it was ordered by the Court, that the verdict should not be entred of record, nor any judgment upon it: and so was it put in execution in a case between Vernon and Fowler. And then the counsel moved and took exception to the supersedeas, because it was not subscribed by the hand of Justice Gawdy. But it was not allowed, because his seal was sufficient.

2 Len. 167.

PASCH. 26 ELIZ. IN THE KINGS BENCH.

CXLVI. FULLER AND COOK'S CASE.

In an action upon the case, the plaintiff declared, that the defendant had informed one Tho. Colby a justice of the peace, that the plaintiff had stollen the defendants hoggs; by force of which, the said Colby ad querimoniam defendentis, made a warrant, and directed it to the constable of H. to apprehend **[101]** the plaintiff, and to bring him before the said Colby; by force of which, the plaintiff was arrested, and brought before the said Colby, and there was examined upon the said matter, and bound over by recognizance to appear at the next sessions, and there to answer; at which sessions he appeared; and proclamation was made, that if any one would inform against the plaintiff, &c. and none came; for which the plaintiff was discharged, and so by this matter he was discredited, &c. And all this matter was found by special verdict; and thereupon judgment was given for the plaintiff. And in this case the Court took a difference, where one whose goods are stollen comes to a justice of peace, and shews him the matter, and prays that the matter be examined, and that such a one is examined upon it; here in this case, no action lieth. But if such a person in such case will expresly say, that such a one hath stollen, &c. and procure a warrant from a justice of peace upon such surmise to arrest the party; upon such matter, an action upon the case will lie.

1 Roll. 111. Hob. 192.

TRIN. 26 ELIZ. IN THE EXCHEQUER.

CXLVII. THE QUEEN AND THE LORD LUMLEY'S CASE.

It was moved in the Exchequer, that Queen Mary seised of the rectory of D. granted advocationem ecclesiæ de D. If now by this grant, the advowson should pass as now disappropriate; or that the rectory it self should pass as appropriate; or that nothing at all should pass? And by Manwood, Chief Baron, the advowson shall not pass, but remain appropriate as it was before: for the church as it was appropriate by a judicial act, so without such an act it cannot be disappropriate. And he said, that by the grant of the said advowson, the rectory did not pass; for by the appropriation, the advowson was gone, and it was not in esse, and by consequence, could not be granted: and it is not within the Statute of 4 & 5 Philip & Mary, of Confirmations of Grants of the King; for the said statute helps not, but misrecital, misnaming, &c. But here there is not such a thing in rerum natura, as the patentee pretends to be passed by the letters patents; and if it were in the case

of a common person, nothing should pass; as it was adjudged in Sands case, 11 Eliz. And he said, that at this time a parsonage might be disappropriated; but that ought to be by a judicial act; as by presentment, and not by any private act of the proprietor: and so he said, a church was disappropriated by the Lord Dyer, by a presentment which of late he made to it.

2 Len. 80. Hob. 304.

[102] MICH. 26 ELIZ. IN THE KINGS BENCH.

CXLVIII. COX'S CASE.

In debt upon an obligation against Cox, the case was; A parson made a lease for years, and became bounden to the lessee, to perform the covenants in the lease: the defendant pleaded, that the lease is void, by the statute of 14 Eliz. because he was absent from his benefice above the space of 80 days; part of which time encurred depending the action, and before the plea was pleaded: it was the opinion of the Court, that the plea was good. But exception was taken to the pleading; the defendant saith, that the said church is a parochial church cum cura animarum, but doth not say, that it was so at the time of the lease and obligation made: for it may be, that at the time of the lease there was a vicar; and then it was not cura animarum. And afterwards upon that exception, judgment was given for the plaintiff.

PASCH. 26 ELIZ. IN THE KINGS BENCH.

CXLIX. WROTH AND CAPELL'S CASE.

The case was; A. was indicted upon the statute of 8 H. 6. and exception was taken to the indictment, because no word of freehold was in it; or to prove, that the party grieved had any freehold whereof he might be disseised. But because the words of the indictment were, Expulit & disseisivit, which could not be true, if the party expelled and disseised had not freehold; the exception was disallowed. Another exception was taken to the indictment; for these words, In unum tenementum intravit; and this word tenementum, is too general, and an uncertain word; and therefore as to that, the party was discharged. But the indictment was further, In unum tenementum & decem acras terræ eidem pertinent. And therefore as to the 10 acres, the party was enforced to answer.

4 Len. 197.

[103] CL. PASCH. 26 ELIZ. IN THE COMMON PLEAS.

A. granted to B. a rent-charge out of his lands, to begin when J. S. died without issue of his body; J. S. died, having issue; which issue died without issue. Dyer said, The grant shall not take effect; for J. S. at the time of his death had issue: and therefore then the grant shall not begin; and if not then, then not at all. And by Manwood, If the words had been, To begin when J. S. is dead without issue of his body, then such a grant should take effect when the issue of J. S. dieth without issue, &c. Dyer, If the donee in tail hath issue, and dieth without issue, the formedon in reverter shall suppose that the donee himself died without issue; for there is an interest, and there is a difference betwixt an interest and a limitation: for if I give lands to A. and B. for the term of their lives, if any of them dieth, the survivor shall have the whole. But if I give lands to A. for the life of B. and C. now, if B. or C. die, all the estate is determined, because but a limitation, and B. and C. had not any interest. See Cook 5 Part, Bradnell's case.

CLI. Pasch. 26 Eliz. In the Common Pleas.

A. enfeoffed B. upon condition, that if he pay 10l. to the feoffee, his executors or assigns, within 3 years next ensuing, that then it should be lawful for him and his heirs to re-enter. The feoffee hath issue two sons, whom he makes his executors, and dieth before the day of payment. The Ordinary commits letters of administration to J. S. during the minority of the executors. Manwood conceived, that it is a most sure way for A. to pay the monies to the executors, for they remain executors notwithstanding the administration committed to another: for the administrator in such case is but as bailiff or receivor to the executors, and shall be accomptable to them; which Harper and Dyer, concesserunt: and Manwood said, if in this case the monies be paid to one of the executors, it is sufficient, and the same well paid; but that conditional feoffments are as a sum in gross, and not in nature of a debt: which the rest of the justices granted.

4 Len. 232. 1 Len. 285, 286. Hill. 12. Car. 2 B. R. Goodyer and Clarks case.

CLII. Pasch. 26 Eliz. In the Common Pleas.

A. seised of a mannor leased the same for years, rendring rent, with clause of re-entry; and afterwards levied a fine sur conusans de droit, to the use of himself and his heirs; the rent being demanded, is behind. Dyer, A. cannot re-enter; for although in right the rent passeth without attornment, yet he is without remedy; for it is without attornment: and it would be hard without attornment to re-enter, &c.

[104] It was moved further, if here the conusor be assignee within the statute of 32 H. 8. Manwood, The reversion of a termor is granted by fine, there wants privity for an action of debt, waste, and re-entry: but if the conusee dieth without heir, although that in right it was in the conusee; yet the lord by escheat shall make avowry, and yet the conusee by whom he claimeth, could not. And in the case at Bar, the conusee himself could not, but the conusor being cestuy que use, who is in by the Act of law, shall avow, and shall re-enter without attornment: for the conusor is in by the statute of 27 H. 8. Harper, The heir of the conusee shall avow and re-enter before attornment. Dyer, 13 H. 4. The father leaseth for years rendring rent, with clause of re-entry; the father demands the rent, which is not paid; the father dieth, the son cannot re-enter, for the rent doth not belong unto him: and therefore in the case at Bar, the conusee cannot avow for the rent before attornment; therefore not re-enter.

1 Inst. 309.

CLIII. Trin. 26 Eliz. In the Common Pleas.

It is enacted by the statute of 5 Eliz. cap. 8. that no person shall cut down any oak trees but between the first day of April, and the last day of June, but timber imployed and bestowed in or about buildings or reparations of houses, &c. And upon an information upon that statute, the defendant pleaded, that he cut down the said oak trees and thereof made laths to be bestowed in building, and that he had sold them to J. S. who had imployed part of them in building, and is imploying the residue in the same manner. Windham, The intent of the defendant in cutting down the oaks was not to have them imployed in building, but to sell them: although it is not necessary for the satisfaction of that statute, that the oaks presently after the cutting be imployed about building; for if the lessee of a messuage, who is to have house-bote, seeing that his messuage will want reparation, cutteth down a tree for such intent, although there be not such urgent occasion at present, that it ought to be presently repaired, the same shall not be said trespass; for it is good husbandry to have such timber to be seasonable, which cannot be, without some reasonable time between the cutting down and the imployment. Periam, If at the time of the cutting, the vendor or vendee had an intent to employ them about building, it is good enough: and it is a strong case here, because the defendant imploys the timber himself in laths, which is not of any use but for building; and cannot be made but of timber.

[105] TRIN. 26 ELIZ. IN THE KINGS BENCH.

CLIV. EVE AND FINCH'S CASE.

Peter Eve and John Finch brought an action of trespass against Nathaniel Tracy and Margaret his wife: and upon the pleading, the case was, that John Finch, father of J. F. the plaintiff, seised of the mannor of St. Katherines, held the same of the Queen by knight service in chief, and was also seised of the land where the trespass was done, being holden in socage; and so seised, 6 Junij, 20 Eliz. for the preferment of the said Margaret then his wife, enfeoffed of the said mannor A. and B. unto the use of himself and the said Margaret, and their heirs. And that the said John the father had not any other land but that before mentioned; and that the said mannor at the time of the said feoffment, and at the death of the said John the father attingebat ad duas partes of all the lands and tenements of the said John the father in three parts to be divided. And afterwards, the father by his will devised the lands holden in socage, unto his said wife for life, with divers remainders over: it was the opinion of the Court in this case, that the devise was utterly void by the statute.

PASCH. 26 ELIZ.

CLV. BRETT AND PEAGRIMS CASE.

In an action upon the case, the plaintiff declared, that whereas he himself and the defendant submitted themselves to the award of A. B. and C. D. and whereas the said arbitrators upon the hearing of the causes between them, did intend, and were resolved, amongst other matters of their award, to award, that two obligations by which the plaintiff was severally bounden to the defendant for the payment of certain sums of mony to the defendant, should be delivered by the defendant to the plaintiff to be cancelled: the defendant promised, in consideration, that that article of the delivery of the said two obligations should be left out of the award, that he himself would gratis deliver them to the plaintiff without any coertion or direction of the award: and further declared, that the said article ad specialem instantiam ipsius querentis was left out by the said arbitrators out of their award; and notwithstanding that, that the defendant had not redelivered, ut supra, &c. but had put the same in suit against the plaintiff. In this case, upon the matter, ut supra, &c. it was adjudged for the plaintiff.

[106] PASCH. 26 ELIZ. IN THE KINGS BENCH.

CLVI. NICH. LEE'S CASE.

Nich. Lee by his will devised his land to W. his second son; and if he do depart this world, not having issue, then I will my sons-in-law shall sell my land. The devisor at the time of the devise having six sons-in-law, died; W. had issue John and died; John died without issue; one of the sons-in-law of the devisor died; the five surviving sons-in-law sold the land. 1. It was clearly agreed by the whole Court, that although the words of the will be, ut supra, If W. my son depart this world, not having issue, &c. and that W. hath issue which dieth without issue, there although it cannot be said literally, that William did depart this world not having issue; yet the intent of the devisor is not to be restrained to the letter; but construction shall be made, that whensoever W. dieth (in law upon the matter) without issue, the same land shall be subject to sale according to the authority committed by the devisor to his sons-in-law: and now upon the matter W. is dead without issue. As in a formedon in the reverter or remainder, although the donee in tail hath issue, yet if afterwards the estate tail be spent, the writ shall suppose, that the donee died without issue: a fortiori in the case of a devise, such construction shall be made.

As to the other point concerning the sale of the land, Wray demanded, if the sons-

in-law were named in the will? The clerks answered, they were not. See 30 H. 8. Br. Devise, 31 and 39 Ass. 17. Fitz. title, Executors, 117. Such a sale is good in case of executors. See also, 23 Eliz. Dyer, 371. And see 4 and 5 Mar. Dyer, Land devised in tail, and if the devisee shall die without issue, that then the land shall be sold pro optimo valore by his executors una cum assensu of A. if A. dieth before sale, the power of the executors is determined. And afterwards it was clearly resolved by the whole Court, that the sale, by the manner aforesaid was good; and judgment given accordingly.

1 Cro. 26. 1 Len. 285. 1 Inst. 113. Dyer 177. 219. a. 2 Leu. 220.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

CLVII. RAG AND BOWLEY'S CASE.

Error was brought upon a fine, and the error was assigned in the proclamations: whereupon issued a certiorari to the custos brevium, who certified the proclamations; by which certificate it appeared, that two of the said proclamations were made in one day: upon which the defendant prayed another scire facias to the chirographer; in whose office it appeared, that all the proclamations were well and duly made. It was the opi-**[107]**-nion of Wray, Chief Justice, in this case, that the defendant ought to have his preyer; for the chirographer maketh the proclamations, and he is the principal officer as to them. And the custos brevium, hath but the abstract of the proclamations; and we may in discretion amend them upon the matter appearing. But the other justices seemed to be of a contrary opinion; for that the proclamations being once certified by the custos brevium, who is the principal officer, we ought not afterwards to resort to the chirographer, who is the inferior officer: and afterwards, the Clerks of the Common Pleas were examined of the matter aforesaid by the Justices of the Kings Bench; and they answered according to that which was said by Wray, Chief Justice. Wherefore it was awarded by the Court, that a new certiorari be directed to the chirographer: who certified the proclamations to be well and duly made. And thereupon the Court awarded, that the proclamations in the office of the custos brevium, should be amended according to the proclamations in the custody and the office of the chirographer.

Note, in the same case, before the writ brought, a stranger had brought a writ of error against the same defendant upon the same fine; upon which the transcript of the fine and proclamations are removed in banco, and after the plaintiff is non-suit. Now another who hath cause, may have a writ of error, quod coram vobis resident.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

CLVIII. TAVERNER AND CROMWELL'S CASE.

Upon an evidence unto a jury, containing difficulty and matter in law; it was found, viz. that the Bishop of Norwich, 10 H. 8. was seised of the mannor of Northelman in the right of his bishoprick; and, at his court holden within the same mannor, granted parcel of the demesnes of the said mannor to one Taverner and his heirs, where, of the said land in truth, there was not any demise by copy before: and so the said land continued in copy until 23 H. 8. at which time, Taverner committed a forfeiture; which being presented, the bishop seised the land as forfeited; and granted the same again by copy to Taverner in fee: and so from thence it continued in copy until 8 Eliz. (which interval between 23 H. 8. and 8 Eliz. amounted to 47 years:) It was the opinion of the whole Court in this case, that the continuance for 50 years, is requisite to fasten a customary condition upon the land against the lord. It was also agreed by the Court, that although the original commencement, and that customary interest did commence 10 H. 8. ut supra, from which time, unto 8 Eliz. 60 years passed; yet the seisure for a forfeiture which happened 23 H 8. interrupted utterly **[108]** the continuance from the time which might by the law have perfected

the customary interest. So that now, the time before the forfeiture ought not to be accounted in this case: but the original beginning of the copyhold shall be holden to be 23 H. 8. when the grant de novo by copy was made; between which time, and 8 Eliz. is an interval but of 47 years; within which time, a customary interest cannot be attached upon the land: and then before sufficient time encurred, &c. the lord may well enter upon such a tenant at will: for as yet, there is not any custom begotten by sufficient time to bind him. It was also agreed by the justices, that if the lord of a mannor is seised of an ancient copyhold for forfeiture, or by reason of escheat, and lett the same at will without any copy for divers years, one after the other, that that is not any interruption of the customary nature of the land; but that the lord may grant it again by copy.

As to other parcel of the land, it was given in evidence, that at a court lately holden at Northelman, it was presented by the homage there, that Taverner the plaintiff being a copyholder of the said mannor, had forged a customary of the said mannor, containing divers false customs, pretending them to be true customs of the said mannor, and that he had forged, and put a seal to it, about which, this word, viz. (Northelman) is engraven; and that he had procured divers copyholders of the said mannor to set their seals to it; and that he said unto them, that that customary should be put into the church of Northelman amongst the charters and evidences of the said church: and that he had now made his copyhold as good as his freehold. And, if the said offence committed by the plaintiff, ut supra, be a forfeiture of his copyhold, was the question? It was argued by Popham, who was of counsel with the plaintiff, that without further matter, it was not any forfeiture; and yet he confessed, it is a forgery against the first branch of that statute of 5 Eliz. cap. 14. And so he said it was lately adjudged in the Star-Chamber: but as to the point of forfeiture, he put this difference; if the lord demand his services of his copyholder, there, if the copyholder upon debate between the lord and himself, sheweth forth such a forged customary, and counterpleads the demand of the lord with it; now it is a forfeiture, for that the inheritance of the lord is thereby hazarded: as, if the copyholder after the forfeiture keep it himself, and doth not encounter his lord in his demand with it in his services, the same is not any forfeiture: as, if the copyholder, before any rent be due, saith, that he will not pay any rent to the lord hereafter: or when a court is to be holden, that he will not after appear to do any suit at the court of his lord &c. But if, his rent being due, he denyeth it; or when the court is holden, he saith, that he will not do any suit; the same is a forfeiture: as it was lately adjudged in the Kings **[109]** Bench, in the case between Sir Christopher Hatton, and his copyholders of his mannor of Wellingborough. So if a copyholder being with the other copyholders charged upon oath to enquire of the articles of the court-baron, and sufficient matter being given to them in evidence, to induce them to find a matter within their charge, and they or any of them obstinately refuse to find the same, the same is a forfeiture of his copyhold; as it was adjudged in the case of Sir Rich. Southwell, Knight, and Thurston. Clench, Justice, conceived that in the principal case, the offence of the plaintiff, is not any forfeiture, no more, than if a copyholder makes a charter of feoffment of his customary land, and delivereth the same as his deed to the party, but doth not execute it by livery, the same is not any forfeiture. It was argued by Gawdy, Serjeant, who was of counsel with the defendant, to the contrary: for he said, that if a copyholder will forge a deed of feoffment, purporting, that the lord of the mannor hath enfeoffed him of the said customary land, notwithstanding that he keepeth such charter himself, without shewing it forth, yet it is a forfeiture. At the length, the Court wished the jury to find the special matter, and to refer the same to the Court, whether it was a forfeiture, or not. In this case, another matter was moved, viz. the auncestor of the plaintiff had purchased divers several copyholds from several copyholders by several copies whereof he died seised; or committed several offences by which he forfeited to the lord all his copyholds, for which the lord seised, and granted them again to his auncestor with the ancient rent, and to his heirs, tenendum per antiqua servitia & consueta, &c. And afterwards, the same copyholder commiteth waste, whether the same shall now trench to forfeit all the copyhold lands which were granted ut supra, by one entire copy; or only that which was before the seizure holden by the same rent, et nihil ultra: for these words, tenendum per antiqua

servitia, do not trench only to the quantity of the services, but also to the quality; scil. severally, so as there shall be several services as before: as if A. be seised of copyhold land on the part of his father, and of other copyhold land on the part of his mother, and thereof dieth seised, and his son and heir be admitted to it by one copy, and by one admittance; now if that son dieth without issue, the copyholds shall descend severally, the one to the heir on the part of his father, and the other to the heir on the part of his mother, &c. And afterwards, the jury found the special verdict, and the special matter, ut supra, &c.

3 Cro. 353. 1 Roll 508.

[110] Trin. 26 Eliz. In the Exchequer.

CLIX. Vincent Lee's Case.

Vincent Lee seised of lands in fee, had issue 3 sons, F. G. and J. and by his last will in writing devised, that J. his son should have the land for the term of 31 years, without impeachment of waste, to the intent that he pay certain debts and legacies set down in his said will, the remainder after the said term expired to the heirs males of the body of the said J. begotten. And further willed, that if the said J. die within the term aforesaid, that then G. his son shall have such term, &c. and then also shall be executor; but made the said J. his present executor, and died, J. entred by force of the devise: F. died without issue, by which the fee-simple descended upon J. who had issue P. and died within the term, P. entred; G. as executor entred upon him; and he re-entred; upon which re-entry, G. brought trespass. Pigott said, that the term by the descent of the fee from F. to J. being the second son of Vincent, and heir of F. is not extinct, but only suspended. It hath been objected, that J. cannot be said to die within the term, because by the descent of the fee, the term is extinct, or suspended, and so not in esse at the time of the death of J. therefore nothing did accrue to G. because J. did not die within the term: but that is but a conceit; for the intent of Vincent was, that the heir should not meddle with the land devised as heir, until the 31 years be expired: and words, during, or within the term, extend unto the time of the term, and not unto the estate: and although, that the term as to J. be extinct, yet the right or possession of G. shall stand, and shall be expectant upon the death of J. before the expiration of the said 31 years. As A. leaseth for life to B. and afterwards granteth the reversion with warranty to C. who releaseth to B. in fee, who is impleaded in a præcipe: although now B. hath a fee-simple, yet during his life he shall not recover in value. And in the principal case, this further interest limited to G. cannot be extinct or prevented. See Plow. Com. Welden and Elkington's case. Beaumont, contrary. And that the term is extinct, because he hath the said term in his own right, and not as executor, but as a man trusted with payment of debts and legacies; but the same term which J. had, G. cannot have, for some of the years are expired; and the words of the will are, He shall have such term; but here the term is utterly extinct: as where a rent, common, or way, &c. descendeth upon the ter-tenant; 2 H. 4. A prior had an annuity out of a parsonage, and afterwards he purchaseth the advowson, which is afterwards appropriated to his house; now the annuity is extinct; and although the prior afterwards presenteth to the advowson, yet it is not revived: Br. [111] Extinguishment, 54. A man hath a lease for years as executor, and purchaseth the inheritance, his term is extinct, yet it is assets, &c. And it is said in Bracebridges case, Plow. Com. 419. 14 Eliz. that parson, patron and Ordinary, lease for years the glebe lands of the parsonage; the parson dieth; the lessee for years becomes parson and dieth, his executors shall not have the residue of the said term; for the term is extinct, although he had the term in his own right, and the freehold in the right of his church; and so in several capacities. And it was holden by some, that if the term for years comes to the lessor as executor, who dieth, the term is revived. Manwood, Chief Baron, asked this case of those who argued; A lease is made for 21 years, proviso, that the lessee shall suffer the lessor to enjoy the same, or to take the profits thereof during the life of the lessor, or so long as the lessor shall live; if the same were a good proviso, or not? Pigot conceived, that

the devise to G. was a new devise, and not dependant upon the first devise to J. nor any parcel of it; but this second devise to G. did take away the absolute devise to J. before, and qualified it, so as it determined with his death. The words, such estate, shall be intended an estate to G. to be granted from the death of the testator. Land is devised to A. and his heirs, and he if dieth without heir, that it shall remain to another; the same is no good devise: but a devise to one and his heirs, and if J. S. dieth living the devisee, B. shall have it; the same is good: for it is a new devise, and an estate created de novo, and doth not depend as a remainder upon the first devise, or upon the first estate devised; as the case is 29 Ass. 17. Br. Condition 111. and Devise, 16. So here are several estates limited, one to J. and another to G. which estate of G. cannot be extinct by unity of possession in J. These words, if he die within the term, shall be construed for effluxion of the time of 31 years, and not for the termination of the term. Cooper, Serjeant, to the contrary; J. took this term as purchasor, and not as executor, for that no term was in the testator. See 14 Eliz. Dyer, 309. Granmer's case; G. shall have such term and interest as before I have willed unto J. Manwood, Such term, that is to say, the residue of the term.

Now at another day, the Barons delivered their opinions, that the plaintiff should recover, and that was now G. to whom the second term was devised: and by Manwood, in construction of wills, all the words of the will are to be compared together, so as there by not any repugnancy between all the parts of the will, or between any of them, so that all may stand: and the intent of the testator was, that his son J. should have the lands for 31 years, if he so long lived, and if he died within the term, that G. his son should have such term. And he held, that the same was in J. an estate by limitation, and he could not sell it, nor could it be extinct by Act in law, or of the law. It was a lease **[112]** determinable by his death, and so shall be the lease of G. determinable upon his own death; and G. upon the death of J. within the term, shall have the residue of the number of the years limited by the former devise; scil. so many in number as were not expired in the life of J. who was first executor to that special purpose. Gent, Baron, to the same intent; Here he hath the same term as executor; and it is not like a term devised, which the party hath as legatee; but in our case, he hath only authority in this lease as executor, and the land was tied to the time and the authority; and when the same determines in his person, then the land departs from him to G. who was a special executor to that purpose, as J. was before. And G. had not the same term which J. had; but such a term. Clerk, Baron, acc. And he said, that the will was further, that if G. died before his debts paid, and his will performed; and the jury finding all the special matter, concluded, that if the term limited to J. be extinct, then they find for the defendant. And he held clearly, that J. had this term of 31 years as executor, and that by the discent of the inheritance to J. the term as to himself was gone: but as to creditors and to the legatees, it shall be said in esse, and be assets in his hands: and because that the term as to that purpose shall be said in esse, he died within the term, within the intent of the said will. And this word, term, is vox polysema, terminus status, terminus temporis, terminus loci. And in our case, the word, term, hath reference to time, and not to estate; for the testator did respect the time in which his will might be performed, and that was 31 years; as if I make a lease during the term that J. S. hath in the manor of D. and J. S. hath 40 years in it; now although that J. S. surrendreth or forfeiteth it, yet he shall hold over, but he shall have it for 40 years; for my lease refers to the time, and not to the estate. In the like manner here, G. cannot have the same term which J. had, nor for 31 years after the death of J. but so much of the said 31 years shall be cut off in the interest of it, as J. had enjoyed it; and G. shall have as many years as J. hath left; and G. shall perform so much of my will as J. at his death within the term aforesaid shall not have performed: as if I lease my land to one until he hath levied 100l. and if he dieth before that he hath levied it, then J. S. shall have such term for the levying of it: the first lessee levieth 50l. and dieth, J. S. may levy the residue, but not the whole. And although that the jury saith, that if the term be extinct, then they find for the defendant; although that it be extinct, yet they are not to take conusance what the law is thereupon: but that is the office of the Judges. As 13 E. 3. the jury found, that the son was born during the elopement, and so bastard; that conclusion of the verdict is not to the purpose, but the Court ought to judge upon

the premises of the verdict, if upon the birth during the elopement, the party be bastard or not? And afterwards, Manwood, with **[113]** the assent of his companions the barons, commanded, that judgment should be entred for the plaintiff; which was done accordingly.

1 Inst. 138. b. 1 Inst. 338. b. 2 Roll. 472.

TRIN. 26. ELIZ. IN THE EXCHEQUER.

CLX. THE BISHOP OF BRISTOW'S CASE.

Note, it was holden by Manwood, Chief Baron, in this case, that if a lease be made for years rendring rent, with clause of distress; and afterwards, the rent and reversion are extended upon a statute, or seised into the Kings hands for debt; if the lessee payeth the rent according to the extent, the same is not in any danger of the condition, for that now the lessee is compellable to pay it according to the extent.

1 Cro. 398. More Rep. 891.

CLXI. HILL. 26 ELIZ. IN THE EXCHEQUER.

The Queen by her letters patents granted to J. S. catalla utlagatorum, & felonum de se, within such a precinct; one who was endebted unto the Queen, is felo de se, within the precinct. It was the opinion of all the barons, and so ruled, that notwithstanding the grant by the said letters patents, that the Queen should have the goods for to satisfie her debt.

More Rep. 126, 127.

PASCH. 26 ELIZ. IN THE KINGS BENCH.

CLXII. TUKER AND NORTON'S CASE.

The case was; An infant being in execution upon a condemnation in debt, brought a writ of error: his father and his brother was his bail: it was the opinion of the justices, that they two only should enter into the recognizance, that the enfant shall appear: and that if the judgment be affirmed, that they shall pay the mony, and not that they shall render the body of the enfant again to prison; for that, when once he is discharged of the execution, he shall never be in execution again.

[114] MICH. 27 ELIZ. IN THE COMMON PLEAS.

CLXIII. MARSH AND JONES'S CASE.

In a replevin, the case upon the evidence was, that before the Statute of Quia Emptores Terrarum, a man made a feoffment in fee to hold of him by the services, solvend. post quamlibet vacationem sive alienationem, the value of the annual profits of the lands, &c. It was holden by the Court, that value shall be intended, which at the time of the feoffment was the value, and not as it is now improved by success of time.

2 Len. 117.

MICH. 27 ELIZ. IN THE COMMON PLEAS.

CLXIV. ANNESLEY AND JOHNSON'S CASE.

In an ejectione firme, upon evidence, the case was, that Roger Wake was seised, &c. and before 27 H. 8. enfeoffed certain persons to his use, &c. and they being so seised to the use aforesaid, the said Roger by his will willed, that his feoffees and

executors should found a chauntry in perpetuity, and a priest there, to say mass pro anim', &c. and that they procure a licence to alien in mortmain, and also an incorporation for such chauntry priory; and that the said lands should be conveyed to such a priest, &c. And also that every such priest should be school-master there; and that post dictam cantariam sic fundatam & stabilitam, the said priest should say mass, &c. Roger Wake died: the feoffees and executors did not procure any corporation, or licence to alien in mortmain, nor make any estate to the chauntry priest: but the appointing a priest who said mass according to the will of the said Roger, and was also a school-master, and took the profits of the said lands as owner of them, and died: after which, one Vere was appointed to be school-master there, but he was meerly a lay-person, and so continued until his death, and took the profits of the land; and upon part of the land he built a house, and there dwelt, and kept a school. And after his death, one Curtis was appointed by the executors to teach there, and he was a lay-man, and there taught many years; and afterwards he took orders, and became a priest, and said mass, and other Divine service, and continued school-master also: and 26 H. 8. the same was presented for a chauntry for first-fruits, and first-fruits were paid for it, as appeared by a particular which was shewed in evidence. And also, 2 E. 6. it was presented for a chauntry, and the possessions of it seised into the Kings hands. And it was much insisted upon, that Vere being a mere lay-man, that the same was a forcible interruption of the reputation of the chauntry. But it was the opinion of the whole Court to the **[115]** contrary: and that notwithstanding, that no corporation was obtained, yet because that the priest was appointed by colour of the will, and he said mass according to the will, although Vere who succeeded him was a meer lay-man, and not a priest; yet afterwards when Curtis came being appointed but a school-master, being also a meer lay-man, yet afterwards when he took upon him orders, and demeaned himself as a chauntry priest there ratione institutionis by the will of Wake, which is confirmed by the certificate, and also by the presentment; the first reputation is revived, and the law shall not construe, that Curtis took the profits in the quality of a school-master, but as a priest; for the law hath respect to the will of the said Wake, which was the ground of all these proceedings, and that, although he did not say mass within 5 years before the statute of 1 E. 6. And note, that the certificate of 26 H. 8. was, that Rich. Curtis was cantarista: and it hath always been adjudged, that a chauntry by reputation is within the statute of 1 E. 6.

Trin. 27 Eliz. In the Common Pleas.

CLXV. Brian and Cawsen's Case.

In trespass by Brian and his wife and others, against Cawsen; it was found by special verdict, that W. Gardiner was seised in fee according to the custom of the mannor of C. of certain lands, and surrendred them to the use of his last will, by which he devised them in this manner; scil. I bequeath to Jo. Th. my house and lands in M. called Lacks and Stone; to Ste. Th. my house and lands called Stokes and Newmans; and to Roger Th. my house and lands called Lakins and Brox. Moreover, if the said Jo. Ste. or Roger, live till they be of lawful age, and have issue of their bodies lawfully begotten, then I give the said houses and lands to them and their heirs in manner aforesaid, to give and sell at their pleasure. But if it fortune one of them to die without issue of his body lawfully begotten, then I will, that the other brothers or brother have all the said houses and lands in manner aforesaid; and if it fortune the three to die without issue in like manner; then I will, that all the said houses and lands be sold by my executor or his assignee, and the mony to be given to the poor. The devisor dieth, Jo. Ste. and Roger are admitted according to the intent of the will; Roger dieth within age without issue; John and Ste. are admitted to his part; John comes of full age, and hath issue J. and surrenders his part of the whole, and his estate therein, to the use of Ste. and his heirs; who is admitted accordingly. Ste. comes of full age, John the father dieth; Ste. dieth without issue; J. the son as cosen and heir of Ste. is admitted according to the will, and afterwards dieth without issue; the wives of the plaintiffs are heirs to him, and are admitted to the **[116]** lands called Lacks and Stone, and to the moyety of the lands

called Lakins and Brox, parcel of the place where, &c. prætextu quorum, they enter into all the lands where the trespass is done. And it was found, that A. the executor died intestate; and that Cawsen the defendant is cosen and heir to the said devisor, and that he as heir entred and did the trespass.

First, it was agreed by all, that by the first words of the will, the 3 devisees had but an estate for life: but Fenner and Walmesley who argued for the plaintiffs, conceived, that by force of the later words, scil. if the said John, Stephen and Roger, live till they be of lawful age, and have issue of their body lawfully begotten, then I give the said lands and houses to them and their heirs in manner aforesaid, &c. They have fee; and the words, in manner aforesaid, are to be referred not unto the estate which was given by the first words which was but for life, but to make them hold in severalty as the first devisor willed, and not joyntly, as the words of the second devise purported. And Fenner said, it had been resolved by good opinions, that where a fine was levied unto the use of the conusor and his wife, and of the heirs of the body of the conusor, with divers remainders over; proviso, that it shall be lawful to the survivor of them to make leases of the said lands in such manner as tenant in tail might do by the statute of 32 H. 8. although those lands were never demised before the fine, yet the survivor might demise them by force of the proviso, notwithstanding the words, in manner, &c. So if lands be given to A. for life upon condition, the remainder to B. in manner aforesaid; these words, in manner aforesaid, refer unto the estate for life limited unto A. and not unto the condition, nor unto any other collateral manner.

The words, if they live until they be of full age, and have issue, are words of condition, and shall not be construed to such purpose, to give to them by implication an estate tail: for the words subsequent are, that they shall have them to them and their heirs, to give and sell at their pleasure. By which it appeareth, that his intent was not to make an estate tail; for tenant in tail cannot alien or dispose of his estate, &c. And as unto the last words, and if it fortune they three to die without issue, &c. these words cannot make an estate tail, and the express limitation of the fee in the first part of the will, shall not be controverted by implication out of the words subsequent. As if lessee for 40 years deviseth his lands to his wife for 20 years, and if she dieth, the remnant of the term unto another; although, that she survive the 20 years, she shall not hold over: and here the second sale appointed to be made by the executor, shall not take away the power of the first sale allowed to the devisee's after-issue. Snagg and Shuttleworth, Serjeants, to the contrary; and they conceived, that the defendant hath right to two parts; for no express inheritance vests in the devisees until full age and issue; and because two of the **[117]** devisees died without issue, they never had any inheritance in their two parts, and so those two parts descended to the defendant as heir to the devisor, no sale being made by the executor. These words, if John, Stephen and Roger, are to be taken distributive; viz. if John live, &c. are to be taken distributive; if John live until, &c. he shall have the inheritance in his part; and so of the rest. As if J. have right unto land which A. B. and C. hold in common, and J. by a deed release to them all, the same shall enure to them severally, 19 H. 6. And here, these later words, if these three do die without issue, by that they conceived, the same to be but an estate in tail. And see to that purpose, 35 Ass. 11. 37 Ass. 15. For a man cannot declare his intent at once, but in several parts; all which make but one sentence. And so it is said by Persay, 37 Ass. 15. We ought to have regard upon the whole deed, and not upon parcel. And see Clark's case, 11 Eliz. Dyer, 330, 331. And it was said, if I give lands to one and his heirs so long as he hath heirs of his body, it is a feesimple determinable, and not an estate in tail. Quære of that. Then here the feesimple is determined by the death of the devisees without issue, and therefore the land ought to revert to the heir of the devisor, especially being no person in rerum natura, who can sell, for the executor before sale by him made, died intestate; and if he had made an executor, yet the executor of the executor could not sell. Which see, 19 H. 8, 9 & 10. And afterwards resolved, that no estate tail is created by this will, but the feesimple settled in them, when they came at their lawful age, and had issue; so as the residue of the devise was void, and judgment was given accordingly.

2 Len. 68.

MICH. 27 ELIZ. IN THE COMMON PLEAS.

CLXVI. GRIFFITH AND AGARD'S CASE.

In disceit by Griffith against Agard and his wife; for that a fine was levied of a messuage, being ancient demesne, by which it became frank-fee; and the fine was levied in the life of A. Griffith, grandfather of the plaintiff: exception was taken to the writ, because it is brought by the plaintiff as cosen and heir of A. G. his grandfather; and in the beginning of the writ, the words are, Si Henricus Griffith fecerit te securum; without saying, cousen and heir of A. G. fecerit te securum. But the exception was not allowed; for afterwards in the writ, these words are, cujus hæres ipse est. See the Register, 238. that it is sufficient; if there be in the body of the writ, these words, cujus hæres ipse est.

Another exception was taken to the declaration, in that it is alledged, that the lands were, de antiquo dominico Dominæ Reginæ Angliæ; whereas it ought to have been, de antiquo domi-[118]-nico Dominæ Coronæ suæ, &c. The opinion of the Court was, that it was good both ways. See Book Entries, 100. antiquo dominco Coronæ, & 58. de antiquo dominico Domini Regis.

1 Len. 290.

MICH. 27 ELIZ. IN THE KINGS BENCH.

CLXVII. BASHPOOL'S CASE.

The case was, the father was seised of lands in fee, and bound himself in an obligation; and devised his lands unto his wife, until his son should come to the age of 21 years, the remainder to his son in fee, and died, and no other land descended or came to the son from the father. It was moved by Godfrey, that the heir in this case might elect to waive the devise, and to take the land by descent. See 9 E. 4. 18. by Needham. But it was the opinion of Gawdy and Shute, Justices, that the son should be adjudged in by descent; and so bounden with the debt.

2 Len. 101. Stiles Rep. 148.

MICH. 27 ELIZ. IN THE KINGS BENCH.

CLXVIII. BRANTHWAIT'S CASE.

Debt brought by J. D. against Branthwait upon an obligation; the condition of which was, that whereas J. F. claimed to have a lease for years of the mannor of D. made and granted to him by one W. D. If the said Branthwait keep without damage the plaintiff, from all claim and interest to be challenged by the said J. F. de tempore in tempus during the years, &c. and also deliver the said lease to the plaintiff, that then, &c. The defendant pleaded, that the said J. F. had not any such lease, and that after the making of the said obligation, untill the action brought, the plaintiff was not damnified ratione dimissionis prædictæ. Exception was taken to the same, because, where the words of the condition are, keep without damage the plaintiff from all claim and interest: and he hath pleaded, that the plaintiff was not damnified ratione dimissionis, &c. But the exception was disallowed by the Court; for if he were not damnified ratione dimissionis, then he was not damnified by reason of any claim or interest. Another exception was taken, because he could not now say, there was no such lease: for it is recited in the obligation, that J. F. claimed to have a lease: and therefore by this recital he is estopped, &c. And see where a recital is an estoppel, 8 R. 2. Fitz. tit. Estoppel, 283. 39 E. 3. 3. Fitz. Estoppel, 112. 46 E. 3. 12. It was holden by the Court, that it was a good estoppel. And afterwards, judgment was given for the plaintiff.

2 Len. 11.

[119] CLXIX. MICH. 27 ELIZ. IN THE KINGS BENCH.

Debt upon an obligation: the words of the obligation were; I am content to give to W. 10l. at Michaelmas; and 10l. at our Lady Day. It was holden by the Court, that it was a good obligation: and it did amount to as much as, I promise to pay, &c. It was also holden by the Court, that an action of covenant lay upon it, as well as an action of debt, at the election of the plantiff. And it was holden, that although the action is for 40l. and the declaration is 20l. and 20l. at two several days; yet it is good enough, and the declaration is well pursuant to it: and afterwards, judgment was given for the plaintiff.

TRIN. 27 ELIZ. IN THE COMMON PLEAS.

CLXX. THE QUEEN AND KETTELL'S CASE.

The Queen brought a writ de valore maritagii against Kettell, and counted of a tenure in chief. The defendant pleaded, that, pendant the writ, the Queen had granted to one Edmund Kettel, custodiam & maritagium of the said defendant, with whom he had compounded. It was holden by the whole Court, to be no plea; for the letters patents were void, because the Queen was deceived in her grant: for it appeareth by the count, that the defendant before the grant of the Queen, was of full age; and by the letters patents, the Queen intended that he was within age; and, by the same, granted custodiam, &c.

CLXXI. MICH. 27 ELIZ. IN THE COMMON PLEAS.

A. seised of land, by his will devised, that his executors should sell the lands, and died; the executors levied a fine thereof to one F. taking mony for it of F. The question was, if in title made by the conusee to the said lands by the fine, it be a good plea against the same to say, quod partes finis nihil habuerunt? Anderson conceived, that it was. But by Windham and Periam, upon not guilty, The conusee may help himself, by giving in evidence the special matter; in which case the conusee shall be adjudged in, not by the fine, but by the devise. And Windham said, that if A. devise, that his executors shall sell a reversion of certain lands of which he dieth seised, and they sell the same without deed, the same is well enough; for the vendee is in by the devise, and not by the conveyance of the executors; quod vide 17 H. 6. 23. And by Periam, The conusee may help himself in pleading; as he who is in by the feoffment or grant of cestuy que use, by the statute of 1 R. 3.

1 Len. 31. 1 Inst. 113. a.

[120] TRIN. 27 ELIZ. IN THE COMMON PLEAS.

CLXXII. LEE AND LOVEDAY'S CASE.

Tenant in tail leased for 60 years, and afterwards levied a fine to Lee and Loveday, sur conusans de droit come ceo, &c. and their heirs in fee: and afterwards, the lord of the mannor of whom the land was holden, brought a writ of disceit, and upon that, a scire facias against the conusees, supposing the land to be ancient demesne. The defendants made default, by which the fine was annulled, and now the issue in tail entred upon the lessee for years; and he brought an ejectione firme. And it was found, that the land was frank-fee. And the sole question was, if by the reversal of the fine by the writ of disceit, without suing a scire facias against the ter-tenant, should bind him? Atkinson, It shall not bind the lessee for years; for a fine may bind in part; and in part, not: as, bind one of the conusees, and not the other. As 7 H. 4. 11. a fine levied of lands part ancient demesne, and part at the

common law, and by a writ of disceit, the fine was reversed in part; scil. as to the land in ancient demesne; and stood in force for the residue. See 8 H. 4. 136. And there by the award of the Court, issued a scire facias against the ter-tenant; and the justices would not admit of the fine without certificate that the land is ancient demesne, notwithstanding that the defendant had confessed it. But as to those which were parties to the fine, the fine was become void between the parties; and he who had the land before, might enter. See 8 E. 4. 6. And it would be a great inconvenience, if no scire facias, or other process, should be awarded against the ter-tenant; for he should be dispossessed and dis-enherited without privity or notice of it. Whereas upon a scire facias he might plead matter of discharge, in bar of the writ of disceit, release, &c. which see, Fitzh. Na. Br. 98. and so, although that the fine be reversed; yet he may retain the land. And he resembled the same to the case of 2 H. 4. 16, 17. In a contra formam collationis against an abbot; a scire facias shall issue forth against the feoffee: and by the same reason, here in this case. And for the principal matter, he conceived, that the fine should be awarded between the parties, but not against the lessee. Kingsmill conceived, that a scire facias brought against the parties only, was good enough; for they were parties to the disceit, and not the ter-tenants, &c. it was adjourned.

[121] CLXXIII. Trin. 27 Eliz. In the Kings Bench.

Error was brought upon a judgment in a quid juris clamat: it was assigned for error, that the tenant appeared by attorny; which act he ought not to do in his own proper person, if it be not in case of necessity; where in such case an attorny may be received by the King's writ, and plead matter in bar of the attornment. As if he claim fee, &c. or other peremptory matter, after which plea pleaded, he may make an attorny, 48 E. 3. 24. 7 H. 4. 69. 21 E. 3. 48. 1 H. 7. 27.

Another error was assigned, because it is not shewed in the quid juris clamat, what estate the tenant hath. Another matter was, if the grantee of the estate of tenant in tail after possibility of issue extinct, should be driven to attorn? And conceived, he should not, because the priviledge passeth with the grant. See 43 E. 3. 1. Tenant in tail after possibility of issue extinct, shall not be driven to attorn, 46 E. 3. 13. 27. therefore neither his grantee. Williams, contrary, As to the appearance of the tenant by attorny, because the same is admitted by the Court, and the plaintiff, the same is not error. Which see, 1 H. 7. 27. by Brian and Conisby, 32 H. 6. 22. acc. And he conceived, that the grantee should be driven to attorn; for no other person can have the estate of the tenant in tail after possibility of issue extinct, but the party himself, therefore not the priviledge: and although he himself be dispunishable of waste; yet his grantee shall not have such priviledge; as if tenant in dower, or by the curtesie, grant over their estates, the heirs shall have an action of waste against the grantees for waste done by the grantees. But if the heir granteth over the reversion, then waste shall be brought against the grantees. See Fitzh. Na. Br. 57. And if two coparceners be, and one taketh husband, and dieth, the husband being tenant by the courtesie, a writ of partitione facienda lieth against him; but if he granteth over his estate, no writ of partition lyeth against the grantee. 27 H. 6. Statham, Aid; Tenant in tail after possibility, &c. shall not have aid, but his grantee shall. Clark conceived, that the grantee should not be driven to attorn: if the tenant in tail grant all his estate, the grantee is dispunishable of waste: so if the grantee grant it over, his grantee is also dispunishable. It was adjourned.

Post. 241.

[122] CLXXIV. Trin. 27 Eliz. In the Kings Bench.

In action of trespass against J. D. for breaking of his close, &c. The defendant pleaded, that the trespass whereof, &c. was done by the defendant, and one J. S. against which J. S. the plaintiff at another time had brought an action of trespass, and recovered, &c. and had execution of the damages, &c. Plowden said, it was a

good bar, for that all is but one trespass; and satisfaction by one of the trespassors, is satisfaction for the other: and if the plaintiff had released to the other trespassors, the defendant if he had it in his hand might well plead it. Wray conceived it a good bar; for it is but one trespass and one wrong, although in respect of the several persons of the trespassors, there are several corporeal acts. Atkinson conceived, that the bar was not good; and it is not like the case of release, for that taketh away the whole trespass whosoever doth it: and this action may be sued joyntly or severally against the trespassors: and when the joynt suit is released, the several suit is released. Clench, If an action of trespass be brought against two, and they plead several pleas, and afterwards one of them is found guilty by a several jury, that jury shall assess all the damages; and if the other be afterwards found guilty, he shall be subject to the said damages, although he was not party to the said jury: and by the same reason that he shall be charged with the same damages, by the same reason he shall have advantage of the satisfaction of them made by his companion. See Br. Trespass, 2.

Hob. Rep. 66.

TRIN. 27 ELIZ. IN THE KINGS BENCH.

CLXXV. HITCHCOCK AND THURLAND'S CASE.

In an action upon the statute brought for taking of lands to farm by a spiritual person, 21 H. 8. it was holden, that if any such lease be made at this day to any spiritual person, such a lease is not void: but such a lease extends to such leases made before the Feast of St. Michael mentioned in the said Act, and not aliened before the said feast, &c. And so it was said, it was lately adjudged in one Underwood's case.

[123] TRIN. 27 ELIZ. IN THE KINGS BENCH.

CLXXVI. CUTTER AND DIXWELL'S CASE.

An action upon the case brought by Cutter against Dixwell: for that the said defendant had exhibited a bill to the justices of peace against the plaintiff, containing, that the plaintiff is an enemy to all quietness, seeking all means to disquiet his neighbors, and hath used himself as a lawless person; and having process to serve upon one in the parish; viz. the parson, did keep the process, and would not serve it but on the Sabbath day in the time of Divine service, not having regard to Her Majesties laws, or the quiet of his neighbours. Upon which bill, the justices to whom it was exhibited, awarded process against the plaintiff, to find sureties for his good behaviour. It was the opinion of the justices, that upon this matter, an action would not lie.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

CLXXVII. MASON'S CASE.

Mason leased certain lands to one R. for years; and afterwards leased the same lands to one Tinter for years; Tinter covenanted with the defendant, that if the said R. should sue the said Mason by reason of the later lease, that then he would discharge or keep harmless without damage the said Mason, and also would pay to him all the charges which he should sustain by reason of any suit to be brought against the said R. in respect of the said former lease: and Mason by the same indenture covenanted with Tinter, that the said land demised, should continue to the said Tinter discharged of former charges, bargains, and incumbrances: and now upon the second covenant, Tinter brought an action of covenant, and shewed, that the said R. had sued him in an action of ejectione firme upon the said first lease, and had recovered against him, &c. And Mason pleaded in Bar, the said second covenant, intending that by that

later covenant, the plaintiff had notice of the said former lease made unto R. so as the first lease shall be excepted out of the covenants of former grants; for otherwise, there should be circuity of action. But the opinion of the whole Court was to the contrary: for the covenant of Mason shall go to the discharge of the land; but the covenant of Tinter only to the possession.

[124] PASCH. 27 ELIZ. ROTT. 1127. IN THE COMMON PLEAS.

CLXXVIII. KNIGHT AND BEECHES CASE.

[See S. C. 5 Co. Rep. 54 b.]

William Knight brought ejectione firme against William Beech. The case was, that the prior of St. Johns of Jerusalem, 29. H. 8. with the assent of his covent, leased by indenture divers houses in Clarken-well, in the county of Middlesex, for fifty years, to one Cordel, rendring rent 5l. 10s. and 11d. at four feasts of the year, usual in the City of London, viz. for such a messuage, called The High-House, 14s. for another house, 3s. 11d. for another house, xxs. &c. Et si contingat dictum annualem redditum, 5l. 10s. 11d. a retro fore, in parte vel in toto, ultra aut post aliquem terminum solutionis, in quo solvi deberet, per spatium trium mensium, &c. quod tunc, & ad omnia tempora deinceps, ad libitum, &c. liceret dicto priori, & successoribus suis, & omni tali personæ & personis, quam vel quas dictus prior & successores sui nominarent & appunctuarent, sine scripto, in omnia dicta tenementa totaliter re-entrare, &c. And afterwards, 32 H. 8. the said hospital of St. Johns was dissolved, and the possessions of it granted to the said King; and afterwards the said King, 36 H. 8. gave the said house, upon which the said rent of 20s. was reserved, to one Audley, &c. in fee: and afterwards the now Queen being seised of the residue, a commission issued out of the Exchequer bearing date 8 Maii, 23 Eliz. ad inquirendum, utrum the defendant to whom the interest of the said term did appertain, perimplevisset & performasset omnes provisiones fact. & reservat. in & super prædict. indenturam, necne? Office was found before the grant, and after 25 August following, the said Queen, by her letters patents, gave the said house, called The High-House, to Fortescue the lessor of the plaintiff; and afterwards Tres Mich. the commission was retorned, by which it was found all as aforesaid; et quod termini & festi solutionis in London, are Michaelmas, Christmas, Annunciation, and Mid-summer; and that at the Feast of Michaelmas, such rent was behind for the space of three months, &c. It was argued in this case by Gawdy, Serjeant, on the part of the plaintiff, that here are several rents; for the entire sum by the viz. is distributed into several portions, which make several rents; and to that purpose he cited Winter's case, 14 Eliz. Dyer, 308. A lease for years is made of the mannors of A. B. and C. rendring for the mannor of A. xxs. and for the mannor of B. xs. and for the mannor of D. xs. with a condition for the non-payment of the said rents, or any of them, or any part or parcel of them, within one month, &c. then a re-entry; here are several rents: and he conceived, that a condition in the case of the King might be apportioned; for a rent charge, and a condition, are in the King in **[125]** better condition than in a subject, for the King may distrain for a rent-charge in all the lands, of him who is seised of the land out of which such a rent is issuing; and if a rent-seck be due to the King, he may distrain for the same; and the King shall never demand his rent which he hath reserved with clause of re-entry; and it appeareth in the register, that if before the Statute of Westm. 3. the King purchaseth parcel of the land holden of him, the rent shall be apportioned, which was not in the case of a common person, and there are in the Exchequer divers presidents to that effect, scil. If A. be bounden in a recognizance to B. and afterwards enfeoffeth the King of part of his land, and C. of the other part: if B. be afterwards attainted of treason, so as the said recognizance accrueth to the King; that now, notwithstanding that he hath part of the land lyable to the recognizance, he shall have execution of the residue. And see F. N. B. 266. If, after the recognizance acknowledged, the conusor enfeoffeth of certain parcels of his lands several persons, and of the residue enfeoffeth the King; that land which is

assured to the King is discharged of the execution, but the residue shall be charged: so that the possession of the King doth alter the nature of the rent, condition, and execution. Fenner, Serjant, contrary. And he said, that this grant before office retorned was not good; for without office the King cannot enter, multo minus his patentee; and that the King by the grant hath interrupted the relation of the office, as if a man by indenture bargaineth and selleth his lands, and afterwards makes livery to the bargainee, and afterwards the deed is enrolled. Now the party shall not be said to be in by the bargain and sale, but by the livery; for the livery hath interrupted the force of the first assurance by way of bargain, and the relation is utterly gone: so in our case, the grant of the Queen, mean between the award of the commission, and the retorn of it, hath destroyed the force and effect of the commission, so as no appearance shall be had of it: and he agreed, that here are several rents, but the condition is entire; and admit, that a condition may be apportioned in some cases, yet in some cases it cannot. And the statute of 32 H. 8. gives the condition and the reversion, to which it is annexed, to the King, in such sort as it was in the prior: but the condition in the prior was not capable of apportionment, and therefore no more it shall be in the case of the King. As where a recognizance is acknowledged, which cometh to the King by the attainder of the conusee; now, if the King will sue execution upon it, he shall not have the whole land of the conusor in execution, but only the moyety by elegit, &c.

This case afterward, Trin. 28 Eliz. for difficulty, was adjourned into the Exchequer-Chamber, and there argued before all the Justices, and Barons of the Exchequer. And Shuttleworth, Serjeant, argued for the plaintiff; and first he said, Here are several [126] rents, and so several conditions, especially when all the things demised are of such a nature, that they may yield a distress: but if any of the things demised cannot yield distress, then it shall be one entire rent, and shall issue out of the residue, &c. Which see, 17 Ass. 10. An assise was brought of 20s. rent, and the said rent was reserved upon a lease for life made of 100 acres of lands, and 15 acres of wood; scil. for the land 10s. and for the woods 10s. And by the assise it was found the disseisin in the wood, but not in the land. Wherefore it was awarded, that the plaintiff should recover seisin of the 10s. and for the residue, that he should take nothing. And although these words (reddendo inde) trench unto all the things demised entirely, yet this word (viz.) is a distributive, and makes an apportionment; and the viz. is not contrary to the premisses; scil. to the reddendo inde. As if I enfeoffe A. and B. of an acre of land, habendum the one moyety thereof to A. in fee, and the other moyety to B. in fee; this is good, for it well stands with the premises. But if I enfeoffe A. and B. of two acres of lands, habendum the one acre to A. and the other to B. the same habendum is void, because contrary to the premisses, for each of them is excluded out of one acre which was given to him in the premisses. And in our case, if the rent set forth in the (viz.) had been greater or less than that which is reserved upon the reddendo, then the (viz.) should be void for the contrariety, and the reddendo stand. Walmesley, contrary; and that here is one entire rent. Which see to be so, by the close of the condition, si redditus prædict' aut aliqua inde parcella, &c. And the lessor may distrain in any part of the land demised for the whole rent, notwithstanding the (viz.). And it was moved by Shuttleworth, that admit the rent and condition be entire; yet now when the King grants the reversion of one of the things demised in fee to a stranger, the condition remains, and not determined by the destruction of the reversion, as in the case of a subject: for the King hath divers prerogatives, by which he is exempted and protected from such mischiefs and inconveniences which happen to subjects by their own acts and their laches and folly, which shall not be imputed to the King; and the reason of extinguishment of a condition in such case in the case of a common person, is his own folly, that he will distrahere his reversion; and folly shall never be imputed to the King: and as the case is here, the King is not bound to take notice of a condition made by a common person; for it is not matter of record, and by this grant of the King, the rent doth not pass; for the grant is only of the reversion, without any mention of the rent. And the King hath divers prerogatives in a condition; as in the creating of a condition, 35 H. 6. 38. The Abbot of Sion's case, ad effectum, is a good condition in the case of the King, by prisoit: and where the King grants lands in fee to one upon condition, that the grantee shall not alien,

the same is a **[127]** good condition. So for a rent-seck, the King may distrain; and the King may reserve a rent and a condition to a stranger; and if he doth reserve a rent and a condition to himself, he may grant the same over to a subject, 2 H. 7. 8. And the condition in the case of a common person may be apportioned: as if lessee of two acres upon condition, alien one of them in fee, and the lessor entreth for the forfeiture, or recovereth part in an action of waste, &c. but of a surrender, it is otherwise. Walmesley contrary; The condition is gone; for a condition in the hands of the King is of the same nature, as in the case of a common person, impatient of any division, partition, or apportionment: as, if the King hath a rent out of 3 acres of land, and afterwards purchaseth one of them, the rent is utterly gone, and shall not be apportioned as well as in the case of a common person: so of a common. And as this case is, if the condition doth remain, then, upon the breach of it, the King shall enter into the whole; for the words of the condition are, Wholly to re-enter; and so he should defeat his own grant. And he cited a case adjudged at the Assizes at York; the King gave land in fee-farm, rendring rent, with clause of re-entry: the King granteth the rent over to a stranger; and after, the rent is behind; the King cannot re-enter, nor the grantee.

It was also moved, if the jurors of Middlesex might enquire of the usual feast days in London. Shuttleworth, that they might do so. See 5 H. 5. 23. Where a commission issued out to enquire in the county of Surrey, of escheats, words, &c. who found, that A. held of the King in chief, and took to wife one E. Cosen of A. within the degrees they then knowing of it, and had issue betwixt them; and afterwards they were divorced in the county of Kent, &c. And exception was taken to that office, because the enquest of Surry had found a divorce in the county of Kent. Another matter was, because the jurors have found the breach of the condition; and before the jurors had put their hands and seals to the inquisition, the Queen granted part of the things demised in his hands, to Fortescue; after which grant, the inquisition was sealed, and retorned into the Exchequer: if now, the grant to Fortescue be good, or not? Vide inde, Dyer, 2 Eliz. 17. Upon a writ of mandamus, the escheator charged the enquest, who were agreed of their verdict, and delivered the same in paper to the escheator; and, before the engrossing, sealing, and delivery of it, came a supersedeas: and it was resolved, by all the justices, that before the engrossing, indenting, and sealing, it was no verdict. See this case reported in Cook 5. part, 54.

1 And. 173. Coke 5. Rep. 55. 1 Len. 12. 2 Len. 134.

[128] PASCH. 27 ELIZ. IN THE COMMON PLEAS.

CLXXIX. NELSON'S CASE.

In trespass brought by Nelson, Chief Preignothory of the Court of Common Pleas, the case was, that the abbot of D. was seised of a common out of the lands of the abby of S. as appendant unto certain lands of the said abby of D. And afterwards the said houses were dissolved, and the possessions of them given to the King by Act of Parliament, to have and hold in as large and ample manner and form as the late abbots, &c. After which, the King so being seised, granted the said possessions of the said abby of D. to A. and the possessions of the said abby of S. to B. It was argued, that the common (notwithstanding the unity of possession) did continue; for unity of possession is so qualified and restrained by the statute, by the words aforesaid, and also by the words (in the state and condition as they now be,) and the abbot of D. was seised in the right of his house, of the said common; therefore so also shall be the King, and his patentees; and so a special seisin is given to the King. Rhodes, Windham, and Anderson, Justices, to the contrary. And the said words in the said statute are to be construed according to the law, and no further; and by the law, the said common cannot stand against the unity of possession.

TRIN. 28 ELIZ. IN THE COMMON PLEAS.

CLXXX. LEONARD'S CASE.

Leonard, custos brevium, brought an action of trespass for breaking of his close: the defendant pleaded, that William Heydon was seised and enfeoffed him; and upon ne enfeffa pas, they were at issue. And it was found by special verdict, that the said William Heydon was seised, and leased to the defendant for years, and afterwards made a charter of feoffment to him, by these words, dedi and concessi, with a warrant of attorny in it, and delivered the same to the said lessee; who delivered the same to him who was made attorny in the said deed, who made livery accordingly. It was moved by the plaintiff's counsel, that here is not any feoffment found, but only a confirmation; for as soon as the charter was delivered to the lessee for years, the law gave it its operation to that effect, to vest the fee in the lessee by way of confirmation. See Litt. 532. But the opinion of the whole Court was clear to the contrary; for here the lessee hath liberty, how and by what conveyance he shall be adjudged seised of the land, either by feoffment, or by confirmation: and it appeareth here, that when the lessee de-**[129]**-livered the charter to the attorny; and also when the lessee accepted livery from the attorny, he declared his meaning to be, that he would take by the livery: and the Lord Anderson said, that if tenant in tail be disseised, and makes a charter-feoffment with a warranty of attorny, and delivers the same to the disseisor, who delivers the same to the attorny, who makes livery accordingly, the same is a good feoffment, and so a discontinuance. And after many motions, the Court awarded, that the plaintiff should be barred.

2 Len. 192. 2 Roll. 787.

TRIN. 28 ELIZ. IN THE COMMON PLEAS.

CLXXXI. PALMER AND WADDINGTON'S CASE.

Richard Palmer brought an action upon the case against Anthony Waddington; and declared, that Henry Waddington, brother of the defendant, was endebted to the said plaintiff in 20l. Et jacens in extremis, & mortem indies expectans, vocavit ad se dict. Anthonium quem executorem testamenti & ultimæ voluntatis constituisset, eum rogans ut dictas 20 libras præfato Richardo infra spacium duorum mensium mortem suam proxime sequend. numeraret & solveret; et dictus Anthonius in consideratione inde super se assumpsit, &c. And all the matter aforesaid was found by verdict, upon non assumpsit pleaded. And it was the opinion of the whole Court, that the declaration was insufficient, because there is not any good consideration set forth in it; for it is not said, that in consideration that the said Henry made the defendant his executor, &c.

TRIN. 28 ELIZ. IN THE KINGS BENCH.

CLXXXII. STRANSHAM AND COLLINGTON'S CASE.

The plaintiff sued in the Spiritual Court for tythes against the defendant within the parish of C. The defendant said, that the tythes are within the parish of A. and the parson of A. came in pro interesse suo, and thereupon they proceeded to sentence, and that was given against Stansham, who now sued a prohibition: and the question was, if within such a parish or such a parish, be tryable by the law of the land, or by the law of the church: Wray, Chief Justice, said, it hath been taken, that it is tryable by our law. Fenner, The Pope hath not distinguished parishes, but hath ordained, that tythes shall be paid within the parish.

1 Cro. 228.

[130] MICH. 28 ELIZ. IN THE COMMON PLEAS.

CLXXXIII. HIGHAM'S CASE.

It was found by special verdict, that Thomas Higham was seised of 100 acres of lands called Jacks, usually occupied with a house; and that he leased the said house, and 40 acres of the said 100 acres to J. S. for life, and made his will; by which he devised the said house and all his lands called Jacks, then in the occupation of J. S. to his wife for life: and that after the decease of his wife, the remainder thereof, and of all his other lands appertaining to Jacks, to Richard his second son, &c. It was said by Meade, that the wife should not have by implication the residue of Jacks, for that she hath an express estate in the house, and 40 acres of the land; and her husband having expressed his will as to that, his will shall not be construed by implication to pass other lands to the wife. And it was said by him, that it had been adjudged in the case between Tracy and Glover, that if lands be devised to one and to his heirs, and if he dieth without heir of his body, that then the land shall remain over; that in such case, the donee hath but an estate in tail to him and the heirs males of his body.

And it was then also said by Anderson, Chief Justice, that in the time of Sir Anthony Brown, it was holden, that if a man be seised of two acres of land, and devised one of them to his wife for life, and that J. S. shall have the other acre after the death of his wife; that the wife hath not any estate in the later acre, for the cause aforesaid: afterwards, it was moved, what thing passed to the second son by that devise: and the Lord Anderson conceived that the words in the will, usually occupied with it, did amount to as much, as land let with it; and then the 60 acres were not let with it, and therefore did not pass. Windham, Justice, held the contrary; and he said, although they do not pass by the words, occupied with it; yet it shall pass to the son by the name of Jacks, or, the lands appertaining to Jacks, to which Anderson, mutata opinione, afterwards agreed.

2 Len. 226. More Rep. 221. 1 Cro. 15. 1 Roll. 839.

PASCH. 28 ELIZ. IN THE KINGS BENCH.

CLXXXIV. WROTH AND THE COUNTESS OF SUSSEX CASE.

The case was this, In anno 4 & 5 of King Philip and Queen Mary; a private Act of Parliament was made, by which it was enacted, that the mannor of Burnham was assured to the Countess of Sussex for her joynture; with a proviso in the Act, that it should be lawful for the Earl of Sussex to may a lease or leases for 21 years; and afterwards, a year before the first lease [131] was ended, he made another lease for 21 years, and this second lease was to begin and take effect from the end of the first lease. And if this second lease were a good lease within the intent and meaning of the Act, was the question?

Popham, the Queens Attorny General said, that it was not; 1. Because it was a lease to begin at a day to come: and, 2. Because it was made before the first lease was ended. But he said, it may be objected, that the Act saith (lease or leases), it is not the sense of the Act, that he might make leases in the reversion: but the sense and meaning of the makers of the Act, was, that he might make leases in possession, and not leases in futuro; for if it should be so, then he might make a lease for 21 years to begin after his death: which should be a great prejudice to the countess, and against the meaning of the Act, which was made for her advantage

The Lord Treasurer, and Sir Walter Mildmay, Knight, have a commission from the Queen to make leases of the Queens lands for 21 years, because the Queen would not be troubled. It was holden, that by virtue of that commission, they could not make any leases, but leases in possession only: but all other leases which did exceed the term of 21 years, and in reversion, were to pass by the hands of the Queen, and

her Attorny General, and not by them only by virtue of their said commission. And if I grant to one power before the statute to make leases of my land for 21 years, he cannot make any lease, but only leases in possession; and he cannot lease upon lease, for by the same reason, that he might make one lease to begin in futuro; by the same reason he might make 20 several leases to begin in futuro; and so frustrate the intent of the Act. It was Marshall's case upon the Statute of 1 Eliz. of Leases to be made by bishops; the Bishop of Canterbury made a lease to him for one and twenty years; and afterwards he made a lease unto another for 21 years to begin at the end of the first lease. And it was holden, that the second lease was void. But in the great case which was in the Exchequer-Chamber, upon this point, there the second lease was in possession, and to begin presently, and to run on with the other lease; and therefore it was adjudged to be good, because the land was charged with more than 21 years in the whole. And if the earl had done so here, it had been a good lease. Wray, Justice, said, that if the second lease had been made but two or three years before the expiration of the first lease, that then it had been utterly void; but being made but 2 or 3 days or months before the expiration of the first lease, he doubted, if it should be void, or not. The statute of 32 H. 8. makes leases for 21 years, to be good from the day of the date thereof: and a lease was made to begin at a day to come: and yet it was holden by two of the justices in the Court of Common Pleas, that it was a good lease: and by two other justices of the same Court, it was holden, the lease was **[132]** not good. And Clench, Justice, said, that there was no difference, if it be by one deed, or by two deeds: and therefore he held, that if the earl had made a lease for 21 years, and within a year another, the same had been void, if it were by one deed, or two deeds, for that he did exceed his authority. And he said, in the principal case, if there had not been a proviso, he could not have made a lease; and therefore the proviso which gave a power to make a lease for 21 years, should be taken strictly. There was a case of the Lord Marquess of, &c. that it should be lawful for him to make leases for 21 years by a statute; and he made another lease to begin after the end or expiration of the first lease; and it was doubted, whether it were a good lease or not, because he had not made any lease before: but if both were made by force of the statute; all held, that the second lease was void.

At another day, the case was argued by Daniel, for the lease in reversion to begin at a day to come. And he said, that in a statute the words alone are not to be considered, but also the meaning of the parties, and they are not to be severed. Also he said, that a statute-law is to be expounded by the common-law; and by the common-law, if one giveth power unto another to make leases of his lands, he might make leases in reversion, because an authority is to be taken most beneficially for them for whose cause it was given. So that if a man grant an authority to another to make estates of his lands, by those general words he may make leases for years or for life, gifts in tail, feoffments, or any estates whatsoever; if one gives a commission to another to make leases for one and twenty years of his lands, he may make a lease in reversion; and so it was holden in the dutchy in the case between Alcock and Hicks. Also he said, that this lease was a good lease by the statute-law: for the statute of Rich. 3. gives authority to cestuy que use, that he may make estates in reversion. The statute of 27 H. 8. which gives authority to the Chief Officer of the Court of Surveyors to make leases, if it had stayed there, he might have made leases in reversion; therefore the statute goes further, and saith, proviso, that he shall not make a lease in reversion. See 19 Eliz. Dyer, 357. The Statute of 35 H. 8. of Leases to be made by the husbands of the lands of their wives, by the general words of the statute they might have made leases in reversion; and therefore the case there was, that where the husband had made a lease of his wives lands for 21 years; and afterwards he made another lease for 21 years, to begin after the lease in esse: it was conceived, that such a lease was good, because in the Act there was no restraint of leases in reversion, as there is in the statute of 32 H. 8.

In all cases of statutes which are with provisoes, the law upon them shall be taken generally, but in such particulars only as are restrained by the proviso; and here in this case, the pro-**[133]**-viso went to the ancient rent to be reserved, and that the countess should have remedy for the said rent; and therefore it shall be construed at large as unto all other points which are not restrained by the proviso.

As if the wife be within age, and she and her husband joyn in a lease, yet such a lease shall be good, by the statute of 32 H. 8. because the law is general, and doth not restrain these imperfections expressly. So if a feoffment in fee be made with warranty, proviso, that he shall not vouch; yet that restraint goes to the voucher only, and he is at large to rebutt, or to have a warrantia chartæ. A lease is made for life, proviso, that he shall not do voluntary waste; he is at large to do any other waste: otherwise it would be, if there were no proviso; and there a proviso makes the precedent words to be expounded more liberally. The Stat. of 33 H. 8. cap. 39. of Surveyors, which giveth authority to the chief officer to set, or let for 21 years, he might have made a lease for 21 years, if by the proviso he had not been restrained; and yet the words are put singularly: but the words of this Act, upon which the case in question doth arise, are lease or leases; and therefore it shall be expounded most liberally for the party.

Again, he argued, that as to the intent of the statute, that this lease was within the meaning of it; for the meaning is to be collected out of the words, and shall not be drawn to any private construction or intent against the words, which should be here, if this lease should be avoided: for by such construction and exposition, the earl, his heirs, executors, &c. should be prejudiced, and the countess only should be benefited. Also by this Act remedy is given to the countess against such lessees, that she should have the rent, by debt, or distress; as if she had been party or privy: therefore it is reason, via versa, that the lessees have remedy against her for their leases. Also he said, that the same remedy should be for them against the countess, as they had against the earl himself if he had been alive; and therefore they should have such remedy against the countess, as they had against the earl. And further he said, that the statute is to be expounded according to the words where such an exposition is not rigorous, nor mischievous: and private laws are to be expounded by the letter, and strictly, as the deed of the party shall be. As 14 E. 4. 1 Br. Parliament, 61. A particular Act was made, that the Chancellor calling unto him one justice, might award a subpena between A. and B. and end the matter betwixt them: and there, by all the justices, except Littleton, he shall not award a general subpena, but a special subpena, making mention of the Act; for he shall pursue the particular Act strictly: but an Act which is for the common profit, shall be expounded largely. Also a statute shall not be expounded largely, or by equity to overthrow an estate. As the statute which gives, that if the woman doth consent to the ravisher, that the next heir shall enter: if the daughter entreth; and after a son is born; he shall not put out the daughter, **[134]** because the statute shall not be drawn to a private intent, to the overthrow of the estate before lawfully vested in the daughter: and so in the principal case, the statute shall not be drawn to a private intent for the benefit of the countess, to overthrow the lease for years. And it is not like to the case which hath been put, that if he maketh a lease for 20 years, and so for 20 years; that the same is not good by the statute; for I will agree, that that is a lease for 40 years. Egerton, Sollicitor, contrary; First, as to the word (demise, or dimission,) it is nothing else but the letting of the land, and so, (lease) comes from (laiser) a French word; and such a lease to begin at a day to come, is interesse of a lease, and not a lease it self, for he hath not left the land. As if I say to you, I let you my lands for 21 years; when shall you have my land? Not at a day to come, but presently. If I sell you land, and covenant, that it is discharged of another lease for 21 years, and there is a lease to commence after the lease for 21 years, I have broken by covenant. If I be bounden to make you a lease for 21 years, and I say to you, I make you a lease to begin 200 years hence, I have forfeited my bond. If the custom of the mannor be, that dominus pro tempore may make a lease for 21 years, may he make a lease to begin at a day to come? Truly no, if there be not a special custom so to do. If I give authority to my steward to make leases of my lands for 21 years, he cannot make a lease to begin 100 years after. As to the case of the dutchy, there the commission was, that he might make leases according to his discretion, therefore there he might make what lease he pleaseth. As to the statute which enableth cestuy que use, of 1 R. 3. that case is not like to our case, for that Act is, All feoffments, estates, &c. therefore he might make such leases without doubt. And if I devise, that my executors shall make leases of my lands for 21 years,

they cannot make leases to begin at a day to come; and if they do not make the leases within convenient time, the heir shall enter, and avoid their authority.

And statute-law shall have such an exposition, as that the precise time ought to be observed; as the statute of 14 E. 3. Rastal Voucher, 8. If the tenant voucheth to warranty a dead man, and the demandants will aver, that the vouchee is dead, or that there is no such, their averment shall be received without more delay. Upon this statute the case was, 21 E. 3. where one was vouched to warranty, and the summoneas ad warrantizandum issued, and then came the demandant and would have averred, that the vouchee was dead; and the tenant said, that he ought to have averred that upon the voucher to warranty, and that now he had surceased his time: and the demandant said, that the statute did not bind him to that, nor did prescribe any time, but left the same generally. Yet it was the opinion of the whole Court, that he should have the averment at the time of the **[135]** voucher, or not at all. So the statute of 11 H 7. cap. 20. If a woman who hath a joynture for life or in tail, suffereth a recovery, and afterwards the issue in tail releaseth all his right by fine, and dieth, his issue may enter; for the assent ought to be by voucher in the same action, or the like: for if there be a mean instant between the recovery and the assent, then any assent after is nothing to the purpose; for the recovery being once void by the statute, cannot be made good by an assent afterwards. See Doctor and Student, 54. And yet the statute is, provided, that the statute shall not extend to any such recovery, &c. if the next heir be assenting to the same recovery, &c. so as the same assent, or agreement be of record, or enrolled. And it doth not say, that the assent should be at one time, or at another. But to come to leases upon statutes. Before the statute of 2 E. 6. cap. 8. if leases had not been found by offices, the lessees should have been ousted, and put to their traverse: but put case, that after that statute, a lease made to begin at a day to come, were not found by office, should it be helped by that statute? No truly; and so it is holden in the Court of Wards at this day; and the Lord Chief Justice of England held so in his reading at Lincolns-Inn.

The Statute of 1 Eliz. of Leases to be made by bishops, is, that leases other than for 21 years from the time that they begin; that is, when they may take effect as deeds, and not when they shall take effect to be executed; for so they might make leases infinite, &c. It was adjourned, &c.

Co. 6. Rep. 33. 1 Len. 35. 4 Len. 61.

MICH. 28 & 29 ELIZ. ROT. 2494. IN THE COMMON PLEAS.

CLXXXV. LEWEN AND MODY'S CASE.

In a replevin brought by Lewen, doctor of the civil law, against Mody; who made conusans as bailiff to one Fowke, and shewed, that 14 Elizabeth, the morrow of the Purification, a fine was levied between Lovelace and Rutland plaintiffs, and the said Fowke and other deforceants: by which fine, the said deforceants acknowledged the said mannor to be the right of the said Lovelace and Rutland, come ceo, &c. And the said Lovelace and Rutland, by the same fine, granted and rendred to the said Fowke a rent of 20l. per annum in fee out of the said mannor; and for the rent arrear, &c. And the plaintiff in bar of the conusans, shewed, that the said Fowke being seised of the said rent, granted the same to one Horden, &c. Upon which grant they were at issue: and the jury found, that the said Fowke being seised of the said rent, by indenture reciting, that whereas a fine was levied between Fowke and 7 others plaintiffs, and Lovelace and Rutland deforceants; as the rest ut supra, granted redditum prædict. to Horden; and further found, that no other fine **[136]** was levied between the parties aforesaid but the said fine, and that the parties to the fine were seised of the mannor at the time of the fine levied, and of no other land: and if this rent so described by the said indenture, should pass or not, was the question? And it is to be observed, that the indenture of grant between Fowke and Horden, recited a fine of the mannor of Coleshall inter alia, where the jury have found, that the fine was levied of the said mannor only. And it was argued by Shuttleworth, that the said rent did not pass to Horden by the said indenture; for the rent, described by the indenture, is

not the rent which was granted by the fine: and if I let lands for years to A. and afterwards A. grants the land which B. holds of me, the grant is void; as 13 E. 3. Grants, 63. Land is given to husband and wife for their lives; and the lessor grants the reversion of the land which the husband holdeth for life, nothing passeth. Walmesley, contrary; The variance in the fine shall not avoid the grant; for the indenture of the rent agrees with the fine, in the term, in the year of the reign, and in the name of the parties to the fine, in the quantity of the rent, and in the land charged; the only difference is in the phrase of law, deforceant for plaintiff; and it is granted, that that is but a matter of circumstance, and not of substance. Snag, Serjeant, contrary. And first he took exception to the verdict; for this, that a special verdict is given upon a special absq; hoc. And the Lord Anderson interrupted him, that it was a clear case, that such a verdict upon such an issue might be found. And so it was adjudged in the case between Vavasour and Doleman. Fenner argued, as Walmesley, The grant agrees with the fine in the points of greatest importance, and one falsity shall not prejudice it where there are so many verities which may induce the Court to judge, that the rent granted by the indenture, is the rent created by the fine: and in a fine, the substance is not, who was deforceant, who was plaintiff; but who was party to the fine? And that some of the parties to the fine were seised of the land of which the fine is levied: and if the indenture had been, whereas such a rent was granted by a fine levied between A. and B. without shewing who was plaintiff, and who deforceant, it had been good enough. And although that in this case, the plaintiff and deforceant as mis-set down, yet the same shall not make the grant void; for utile per inutile non vitiatur. So if I reciting, the original grant was made to me by indenture tripartite between A. of the first part; B. of the second part; and my self of the third part; whereas the indenture it self is, between my self of the first part, the same is not material, &c. For, such a small mistaking shall not avoid the grant. So if I by my deed reciting, that whereas I am possessed of certain lands for term of years of the demise of Sir Christopher Hatton, knight, Treasurer of England; whereas in truth he is Chancellor; that mistaking of the dignity shall not prejudice the grant. And it was **[137]** agreed by all the justices, If the said fine had been pleaded at it is recited in the indenture, mistaking the plaintiff and deforceant; he who had so pleaded it, had failed of his record; but in the case at Bar, the reciting who was plaintiff, who defendant, was matter of surplusage, and therefore it shall not hurt the party. As 23 Eliz. Dyer, 376. A. seised of a house in D. which he purchased of Tho. Cotton, he made a feoffment thereof by these words; A house in D. late Richard Cotton's. And notwithstanding this variance, it was good enough; for the variance is in a thing which is matter of surplusage: and so much the rather, because the said A. had not another house in D. &c.

Pasch. 28 Eliz. In the Common Pleas.

CLXXXVI. Lucas and Picroft's Case.

The case was, that an assise of novel disseisin was brought in the county of Northampton, of two acres of lands; and as to one acre, the tenant pleaded a plea tryable in a forreign county. Upon which the assise was adjourned into the Common Pleas, and from thence into the forreign county; where, by nisi prius, it was found for the plaintiff; and now in the Common Pleas, Snag, Serjeant, prayed judgment for the plaintiff; and cited the book, 16 H. 7. 12. Where an assise is adjourned into the Common Pleas for difficulty of the verdict, they there may give judgment. But all the Court held the contrary; for here is another acre of which the title is yet to be tryed before the justices of assise; before the tryal of which, no judgment shall be given for the acre of which the title is found. And the assise is properly depending before the justices of assise, before whom the plaintiff may discontinue his assise. And it is not like to the cases of 6 E. 4. and 8 Ass. 15. where in an assise, a release was pleaded, dated in a forreign county; which was denyed: wherefore the assise was adjourned into the Common Pleas, and there found by enquest, not the deed of the plaintiff's. Now if the plaintiff will release his damages, he shall have judgment of

the freehold presently. But in our case, parcel of the land put in view, remains not tryed; which the plaintiff cannot release, as he may his damages, and therefore the Court remanded the verdict, to the justices of assise.

2 Len. 41. 2 Len. 199.

[138] MICH. 28 ELIZ. IN THE COMMON PLEAS.

CLXXXVII. HARE AND MELLERS CASE.

[See *Proctor* v. *Webster*, 1885, 16 Q. B. D. 113.]

Hugh Hare of the Inner-Temple brought an action upon the case against Phillip Mellers, and declared, that the defendant had exhibited unto the Queen a slanderous bill against the plaintiff, charging the said Hugh to have recovered against the defendant 400l. by forgery, perjury, and cosening; and also, that he had published the matter of the said bill at Westm. &c. In this case, it was said by the Court, that the exhibiting of the bill to the Queen, is not in it self any cause of action; for the Queen is the head and fountain of justice, and therefore it is lawful for all her subjects to resort unto her ad faciendam querimoniam: but if a subject after the bill once exhibited will divulge the matter therein comprehended to the disgrace and discredit of the person intended, the same is good cause of action. And that was the case of Sir John Conway, who upon such matter recovered: and as to the words themselves, it was the opinion of the Court, that they are not actionable: for it is not expresly shewed, that the plaintiff hath used perjury, forgery, &c. And it may be, that the attorny, or sollicitor in the cause, hath used such indirect means not known to the plaintiff: and in such case it is true, that the plaintiff hath recovered by forgery, &c. and yet without reproach: and by perjury he cannot recover, for he cannot be sworn in his own cause. It was adjudged against the plaintiff.

Post. 163.

MICH. 28 ELIZ. IN THE COMMON PLEAS.

CLXXXVIII. MOORE AND THE BISHOP OF NORWICH'S CASE.

In a quare impedit by Moor against the Bishop of Norwich, &c. it was found for the plaintiff; and thereupon issued forth a writ to the bishop, which was not retorned; upon which an alias issued forth: upon which the bishop retorned, that after judgment given in the quare impedit, the same incumbent against whom the action was brought, was presented, instituted, and inducted into the same church, and so the church is full, &c. And if that was a good retorn, it was oftentimes debated. Windham cited the case, L. 5 E. 4. 115, 116. A quare impedit against parson, patron, and Ordinary, and, pendant the writ, the parson resigned, and the Ordinary gave notice of it to the patron; and afterwards by lapse, the Ordinary presented the same incumbent, who resigned: and afterwards, the plaintiff in the quare impedit had judgment to recover; and it was holden, because the same incumbent is now in by a new title; scil. by lapse, and the same person against whom the recovery was had; and that appeared to the Court, he should be removed. See 9 Eliz. Dyer, 260. [139] and 21 Eliz. Dyer, 364. And it was said by the Lord Anderson, What person soever is presented and admitted after the action brought, unless it be that the title of the patron be paramount the title of the plaintiff upon such recovery he shall be removed: and so in the principal case, it was adjudged, that the retorn of the bishop was not good. Wherefore, he was fined 10l. and a sicut alias awarded upon pain of 100l.

MICH. 28 ELIZ. IN THE KINGS BENCH.

CLXXXIX. PARRET AND DOCTOR MATTHEWS CASE.

A præmunire was brought and prosecuted by the Queen's Attorney-General and Parret, against Doctor Matthews Dean of Christ-Church in Oxford, and others, for that they procured the said Parret to be sued in the City of Oxford before the commissary there, in an action of trespass, by libel according to the ecclesiastical law; in which suit, Parret pleaded his freehold, and so to the jurisdiction of the Court; and yet they proceeded there, and Parret was condemned and imprisoned: and afterward, the said suit depending, the Queens Attorny withdrew his suit for the Queen.

It was now moved to the Court, If, notwithstanding that, the party informer might proceed in his suit there? See 7 E. 4. 2. the King shall have præmunire; and the party grieved, his action, see Br. Præmunire, 13. for by Brook, None can have præmunire but the King.

Cook, There is a president in the Book of Entries, 427. In a præmunire, the words are, Ad respondendum tam Domino Regi quam R. F. and that upon the statute of 16 R. 2. And see ibid. 429. tam Domino Regi de contemptu prædict. quam dicto A. B. de damnis: but it was holden by the whole Court, that if the Queens Attorny will not ulterius prosequi, the party grieved cannot maintain that suit; for the principal matter in the præmunire is the conviction; and the putting of the party out of the Kings protection; and the damages are but accessary; and then the principal being released, the damages are gone. And it was also holden, that the presidents in the Book of Entries, are not to be regarded; for there is not any judgment upon any of the pleadings there.

1 Len. 292.

MICH. 28 ELIZ. IN THE KINGS BENCH.

CXC. ARCHEBOLL AND BORRELL'S CASE.

Archeboll brought an action upon the case against Borrell, and declared, that the defendant had procured one L. to bring an appeal of the death of J. S. against the now plaintiff. To **[140]** which endictment the now plaintiff pleaded, not guilty; and upon that he was acquitted. The defendant pleaded, that the now plaintiff was endicted of the said death in the county of S. scil. of the stroak, and of the death of the dead in the same county. To which the plaintiff by replication said, that the said J. S. was struck in the said county of S. but died in the county of D. so as this indictment found in the county of S. is void by the common law: and by the statute of 2 E. 6 the party ought to be indicted in the county where the party died, and not where the stroke was given. And upon that replication, the defendant demurred in law.

Broughton, The plaintiff ought to be barred; 1. The plaintiff was not lawfully acquitted, for the proceedings are not by due process; for upon the writ of appeal, no pledges are retorned. Which see, 11 H. 4. 160. Then, if the appeal was not duly sued, the plaintiff was not duly acquitted; and then conspiracy, or action upon the case doth not lie: for such suit doth not lie, but where, if the plaintiff had been found guilty, he should have judgment of life and member: which shall not be, upon an insufficient appeal, 9 H. 5. 2. 2. Because it is not shewed in the declaration, if the defendant did flie, or not. 3. The declaration wants these words, falso & malitiose, as they are in the writ of conspiracy. And also it is not shewed, if the plaintiff in the appeal be sufficient or not; for if he be sufficient, the abettors shall not be enquired. See Westm. 2. And as to the action it self, he conceived, that it doth not lie by bill, but by original writ against those who are found abettors. See 2 E. 2. Fitz. Action upon the Statute, 28. such suit by writ. But see 25 Eliz. It was holden, such suit doth not lie by writ. And see Book of Entries, 43, 44.

Flemming, to the contrary, It needs not to be shewed, that the plaintiff found

pledges ad prosequendum, for without that, the writ is good enough; and although that the writ be not well executed, yet it is good. For our action is not grounded upon the record of appeal, but at the common law, and the record is but conveyance to our action: and also there needs not in the declaration, falso & malitiose, for they are implyed in the words, abettavit, & procuravit. And he conceived, that this action is at the common law, and not only upon the statute of Westm. 2. Which see, Stamford, 172. And see 3 E. 3. Fitz. Conspiracy, 13. Conspiracy lieth upon an endictment of trespass, as well as upon an endictment of felony; for the law hath provided remedy in every case where a man is damnified. As 43 E. 3. 20. A writ of deceit was brought, for that the defendant by fraud and collusion had procured J. S. to bring a formedon against the plaintiff of such a mannor, by reason whereof the plaintiff was put to great charges, and holden maintainable; and the statute of West. 2. is in the affirmative, and therefore it doth not abridge **[141]** the common law, but the subject may take the advantage of the common law if he pleaseth; for it may be that the course according to the common-law will more avail him, than that upon the statute: for upon the statute law, if the abettors have not any thing, the party is without remedy; but by the common law, the party grieved, shall have execution upon the body. 13 E. 2. Conspiracy holden maintainable against one who procured one to sue an appeal against the plaintiff. See Fitz. Conspiracy, 25. Fitzh. Na. Br. 98. If A. procures B. to sue an action against me, to vex and molest me, an action of disceit lieth. And as to the matter of the endictment, I conceive, that it is not any bar; for the endictment is meerly void, because it was found in the county where the stroke was, and not in the county where the party strucken died, where of right it ought to be, and that by the statute of 2 E. 6. Then if the endictment be insufficient, it is as no endictment, and then the plea cannot excuse the defendant. Which see, 20 E. 4. 6. If the endictment be not sufficient, the appellee shall wage battail, and the abettors shall be acquitted. Vide inde, 19 E. 3. Coron. 444. 26 H. 8. 2. And by the common law, the plaintiff might at his pleasure bring an appeal where the plaintiff was strucken, or where he died: but in such case, the tryal shall be by both counties. And 3 H. 7. 12. Appeal was brought in the county where the party was stricken; and 44 H. 7. 18. the appeal was brought in the county where the party died; and there it is said, that in an appeal the plaintiff may declare, as if the thing were done in both counties, but the endictment ought to be in one county only. And 43 E. 3. 18. A man strucken in one county, and dieth in another county, the appeal shall be brought in the county where he died. In an action upon the case brought in the county of Essex, the plaintiff declared, that the defendant held certain lands, by reason of which he ought to repair a wall in the county of Essex juxta le Thames, and that the plaintiff had land in the county of Middlesex adjoyning to the said wall; and for want of repairing the said wall, his land in the county of Middlesex was drowned; and the writ was allowed, being brought in the county of Essex. See 6 H. 7. 10.

Clench, I conceive this action doth not lie by the common law; for no writ of conspiracy was at the common law before the statute. And vide F. N. B. 114. F. If the plaintiff in an appeal be nonsuit, conspiracy lieth; but contrary, if he be acquitted, for he shall have his remedy against the abettors, &c.

Plowden, This action lieth at the common law, and an endictment is no plea in this action; and it is not grounded upon the statute as a conspiracy is, and so it well lieth, although the abettors be not enquired.

Gawdy, Serjeant, This is an action by the common law; for in all cases where one procures damages to another, so as the **[142]** party is put to charges, an action lieth, a fortiori where the procurement extends to the danger of life. And see F. N. B. 116. F. Men conspire to have a false office found of my lands, which office is found by such procurement, conspiracy lieth; and the statute of 2 E. 6. doth not alter the law before; for it is in the affirmative. See the statute, cap. 24.

Gawdy, Justice, conceived, that the endictment did not excuse the defendants in this action, but against those who are sworn to give evidence for the King, and not others; for they may well procure an appeal malitiously, notwithstanding the endictment.

Walmesley, Serjeant, conceived, that the action doth not lie at the common law;

for in no case where the party useth but the means of the law by the Kings writ, without any corruption or covin of the party, he shall be amerced only pro falso clamore, and no action lieth against him, because he hath not used but the means of the law. Which see, 2 R. 3. 9. by all the justices. But yet in an appeal, because it toucheth the life of a man, the defendant shall have his damages against the plaintiff, but not in any other action which is a vexation by suit, if no corporation or covin be in the party who prosecutes such suit. See such matter justifiable in Conspiracy, 35 H. 6. 13, 14. Afterwards, the principal case was adjourned.

PASCH. 28 ELIZ. IN THE KINGS BENCH.

CXCI. PARKER AND HOWARD'S CASE.

In debt upon an obligation, the condition was, that whereas the plaintiff and defendant be now joyntly seised of the office of the Register of the Court of Admiralty, if the defendant shall permit the plaintiff to exercise the said office, and take the profits of it wholly to his own use during his life, without let or interruption done by him, that then, &c. The defendant pleaded, that the custom of the realm of England is, that the Lord Admiral for the time being, might grant the said office, and that such grant should be good but for the life of the grantor. And further shewed, that the Lord Clynton, Lord Admiral, granted the said office to the plaintiff and the defendant, and died; and that the Lord Howard was appointed Lord Admiral: and that he 27 Eliz. granted the said office to one Wade, who put him out, and interrupted him; before which time the defendant suffered the plaintiff to enjoy the said office, and to take the profits of it: upon which the plaintiff demurred in law.

Cook argued for the plaintiff, that the defendant's plea was not good, for he hath not entituled the Lord Admiral to grant the office; for he saith, that the custom of the realm of England is; which he hath pleaded in such manner, as no issue **[143]** can be taken upon it; for it is pleaded, quod usitatum est quod Admiralis pro tempore existens, non potest concedere officium prædict. nisi pro termino vitæ suæ; and that cannot be, for it cannot be tryed; for the venire facias cannot be, of the realm of England: also, if it be, through the whole realm of England, then the same is the common law, and not consuetudo. Which see, Br. Custom, 39. And see 4 & 5 Mar. Dyer, 152, 153. An express case of this office; and there he prescribes in consuetudine in Anglia, &c. And also, that such grant is good but during the life of the Admiral who granted it. Also he doth not answer to any time of the grant of the Admiral Howard; for if he were lawfully put out by Wade, yet the defendant against his own obligation cannot put us out, or interrupt us. As L. 5 E. 4. 115. In a quare impedit against an abbot and the incumbent, who make default upon the distress; upon which a writ to the bishop was awarded for the plaintiff: upon which the bishop retorned, that the incumbent resigned; of which the bishop gave notice: and afterwards lapse encurred, and the bishop collated the said former incumbent, and then that writ came to him. Now although the incumbent be in by a new title, yet he is bound by the judgment. So here, although the defendant had another title, and the former title of the plaintiff be determined; yet against his own deed and obligation, he shall not put out the plaintiff. And the Court was clear, that the judgment should be given for the plaintiff. But afterwards, the cause was compounded by the order of the Lord Chancellor.

2 Len. 102. 1 Len. 103.

MICH. 28 ELIZ. IN THE KINGS BENCH.

CXCII. MANNINGS CASE.

Note: it was agreed by the justices in this case, that where an enfant executor sold the goods of his testator at less undervalue than they were worth; and afterwards brought an action of detinue against the vendee upon it in retardatione

executionis testamenti; that this sale of the enfant executor was good; and should bind him notwithstanding his nonage.

CXCIII. Mich. 28 Eliz. In the Common Pleas.

The case was; A man made a feoffment in fee to the use of himself for life, and afterwards to the use of his eldest son in tail, and afterwards to the use of his right heirs, not having at the time of the feoffment any son: afterwards, he suffered a common recovery, had issue a son, who died in the life of his father, having issue a son, and afterwards he himself dieth: it was holden **[144]** in this case, that the son and heir of the son, should not avoid this recovery by the statute of 32 H. 8. For there was not any remainder in him at the time of the recovery had, but the remainder then was in abeyance; for then the son was not born: and the words of the said statute are, that such recovery shall be void against such person to whom the reversion or remainder shall then appertain; i.e. at the time of the recovery. And it was said, that if lands be given to E. for life, the remainder to B. in tail, the remainder to C. in fee; B. dieth, his wife with child with a son; a recovery is had against E. with the assent of C. and afterwards the son is born, he shall not be helped by this statute, for that the remainder was not in esse at the time of the recovery. But it was holden in the principal case, that the heir might avoid this recovery by the common law: for the recompence could not extend to such a remainder which was not in esse.

Hill. 28 Eliz. In the Common Pleas.

CXCIV. The Countess of Sussex and Wroth's Case.

It was moved in this case by Gawdy, Serjeant, if the disseisee licence J. S. to put his cattle into the land whereof he was disseised; if it were a good licence? and, if by the execution of the said licence, the freehold should be revested in the disseisee, so as if the disseisor distrain the cattel of J. S. for damage-feasant, and in a replevin avow, the plaintiff may plead, that the freehold was in the disseisee who so licensed him? Periam, Justice, The licence is void; for at the time of the grant of it, the disseisee had but a right before he had recontinued the land by re-entry. Windham, If the disseisee make a lease for years of the land, whereof he is disseised, it is a void lease. Anderson, If the disseisee command one to enter into the land, and he doth accordingly, the same is good. The case was adjourned.

Mich. 28 Eliz. In the Exchequer.

CXCV. Payn's Case.

A writ of error was brought by Payn, Treasurer of the Records in the Kings-Bench, in the Exchequer-Chamber, upon a judgment given in the Court of the Exchequer for the Queen, upon an assignment of a lease for years by the Countess of Oxford to the Queen; one error was assigned, because whereas the issue was joyned upon the intrusion, and the taking of the profits, and so two matters put in issue; and the jury have found Payn guilty of the intrusion; but have said nothing of the taking of the profits, and so the verdict doth not meet fully with **[145]** the issue. The great matter of the case was upon this point; the information is, that the assignment of the Queen was, 16 Maii, the intrusion 17 Maii, the inrollment of the deed of assignment 18 Maii; and so it appeared upon the record, that the intrusion is supposed to be done before that the Queen had any interest in the land in which the intrusion is supposed, for nothing was in the Queen before the enrollment: for the Queen is a corporation of State, of such prerogative and excellency, that she cannot give or take an interest in land without matter of record; and this lease is a chattel-real, and an interest in land. See as to the inrollment, 1 H. 7. 30. 31. 5 E. 4. 7. 7 E. 4. 16.

But I agree, that if lessee for years be outlawed, the lease shall be in the King without office, for the outlawry it self is a sufficient record to entitle the King unto it. If the Queen makes a lease for years of lands rendring rent, with a clause, that if the rent be behind, that the lease shall cease, if the rent be not paid. It was agreed here in Sir Moile Finch's case, that the lessee continuing his possession, shall not be accounted an intruder before office thereof found, but he shall be accomptant to the Queen for the profits as bailiff of his own wrong: but here we are charged with intrusion.

It hath been doubted, if personal things are in the King without office, 37 H. 6. But now it is clear they are. As 35 E. 3. Br. Prerogat. 113. The villein of the King purchaseth goods, the property thereof is in the King without seisure; and so it is of all personal chattels, because they are transitory, 1 H. 7. 17. 4 H. 7. 1. 39 H. 6. 26. And here it appeareth upon the record, that this deed of assignment was delivered to Baron Clark, 16 May, at Westm. and that was Ascension-day, and so non dies juridicus, and so no Court there then holden, and then the said deed was not delivered in Court of Record, and then not delivered to him as a Judge, but as a private person, although that it was delivered to the use of the Queen. But in 37 H. 6. there is some opinion, that if such a deed be delivered in Court to one of the Barons, or be put into the Kings coffers, that then it is a record.

Atkins, to the contrary: And to the first exception, it is to be known, that in every plea where a contempt is laid to the charge of the defendant, he ought first to excuse his contempt: and therefore here the exordium of the plea is, quoad venire vi & armis, & quicquid est in contemptu Dominæ Reginæ, necnon de tota ulteriore transgressione & contemptu per ipso supposit. Quod ipse in nullo est inde culpabilis: and afterwards plead over: and so it is in an action of trespass. And also upon the Statute of 8 H. 6. of Forcible Entry; and here the issue upon the contempt doth ensue the other issue; for if the other issue is found against the defendant, so also is this. As to the other point I agree, that a corporation cannot take or speak without writing: **[146]** and the King being a corporation, and who only makes corporations, cannot take but by writing of as high a nature; scil. by record: and we have here a record (as is granted by the other side) being enrolled 18 May, which was delivered 16 May; and being once enrolled, it hath relation to the time of the delivery; i.e. to 16 May; and then Payn upon the whole matter was an intrudor 17 May: and an intrudor by his entry doth not gain any thing against the Queen; and therefore the information of the intrusion is, diversis diebus & vicibus intrusit; although it be but one continued possession; and therefore every instant during his possession, he is an intrudor. As to the delivery of the deed of assignment upon the day of the Ascension, which is not dies juridicus, that is not material. As 12 E. 4. 8. by Pigot, If the day of retorn of a writ, i.e. 4to die, falls upon a Sunday, it is good enough, although no Court can then be holden but the day following, and the plea is not discontinued; and this delivery of the deed of assignment might be made out of term there upon any day in the term which is not dies juridicus. Contrary, where the thing is of necessity to be done in the term; as in the case between Fish and Brocket, of proclamations made upon a fine; for a man may acknowledge a recognizance or a deed to be enrolled in the time of Vacation, &c.

Tanfield, As to the interest, the enrollment hath relation, not as to the profits; for Payn cannot be intrudor 17 May, by any relation.

Popham, the Queens Attorny, When an information of intrusion and taking of the profits is here exhibited, the defendant ought to justifie his entry; and if the entry be found against him, so as his entry is an intrusion, then the illegal taking of the profits is found also. And he said, that the deed acknowledged and delivered to the Baron, is a record, although not enrolled, be the acknowledgment thereof in Court, or out of Court. If an information upon a penal law be exhibited to a Baron of the Exchequer out of Court, and afterwards another informer exhibits another information upon the same statute for the same offence against the same person, and that is exhibited in the Court before the first; the first information shall be preferred, and the defendant shall answer to that, and not to the other: and for exhibiting the same in Court, or out of Court, it is not material. And the assignment when it is enrolled, hath relation unto the acknowledging of it. A reversion is granted to one for life,

the remainder to the King; the particular tenant attorns to the King, the remainder is not in the King by the attornment; but if the deed be afterwards enrolled, it shall be said to be in the King from the time of the attornment: and the King shall have the benefit of all the mean profits from the time of the attornment. A lease for years is made by the King, reserving rent, with a clause, that if the rent be not paid, that the lease shall **[147]** be void: the rent is not paid 10 years, after an office is found, the King shall be answered all the profits from the time of default in payment of the rent. And although no intrusion can be laid in the information 17 May, yet it shall be good for the 18th day.

Cook, The judgment for the Queen upon an information of the intrusion, is, quod defendens, de intrusione, transgressione, & contemptu prædict. convincatur, &c. And afterwards, a commission shall issue forth, for to enquire of the mean profits, and there the defendant may shew this matter in taking of the damages: and if the intrusion be at any time in the information, it is sufficient enough to have judgment upon it: and in our case, the continuance is laid 18 May.

Egerton, Sollicitor, The record warrants the judgment given upon it; for possession laid in the Queen, is sufficient to this information. And here Payn doth not answer the Queen's title, but traverseth the intrusion, and therefore he being found intrudor by verdict, judgment ought to be given upon it. For the jury hath found the intrusion generally, and specially, 17 May. And that cannot be assigned for error; for it is part of the verdict, of which error doth not lie, but attaint: for if any error was, it was in the jury, and not in the Court. Which Manwood concessit.

Tanfield, As to the case of continuance of an intrusion, it is clear, that every continuance ought to have a beginning; for a thing, which hath no beginning, cannot be continued; and here is not any beginning: for the beginning which is laid in the information, is pretended to be 17 May; and that cannot be, causa qua supra.

Popham, If an information be brought of an intrusion, where in truth there is not any record to prove it, and the jury find the intrusion, shall you have a writ of error upon it? And every continuance of intrusion, is an intrusion. This matter had been good evidence to the jury. Sed non habet locum hic, &c.

2 Len. 205.

Hill. 28 Eliz. In the Exchequer.

CXCVI. Sir John Southwell's Case.

Sir John Southwel of the county of Lanc. 7 July, 19 Eliz. made a conveyance of all his land to divers feoffees and their heirs, upon condition, that they should find him and his wife, and so many persons in his house, &c. prefer his daughters in marriage, pay his debts, &c. And if there fell out at the years end upon accompt made by the feoffees any surplusage, that then at the end of every such year they should answer such surplusage as should then remain in their hands unexpended of the rents and profits of his said lands, with clause of revocation, &c. After-**[148]**-wards, the said conveyance being in force, came the statute of 23 Eliz. concerning recusants: upon which statute, the said Southwel was now indicted: and afterwards, a commission issued out of the Exchequer to the Sheriff of Lancast. to enquire of the lands of the saith Southwel; and although against the said conveyance it was given in evidence, that after that conveyance, the said Sir John Southwel had granted trees out of the said lands, and had taken fines and incomes for leases, &c. Yet the jurors, charged to enquire, would not find, that the said Sir John had any lands, &c. And by special commandment of the Queen, it was referred out of the Exchequer, to all the justices of England, if the lands of the said Sir John Southwel contained ut supra, were subject to the said statute, and the penalties thereof? And upon great deliberation had, it was by them all resolved and agreed, that notwithstanding that conveyance, the said lands were lyable to the said statute. And as to the jurors which against their evidence given unto them for the Queen, gave their verdict, ut supra; process was awarded against them out of the said Court, for to appear before the Lord Treasurer, and the Barons of the Exchequer: and for their said contempt, they were committed to the Fleet, and each of them fined 50l.

2 Len. 132.

CXCVII. HILL. 28 ELIZ. IN THE COMMON PLEAS.

In a writ of entry sur disseisin, the tenant said, that the house in demand is within the City of London; and that the said city is antiqua civitas; and that King Hen. 3. concessit civibus civitatis prædict. quod non implacitentur de terris & tenementis suis, &c. extra muros civitatis prædict. And further said, that he himself is civis London, &c. and demanded judgment of the writ: (note, in the pleading before, the tenant said) & illis rectum teneatur intra civitatem prædictam secundem consuetudinum civitatis prædict. And to this plea, exception was taken, because that the tenant doth not shew before whom by their custom they ought to be impleaded. It was the opinion of the whole Court, that the tenant ought to have shewed, that the citizens for their lands ought to be impleaded in the Hustings, &c. And the general words in the plea; scil. sed illis rectum teneatur intra civitatem prædictam secundum consuetudinem civitatis prædict. did not supply the defect aforesaid. After, it was awarded by the Court, that the tenant answer further, &c.

[149] MICH. 29 ELIZ. IN THE COMMON PLEAS.

CXCVIII. THE LORD ANDERSON'S CASE.

The Lord Anderson, Chief Justice of the Common Pleas, brought an action of trespass by bill, for breaking of his house in the City of Wor. against one A. citizen of the said city; now came the mayor and communalty of the said city, and shewed their charter granted to them by King E. 6. and demanded conusans of pleas. And by the award of the whole Court, the conusans shall not be granted, because that the priviledge of this Court whereof the plaintiff is a principal member, is more antient than the patent, upon which the conusans is demanded. For the justices, clarks and attornies of this Court, ought to be here attending to do their offices and services, as belongs unto them, and shall not be impleaded, or compelled to implead others elsewhere than in this Court. And this priviledge was given to this Court upon the original erection of it. And such was the opinion of the whole Court. And as for the conusans, it was denyed.

1 Roll. 189.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CXCIX. COCKET AND ROBSTON'S CASE.

Arthur Cocket, Thomas Andrews, and A. his wife, brought an action of accompt against Robston, and declared, that one Mountford by the hands of Jo. Wase, had delivered 100l. to the defendant pro relevamine of the said Arthur and Anne. The defendant pleaded, ne unq; receiver pur accompt render: upon which they were at issue. And judgment was given, that the defendant should accompt: who, before auditors assigned, alledged, that he had expended the said 100l. in the education of the said Arthur and Anne, by the space of 8 years after the delivery of the said 100l. Upon which they were at issue. And upon evidence it was shewed on the plaintiffs part, that heretofore the said Arthur brought a writ of accompt against the said Robston, as guardian in socage for the land of the said Arthur discended; and upon the said accompt, the said Robston demanded allowance of 20 marks by the year for the said 8 years, for the education of the said Arthur, which was allowed to him; so as now he shall not be received to demand allowance for the said 8 years for the education of the said Arthur out of the accompt of the said 100l. and that was fully proved to the jury. It was moved, how the jury should demean themselves in their verdict? for the issue is, that the defendant had expended the whole 100l. in the education of the said Arthur and Anne. And some **[150]** were of opinion, if the defendant had expended part in the education of the said Anne only, yet the jury ought to find for the plaintiffs: for the issue is entire upon the expending of the said 100l. in the education of

the said Arthur and Anne, without saying how much for the said Arthur, and how much for the said Anne. But Periam and Anderson, Justices, were clear to the contrary: wherefore they advised the jury to find specially, if they conceived, that the defendant had expended any part of the 100l. and to find it, and how much. And after the jury found against the defendant, that nothing was expended, &c. and gave damages 20l. And the justices at the first doubted, if damages should be given in an accompt? but at length they received the verdict, by the manner, de bene esse. See 2 R. 2. Fitz. Accompt. 45. 2 H. 7. 13. 10 H. 6. 18. 21 H. 6. 26. And the Book of Entries, 17. in such case damages were given.

2 Len. 118. Post. 192. 230. 1 Len. 219. 1 Len. 302.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CC. TOOLEY AND PRESTON'S CASE.

In an action upon the case by Tooley against Preston, (which see, Mich. 29 Eliz. reported in Leon. 1. Part, fol. 297.) judgment was given for the plaintiff; and now upon the retorn of the writ of enquiry of damages, it was moved, that for as much as the damages are excessive, viz. 200l. that the Court de Gratia would abridge the damages: but the whole Court was against it; for that they as Judges cannot know what prejudice and damage the plaintiff hath sustained, by the wrongful detaining of the said recognizance, but the jury may well have notice of such matter: and as the case is here, the damages are but incertain upon the assumpsit: for the defendant assumed, that if he did not redeliver the said recognizance to the plaintiff to pay him 1000l. so as the damages are reduced to certainty by the promise of the defendant himself. And by Anderson, If I bail to you an obligation, to rebail the same to me before such a day one 10l. now upon not delivery at such a day, I shall have an action of debt for the 10l. contrary, by Windham. And by Anderson, in the principal case, If the defendant had pleaded non assumpsit, and the jury had found the promise, they might have given 1000l. damages, without danger of an attaint, notwithstanding that the plaintiff could not prove that he was damnified one penny, and that by reason of the express assumpsit of the defendant.

1 Len. 397. 1 Cro. 206. 2 Len. 105.

[151] HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCI. BINGHAM AND SQUIRE'S CASE.

Bingham brought debt upon an obligation against Squire; the condition was, that if the said Squire procure a grant of the next avoidance of the Arch-Deaconry of Stafford, to be made to the said Bingham, so that the said Bingham at such next avoidance may present, that then, &c. And the case was, that afterwards by the means and endeavour of Squire, the grant of the said next avoidance was made to Bingham. But before the next avoidance, the present arch-deacon was created a bishop, so as the presentment to that avoidance appertained to the Queen: it was adjudged in this case, that the condition was not performed, and that by reason of these words, (so that Bingham may present;) and afterwards the plaintiff had judgment to recover.

4 Len. 61.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCII. ROLT'S CASE.

The case was; A lease is made to two, durante vita ipsorum & alterius eorum diutius vivent. absq; impetitione vasti, durante vita ipsorum; the one of them dieth: now although some conceived there was a difference between the limitation of the

estate, and of the liberty, &c. for the limitation of the estate seems to be more liberal; yet it was agreed by the whole Court, that the liberty runneth with the estate, and shall endure as long.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCIII. FARMER AND DORINGTON'S CASE.

An action upon the case for these words, I will prove Farmer to be a perjured knave. It was moved, the words are not actionable; for it is not a meer affirmation. But after many motions; it was holden by the whole Court, that upon those words, an action did well lie.

[152] MICH. 29 & 30 ELIZ. IN THE KINGS BENCH.

CCIV. ALLEN AND HILL'S CASE.

In an ejectione firme by Allen against Hill of a house in Cornhill in London; upon not guilty pleaded, the jury found this special matter; viz. that one Francis Beneson was seised of the said house in fee; and 4 Eliz. devised the same to Anne his wife for life, in full satisfaction of all her thirds in London; and after her death, to Tho. Beneson his brother in fee: proviso, that if Anne clearly (the words of the verdict are totaliter) depart out of London, and dwell in the country, that then she shall have a rent out of the said house. And the jury found further, that Francis died without issue; and that afterwards Thomas died, Robert being his next heir; and that 14 Eliz. Anne clearly departed out of London, and went to Melton in the county of Suffolk: and that afterwards Robert before any entry, released unto Anne; and afterwards against his release entred. It was argued for the defendant, that by this proviso, and the departure of Anne out of London, the freehold was not out of her, and vested in Robert, before the entry of Robert; for if it were out of Anne, then is she but tenant at sufferance, to whom a release made cannot enure; and the words of the will are not, that her estate shall cease. And here as the case is, Anne cannot be tenant at sufferance to him in the remainder, betwixt whom and her there is not any privity. See 18 E. 4. 25, 26. Tenant for the term of the life of another, the remainder over in fee, cestuy que vie dieth; the tenant remained tenant until he in the remainder entred upon him. And so in our case, although Anne hath clearly departed out of London, &c. yet the freehold of the house doth continue in her, until the entry of Robert, and then the release made to her is good. Also the breach of the condition is not fully found; for the proviso is, if she clearly departs out of London, (but it doth not stay there) and dwell in the country, &c. And here it is found, that she clearly departed out of London; but they have not found, that she dwelt in the country, &c. but only that she went to Melton; but she ought to do both before her estate shall cease. It was argued by Towse for the plaintiff, that the defendant ought to be found guilty of the ejectment; for it is found, that the defendant entred before the commandment of Anne; but they have not found, that Anne was alive.

Fenner, Justice, The same is well enough: and so it was holden, 18 Eliz. in this Court; for although her life be not found, yet it shall be intended, that she was alive: for the jury did not doubt of it; and the conclusion of the verdict is, that if it shall seem to the Court that his entry is lawful, then the defendant is not guilty. So as the doubt of the jury is only upon that point. Which Wray concessit.

[153] Gawdy, Justice, If one deviseth land to one for life, upon condition, that his estate shall cease (which is all one with the case at Bar,) and after the breach of the condition he continueth in possession, he is not tenant for life, but tenant at sufferance.

Wray, Chief Justice; Tenant for the life of another continues in possession after the death of cestuy que vie, he hath not any freehold remaining in him; for if he

dieth, nothing descends. And so it was lately adjudged by all the justices of England, upon a conference had between them: and the book of 18 E. 4. is not law. Which Gawdy, Justice, concessit. See 35 H. 8. 57. acc. And he said, that the same shall be as a limitation by which the estate shall cease without an entry. And here in this case, because they have not found, that Anne had dwelt in the country, here is no breach of the condition in the case. And afterwards, by the advice of the whole Court, judgment was given for the defendant, quod querens nihil capiat per billam.

1 Cro. 238.

MICH. 29 & 30 ELIZ. IN THE KINGS BENCH.

CCV. CADEE AND OLIVER'S CASE.

In an ejectione firmæ by Cadee against Oliver, of a house in Holborn, &c. the case was, the Lord Mountjoy, and the Lady Katherine his wife, seised of the said house, and of other lands in fee in the right of the wife; 6 Eliz. acknowledged a statute-staple of 1200l. to Sir Lyonel Ducket: afterwards, 9 Eliz. the said Lord Mountjoy and his said wife leased the said house to Hoskins for 21 years; and afterwards by indenture, 11 Eliz. they leased the same to Sir Tho. Cotton for 99 years, to begin at Michaelmas last past: 12 Eliz. Sir Lyonel Ducket extended his statute; and the land extended was delivered to him at 53l. 7s. per annum; who held the same until 22 Eliz. Anno 23 Eliz. the Lord Mountjoy and his wife levied a fine to Perry, to the use of Perry and his heirs: 27 Eliz. Sir Thomas Cotton not being upon the land, granted omnia tunc bona & catalla sua, to Robert Cotton his son: 28 Eliz. the Lady Mountjoy died. Mich. 29 Eliz. the lease to Hoskins expired: Perry entred, and leased the house to Oliver the defendant for 21 years; and afterwards, Robert Cotton entred, and leased the house, &c. to the plaintiff. It was first moved by Brantingham, and argued by him, if this lease for 99 years which was made to begin after the lease made to Hoskins, should pass to Robert Cotton by the words aforesaid? But the Court eased him from arguing of that point; for it was holden, that it passed, notwithstanding the word tunc. Another matter argued by him, was, because at the time of the grant, the lands were in extent, and so the said Sir Thomas Cotton had but a possibility, if therefore the said grant, made during the extent, was **[154]** good? And he argued, that it was; for it is more than a bare possibility, for it is an interest vested: and in some cases, a possibility may be granted. As 19 H. 6. 2. The King granted to a prior, that when any tenth is granted to the King by the clergy, his house shall be discharged of it, &c. And 19 E. 2. Avowry, 224. The lord grants to his tenant, that if he dieth, his heir within age, that such heir shall not be in ward. So 21 E. 4. 44. a grant unto an abbot to be discharged of the collectorship of tenths when it shall be granted by the clergy. It hath been objected, that the term for 99 years is suspended, therefore it cannot be granted during the suspension. But the same is not so; for, a thing suspended may be granted: as 15 Eliz. Dyer, 319. Husband and wife joynt-tenants of lands in fee, the Queen having a rent out of it in fee, giveth the rent to the husband and his heirs; now the husband deviseth the said rent, and dieth; the same is good a devise, notwithstanding the suspension: and he cited the cases, 16 E. 3. Quid juris clamat, 22. and 20 E. 3. ibid. 31. A lease is made to one for life; and if he dieth within 20 years, that his executors and assigns shall hold the land until the expiration of the 20 years, the said interest may be granted. Which Wray, Chief Justice, denyed. See Gravenors case, 3 & 4 Ma. Dyer, 150. such interest is void. It was further moved by him, and argued, if the conusee of the fine might avoid the lease made to Sir Thomas Cotton? And he said, he could not; for he is in under the lessors. So is 34 E. 1. Recovery in Value, 36. see the case there. And here, although the wife after the death of her husband may affirm, or disaffirm the lease at her election; yet this election is not transferred to the conusee by the fine; but the conusee shall be bound by the fine. See 33 H. 8. Dyer, 51. As tenant in tail makes a lease for years not warranted by the statute, and dieth, the issue alieneth the land by fine, before affirmation or disaffirmation of the lease by acceptance or entry, the conusee cannot avoid this lease; for the liberty

is not transferred. Which Gawdy, Justice, concessit. And election cannot be transferred over to the prejudice of another person. As if a rent de novo be granted to the father in fee, who dieth before election, the heir cannot make it an annuity to defeat the dower of the wife, quod Curia concessit. It was also moved by Brantingham, if the lessee might enter upon the conusee of the statute after his extent expired, without suing forth a scire facias: but the Court discharged him from arguing that point; for that by the death of the Lady Mountjoy, the extent was void; and therefore the feoffee or conusee might avoid it by entry: and so Wray, Chief Justice, said, it had been adjudged in the Court of Common Pleas. At another day, the case was argued by Stephens on the part of the plaintiff; who said, that the extent by computation of time according to the value to which it was extended, is not yet satisfied: the verdict hath found, that **[155]** the extent continued until 22 Eliz. but doth not say, that it was then expired and ended. And I conceive also, that this extent doth not evict the interest of Sir Thomas Cotton, or turn it into a possibility; the extent is quousq; leventur denarii; but yet a limitation of time is in law understood, although by a casualty such time may be abridged or extended. Which see, 15 H. 7. 16. by Fairfax, where a man is bounden by statute to pay 40l. and the conusee sueth execution upon it, and the land extended is rated at 10l. per annum: now it shall be intended, by a common intent, that in 4 years the party may be satisfied; and therefore after the 4 years the conusor shall have a scire facias: so upon the matter it is a lease for 4 years. So 7 H. 7. 12. by Keble to the same purpose. And 15 E. 4. 5. by Brian; for the law shall not intend a casualty without alledging of it; for the same shall not be by imagination. And therefore, if the conusor will have the land within the term, he ought to alledge, that the conusee hath levied the duty by an extraordinary casualty, and shew it specially. And so where the conusor sueth a scire facias, and the conusee will hold the land over, he ought expresly to surmise some extraordinary occasion wherefore he could not levy the duty upon the land within the term: which see by Brian, 15 E. 4. 5. and 44 E. 3. The conusee of a statute after extent maketh a lease for 3 years; yet it may be that the duty shall be levied within one year; but if it be so, then a scire facias shall issue forth against the conusee, and not against the lessee; for the law intends, that the whole estate of the conusee is not granted, but that he hath a reversion in him; but if he hath granted his whole estate, then a scire facias shall issue forth against the grantee. So here, although that this extent in our case would continue by computation of time for some of the years of the term granted to Sir Thomas Cotton: yet it is intended, that the extent did run out, and was determined before the expiration of Sir Thomas Cotton's term; so as, notwithstanding that, Sir Thomas Cotton hath an interest left in him which he may grant. It will be objected, how can it be said an estate for years, when as he might hold over the years? As to that, such an interest may be put off in divers cases; as, 15 H. 7. A man grants to another the third avoidance of such a church, and dieth seised, his wife is endowed of the church, she shall have the third avoidance, and the grantee shall have the 4th avoidance, and so per talem intervenientem occasionem, the benefit shall be delayed; and so here in our case: and then the estate by extent being prima facie certain, so as it cannot by intendment surmount the term of Sir Tho. Cotton, as it appeareth upon the extent; the estate shall be taken to continue according to the extent of the years, and then a certain interest doth remain in Sir Thomas Cotton, which he may grant over, which is not a possibility, but rather a reversion: so, and to such purpose, is the case of 7 H. 5. 3 & 4. If the eldest son entreth after the death of his father, and afterwards his mother recovereth **[156]** dower, that shall take away the possessio fratris; but if the son maketh a lease for life, and the wife recovereth dower against the lessee, there shall be possessio fratris, for the reversion doth remain in the lessor, notwithstanding the eviction of the estate for life. And 7 H. 6. 2. there it is holden by Goddard and Strange, that where the term of the wife was extended upon the statute of the husband, who died, the wife shall have the residue of the term, and avoid the extent as to her term, which proves that all the term is not drawn to the conusee by the extent, but that an interest doth remain in the lessee notwithstanding that. And see by Seton, 29 Ass. 64. If lessee for life leaseth to him in the reversion for life, yet he hath a reversion in him, and 31 Ass. 6. A. is

bound by statute to B. and his land extended by force of it: C. recovers against B. in debt, and the land extended by him upon the statute, is now extended by elegit; A. grants his estate to the conusee, it is no surrender; which proves, that B. hath an interest. And so in our case, an interest doth remain in Sir Thomas Cotton, notwithstanding the extent. A. makes a lease for years to begin at a day to come, and before the day, A. is disseised; the lessee notwithstanding this disseisin, may grant his interest, for he never was in possession, and therefore it cannot be turned into a right.

As to the second point, if Robert Cotton may enter within the time of the extent, without a scire facias: and that rests upon this point; if this lease shall be subject to the extent? I conceive clearly, that it shall not. It hath been said, that our lease is not good: but I conceive it without question, that our lease is good enough; for it is made by the husband and wife: and the wife after the death of her husband by acceptance of the rent, might affirm the lease: but the statute is the act of the husband alone; therefore the conusee of the fine shall not avoid the lease, for it is but voidable. So the King grants lands durante beneplacito, and afterwards grants the reversion over, the patentee shall not avoid the estate; but if this lease had been made by the husband only, it had been void, and then the conusee of the fine should avoid it; as it was lately adjudged in Harvy and Thomas's case. And I conceive, that if tenant in tail acknowledgeth a statute, and afterwards makes a lease according to the statute of 32 H. 8. and dieth, the lessee shall not hold the land subject to the statute, for then the rent should not be paid to the issue in tail during the statute, which is against the stat. of 32 H. 8. And see also, 8 Eliz. Dyer, 252. The chaplain of a donative chappel leased for 99 years, which was confirmed by the patron, who was tenant in tail of the patronage which was appendant to a mannor, whereof he was seised in tail; and afterwards he had issue, and died; the Statute of Chauntries cometh; after the death of the incumbent, the King shall avoid this lease. And in our case, after the coverture, the conusee is in **[157]** by the wife, and then he shall avoid the statute extended upon it: and if so, then there needeth not any scire facias; as the issue in tail may enter upon the conusee of a statute acknowledged by his father; for if execution had been sued against the issue in tail, it had been a disseisin. And see 2 R. 3 7. that in such case, the wife, or her heirs, may enter upon the conusee; and by consequence, the conusee who is in by her, &c.

Cook, contrary; I conceive, that this grant of this lease by Sir Thomas Cotton to his son, is not good; for it is but a possibility, and no interest: I agree all the cases which have been put before, for law, but they cannot be applied to this case; the book in 7 H. 6. 2. is, that if the term of the wife be extended upon the statute of the husband, that the wife shall have the residue after the death of the husband; but it doth not say, that the wife or her husband may grant it during the extent; which is the matter now in question. And I conceive, that Sir Thomas Cotton hath but a possibility; for the conusee upon the extent hath but an incertain interest: and although it may be by some means reduced to a certainty in the Chancery, where the costs and damages shall be assessed; yet until it be reduced to a certainty, it cannot be granted. And therefore it is clear, that if I have a term for 8 years in land, and grant it unto another until he hath levied 100l. and all his costs of suit for it, by this grant all the interest of the term is in the grantee, and nothing is in me, but a possibility. And so it was holden in the Common Pleas by the Lord Anderson, the day when he was made Chief Justice there, at which time, this case was put; Lands of the yearly value of 20l. are leased to one until he hath levied 100l. And the matter was, what estate the grantee hath? and it was holden, that if livery be not made, that he hath but an estate at will, for the profits of the lands are incertain, the one year more, and the other year less: and Bromley, Lord Chancellor was then of the same opinion. Then, if in case of a lease it be so, it shall also be so in case of an extent; and in both the cases, the whole interest is out of the parties. And 19 Eliz. the case was in this Court, that the lessee for years devised his term to his executors for the payment of his debts and legacies; and after the payment of them, the residue of the years he devised to his son: the executors enter, which is an assent to the remainder; he in the remainder grants his interest: and it was holden void, because it was but a possibility, and so incertain: and although it might be reduced to a

certainty afterwards, yet the same is not sufficient; for it ought to be reduced to a certainty at the time of the grant. And 17 Eliz. in this Court the case was, that land was given to the husband and wife, and to the heirs of the husband; the husband makes a lease for years, and dieth; the wife enters, and entermarrieth with the lessee: and it was moved, if the interest of the lessee by the entermarriage, was extinct? and it was holden, that **[158]** it was not; for it was but a possibility, and not an interest, quod fuit concessum per totam Curiam. And if a possibility cannot be extinct, then it cannot be granted. And he denyed the case put by Stephens, where a man seised of lands leaseth the same for years to begin at a day to come, and afterwards before the day, the lessor is disseised; now during that disseisin, the grantee cannot enter for his future interest; for the feesimple being turned into a right, so also shall be the interest. And that is proved by Delamere's case, A feoffment in fee was made to the use of A. for life, and afterwards to the use of C. for life, and afterwards to the use of D. in fee; and afterwards A. enfeoffed a stranger, who had notice of the use; the same doth take away all the other uses; and said feoffee although he had notice of the use, yet he shall not be seised to the first use, for the estate out of which the first uses do arise, is taken away; and then also the uses. And he said also, that the lease made to Sir Thomas Cotton is not good; for it was made, 11 Eliz. And it is found by verdict, that 10 Eliz. a writ of extent issued forth upon the statute, then was the lands in the hands of, &c. during which time, the Lord Mountjoy and his wife could not make the lease aforesaid to the said Sir Thomas Cotton. And as to that, see 5 E. 3. Retorn of the Sheriff, 99. See the case of 3 E. 6. Dyer, 67. Stringfellow's case. Then admitting the lease to Sir Thomas Cotton, yet the lessee cannot put out the conusee without a scire facias; for the conusee is in by matter of record. Also here, this lease made by the husband and wife without any rent reserved, is utterly void, and then the conusee shall take advantage of it, 9 H. 7. 24. 18 E. 4. 2. And so was it ruled in the case of seniori puero, in the case of an enfant. And see 7 Eliz. Dyer, 239. Where the Provost of Wells being parson impersonee of the patronage of W. leased the tythe for 50 years, rendring rent, which was confirmed by the dean and chapter, but not by the patron and Ordinary: and afterwards by Act of Parliament, the provostry was united to the deanery cum primo vacare contigerit; the provost died, the dean accepteth the rent; the same shall not bind the church, for the lease is void, as it is of a parson, or prebend, &c. And so the dean shall take advantage of it, although not privy to it. See 16 Eliz. Dyer, 337. Lands given to a parson and his successors for to find lights, and he leaseth the same for life; the rent is so imployed accordingly: the incumbent dieth, the successor accepteth the rent; the King grants it over, the patentee shall avoid the lease, as the successor might have done before the statute, if he had not accepted the rent: but the acceptance before the statute shall bind the successor, for that it was but a voidable lease. And the case between Harvy and Thomas, which hath been put on the other side, serves to our purpose, for there the conusee shall avoid a lease in law which is void; and here, in the principal case, the lease is void; for that no rent is reserved upon it, Wherefore, &c. It was adjourned.

1 Cro. 152. Roll. Tit. Grant. 48. 1 Cro. 386. 1 Roll. 887. 2 Roll. 48. 1 Cro. 15. 1 Inst. 22. b. 8 Co. Mannings Case.

[159] MICH. 29 & 30 ELIZ. IN THE KINGS BENCH.

CCVI. BEADLE'S CASE.

The case was, that A. leased to B. certain lands for 40l. per annum; and a stranger covenanted with A. that B. should pay him 40l. for the farm and occupation of the said lands: A. brought an action of covenant; the defendant pleaded, that before the day of payment, the plaintiff put the said B. out of his farm: it was moved by Godfrey, that the same is no plea; for this is a collateral sum, and not for rent issuing out of the land: also, the defendant is a stranger to the contract for the farm. But the opinion of the whole Court was clear to the contrary; for the defendant hath covenanted, that the lessee shall pay for the said farm and occupation 40l. so as it is

as a conditional covenant, and here is quid pro quo, and here the consideration upon which the covenant is conceived, scil. the farm, and the occupation of it, is taken away by the act of the plaintiff himself; and therefore the plea is good, and the action will not lie.

2 Len. 115.

PASCH. 29 ELIZ. IN THE COMMON PLEAS.

CCVII. THE ARCHBISHOP OF YORK, AND MORTON'S CASE.

The Archbishop of York recovered in an assise of novel disseisin, against one Morton, before the Justices of Assise; upon which judgment, Morton brought a writ of error, retornable before the Justices of the Common Pleas; and after many motions at the Bar, it was adjudged, that a writ of error upon such judgment doth not lie in the said Court. Which see 8 Eliz. Dyer, 250. See also, N. B. 22. e. That upon erroneous judgment given in the King Bench in Ireland, error shall be in the Kings Bench in England, 15 E. 3. Error, 72. And Fenner, who was of counsel with the archbishop, demanded of the Court, how, and in what manner the record shall be sent back to the Justices of Assise, so as the said archbishop might have execution? to which the Court answered, that the surest way is to have a certiorari out of the Chancery into the Common Pleas directed to the Judges there; and then out of the Chancery by a mittimus to the Justices of Assise: but Fenner made a doubt to take such course for such remanding. Then Anderson, Chief Justice, said, Sue execution out of the said record; for in as much as the record came before us by writ of error, it shall also be removed and sent back by writ. And so it was done.

1 Len. 55.

[160] HILL. 29 ELIZ. IN THE KINGS BENCH.

CCVIII. THE QUEEN AND HURLESTON'S CASE.

The Queen brought a scire facias against Hurleston, to repeal a patent made to him of the constableship of Chester, and judgment was given for the Queen; and now Hurleston brought a writ of error against the Queen in the Kings Bench. And it was moved by Gawdy, Serjeant, that the writ did not lie for the manner, for that he ought first to have sued to the Queen by petition. See 22 E. 3. 3. & 23 E. 3. Fitz. Error, 9. If the King recover by an erronious judgment, a writ of error cannot be granted upon such a recovery, sine gratia Regis speciali. And he said, that in Chester, they have Courts of Common Pleas, Kings Bench, Exchequer, and Chancery; and that if judgment erronious be given in the Chancery at Westminster, it cannot be reversed, but by Parliament; and so it is of an erronious judgment given in the Chancery at Chester. Also he said, they have a custom in London, that within one month they may reverse their own judgment. See 23 Eliz. Dyer 376. Erronious judgment given in the 5 ports, cannot be reversed in the King Bench; but it is reversable in the Court of the Guardian of the 5 Ports.

Clench, Here both the parties claim by the Queen, therefore there needeth no petition; for, valeat quantum valere poterit, it is no prejudice to the Queen.

Cook, There needs no petition here, for the Attorney General hath subscribed our writ of error.

Egerton, Sollicitor General, It was the case of Eliz. Mordant, who was to reverse a fine levied during her nonage; and the proceedings were stayed, because she had not sued to the Queen by petition. See the case of 24 E. 3, 35, the case of William de Ingularby, who sued to reverse a judgment given against him in a writ of conspiracy in the eyre of Derby; and there it was said by Thorp, Justice, that he must first sue to the King by petition.

Wray, An outlawry may be reversed by bringing a writ of error, without suing petition to the King.

2 Len. 194.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCIX. BECKWITH'S CASE.

Roger Beckwich by indenture tripartite, between him of the first part; William Vavasour, Frances Slingsby, and Elizabeth sister of Roger, of the second part; George Harvey, and Frances wife of the said George, (the said Frances being another of the sisters of the said Roger) of the third part; covenant with the aforesaid William Vavasour, and Frances Vavasour his daughter, **[161]** and with the aforesaid George and Frances, & cum quolibet & qualibet eorum, that the said Roger at the sealing and delivery of the said indenture, was lawfully and solely seised of the rectory of Aldingfleet in the county of York, discharged of all incumbrances; Francis Vavasour took to wife Frances Slingsby; and note, that by the same indenture, Roger Beckwith conveyed the said rectory to the said Francis Vavasour; Francis Slingsby and Frances his wife, brought an action of covenant against the said Roger Beckwith; and assigned the breach in this, that the said Roger was not seised of the said rectory. And note, that the plaintiff declared of an indenture bearing date at the castle of York; and upon the breach of the covenant, they were at issue; which was found for the plaintiff, and damages assessed, and judgment given for the plaintiff. And note, that the venire facias was, de vicineto castri de York. And upon that judgment, a writ of error was brought in the Exchequer upon the new statute; and error was assigned, because all the covenanters ought to have joyned in the action of covenant, notwithstanding those words, cum quolibet, & cum qualibet; which words do not make the covenant to be several: and for that cause, the judgment was reversed. Another error was assigned, because the issue is not well and duly tryed; for the issue is upon the seisin of the rectory of Aldingfleet; in which case, the venire facias ought to have been de vicineto de Aldingfleet. And of that opinion was Manwood and Anderson, Justices.

5 Co. 19.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCX. YOUNG AND ASHBURNSHAM'S CASE.

In an action of debt brought by the administrators of Young against Ashburnham; the defendant pleaded, nihil debet: and the enquest was taken by default. And upon the evidence given for the plaintiff, the case appeared to be this, that the said Young was an innholder in a great town in the county of Sussex where the sessions used to be holden; and that the defendant was a gentleman of quality in the country there; and he, in going to the sessions, used to lodge in the house of the said Young, and there took his lodging and his diet for himself, his servants, and horses: upon which, the debt in demand grew: but the said Young was not at any price in certain with the defendant, nor was there ever any agreement made betwixt them for the same. It was said by Anderson, Chief Justice, that upon that matter, an action of debt did not lie. And therefore afterwards, the jury gave a verdict for the defendant.

[162] HILL 29 ELIZ. IN THE COMMON PLEAS.

CCXI. HEIDON AND IBGRAVE'S CASE.

A writ of right was brought by Heidon against Ibgrave; and he demanded the third part of 40 acres of land in the county of Hertford; and they were at issue upon the meer right, upon which the grand assise appeared; and first the 4 knights were specially sworn, to say upon their oath, whether the tenant hath better right to hold the land, than the demandant to demand it. And afterwards, the rest of the jurors

were sworn generally, as in other actions. And there was some doubt made, whether the demandant or the tenant should first begin to give evidence? And at the last, it was ruled by the Court, that the tenant should begin, because he is in the affirmative. And it was said by Periam, Justice, that so it was late adjudged in the case betwixt Noell and Watts; and upon the evidence, the case was, that King Hen. the 8th by his letters patents gave to the demandant the mannor of New-Hall, and all the lands in the tenure and occupation of John Whitton, before demised to Johnson, and in the parish of Watford; and the truth was, that the said 40 acres, whereof now the third part was in demand, were in the occupation of the said John Whitton, but were never demised to Johnson, nor in the parish of Watford: and by the clear opinion of the Court, the said 40 acres did not pass; for the circumstances of the deed are not true, scil. the demise to Johnson, and the being in the parish of Watford; but both were false. But if the said land had had an especial name in the letters patents, then it had been well enough, notwithstanding the misprision in the rest. And by Anderson, If upon the particular it had appeared, that the demandant had paid his mony for the said 40 acres, peradventure they had passed.

1 And. 148.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCXII. THE DEAN OF GLOUCESTER'S CASE.

The Dean and Chapter of Gloucester brought a writ of partition, against the Bishop of Gloucester, upon the Statute of 32 H. 8. of Partition: and it was moved, that upon the words of the statute, that the action did not lie in this case; for, the statute doth not extend but to estates in joynt-tenancy, or in common of lands whereof such joynt-tenants or tenants in common are seised in their own right. And also it is further said, that every such joynt-tenant, or tenant in common, and their heirs, shall have aid to deraign the warranty; without speaking of the word, successors. And by Periam and Windham, Justices, The writ **[163]** doth not lie. But Anderson seemed to be of a contrary opinion.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCXIII. HARE AND MELLER'S CASE.

Hugh Hare of the Inner-Temple brought an action upon the case against Philip Meller, and declared, that the said defendant had exhibited to the Queen a scandalous bill against the plaintiff, charging the said Hugh to have recovered against the said defendant 400l. by forgery, perjury, and forswearing and cosenage; and also that he had published the matter of the said bill at Westm. &c. It was said by the Court, that the exhibiting of the bill to the Queen, is not in it self any cause of action; for the Queen is the head and fountain of justice, and therefore it is lawful for all her subjects to resort to her to make their complaints. But if a subject after the bill once exhibited, will divulge the matter comprised in it, to the disgrace and discredit of the person intended; the same is a good cause of action. And so was the case of Sir John Conway, who upon such matter did recover. And as to the words themselves, it seemeth to the Court, that they are not actionable; for it is not expresly shewed, that the plaintiff had used perjury, forgery, &c. And it may be, that the attorny, or sollicitor in the cause, hath used such indirect means, the plaintiff not knowing it; and in such case the plaintiff hath recovered by forgery, &c. and yet without reproach: and by perjury he could not recover, for he could not be sworn in his own cause. And Stanhops case was remembred by the Court; which was, that Edward Stanhop of Grays-Inn brought an action upon the case against one who had reported, that the said Edward Stanhop had gained his living by swearing and forswearing; and by the opinion of the Court, the action did not lie; for those words do not set forth any actual forswearing in the person of the plaintiff; but it might be in an action depending

between the plaintiff and a stranger, that another stranger produced as a witness had made a false oath, without any procurement or practice of the plaintiff; in which case, it might be, that the plaintiff had gained by such swearing.

Ante 138.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCXIV. CHEVERTON'S CASE.

Henry Cheverton brought a quare impedit, and counted, that he was seised of the moyety of the church of D. that is to say, to present qualibet prima vice; and that J. S. is seised of the other moyety; that is to say, to present qualibet secunda **[164]** vice, &c. And exception was taken to the count, because it was not shewed how the special interest did begin; scil. by prescription, composition, or otherwise; for it is clearly against common right, and therefore that ought to be shewed. See Dyer, 13 Eliz. 229.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CCXV. EDMOND'S CASE.

In an action upon the case against Edmonds, the case was, that the defendant being within age, requested the plaintiff to be bounden for him to another, for the payment of 30l. which he was to borrow for his own use; to which the plaintiff agreed, and was bounden, ut supra, afterwards, the plaintiff was sued for the said debt, and paid it; and afterwards, when the defendant came of full age, the plaintiff put him in mind of the matter aforesaid, and prayed him that he might not be damnified so to pay 30l. it being the defendant's debt: whereupon the defendant promised to pay the debt again to the plaintiff: upon which promise, the action was brought. And it was holden by the Court, that although here was no present consideration upon which the assumpsit could arise; yet the Court was clear, that upon the whole matter the action did lie, and judgment was given for the plaintiff.

MICH. 29 ELIZ. IN THE EXCHEQUER.

CCXVI. FARRINGTON AND FLEETWOOD'S CASE.

Between Farrington and Fleetwood, the case was, upon the Stat. of 31 H. 8. of Monasteries, the abbot and covent of D. 29 H. 8. makes a lease of certain lands for 3 lives, to begin after the death of one J. S. if they shall so long live: and afterwards, 30 H. 8. within a year before the dissolution, they make another lease to J. S. If the first lease in the life of J. S. be such an estate and interest, which by vertue of the said statute shall make the second lease void, was the question; for it was not in esse, but a future interest.

Manwood, All the reason which hath been made for the second lease is, because the first lease is but a possibility; for J. S. by possibility may survive all the 3 lives, and so it shall never take effect: but notwithstanding, be it a possibility, &c. or otherwise, it is such a thing as may be granted or forfeited, and that during the life of the said J. S. And note also the words of the statute, If any abbot, &c. within one year next before the first day of the Parliament, hath made, or hereafter shall make any lease or grant for years, life, or lives of any mannors, &c. whereof and in which **[165]** any estate or interest for life or years at the time of the making of any such lease or grant, then had his being or continuance, or hereafter shall have his being or continu ance, and then was not determined, &c. shall be void, &c. And here is an interest, and that not determined at the time of the making of this lease to J. S. And of that opinion was the whole Court, and all the barons, and divers other of the justices; and therefore a decree was made against that lease, &c.

2 Len. 55. 1 Len. 333.

MICH. 29 ELIZ. IN THE EXCHEQUER.

CCXVII. THE MASTER AND CHAPLAINS OF THE SAVOY'S CASE.

The Master and Chaplains of the Savoy aliened a parcel of their possessions unto another in fee, and afterwards surrendred their patents, and a vacat is made of the enrollment of them: it was now moved, how the alienee should be adjudged to make title to the said lands, claiming the same by the letters patents; for the clerks would not make a constat of it. For the patents were cancelled, and a vacat made of the enrolment. And the case of Sir Robert Sidney was vouched; in which case, the statute of 3 E. 6. was so expounded upon great advise taken by the Lord Chancellor; who thereupon commanded, that no constat be made in such case.

Manwood, If tenant in tail by letters patents of the King, surrendreth his patent, and cancelleth it, and a vacat be made of the enrollment, by that the issue in tail shall be bound; for no other person at the time of the cancelling hath interest: but in the case at Bar, a third person, scil. the alienee hath an interest; and therefore he was of opinion, that he should have a constat, &c.

HILL. 29 ELIZ. IN THE COMMON PLEAS.

CCXVIII. INCHELY AND ROBINSON'S CASE.

In an ejectione firmæ, it was found by verdict, that King E. 6. was seised of the mannor and hundred of Fremmington; and granted the same by his letters patents to one Barnard in fee, rendring 130l. per annum, and also to be holden by homage and fealty; and afterwards Queen Mary reciting the said grant by King Ed. 6. and the reservation upon it, granted unto Gertrude Marchioness of Exeter, the mannor of Fremmington, and the said rent and services, and also the mannor of Camfield, and other lands and tenements, tenendum per vicesimam partem unius feodi militis; Gertrude being so seised, devised to the Lord Mountjoy the mannor of Fremmington, the mannor of Camfield, &c. and also bequeathed divers sums of monies to be levied of the pre-[166]-mises. And further found, that the said rent of 130l. was the full third part of the yearly value of all the lands and tenements of the devisor. The question was, if by these words of the devise of the mannor of Fremmington, the rent and the services pass; i.e. the rent, homage, and fealty reserved upon the grant made by King Ed. 6. of the mannor and hundred of Fremmington; and if the said rent and services are issuing out of the mannor: for if the rent doth not pass, then the same is descended to the heir of the marchioness; and then being found the full third part of the value, the King is fully answered and satisfied, and then the residue of the inheritance discharged, and is settled in the devisee. And if the rent doth not pass, then is the heir of the marchioness entituled by the statute to a third of the whole, &c.

And Shuttleworth conceived, that if the marchioness had devised by express words the said rent and services, they could not pass; for as to the services, they are things entire; as homage and fealty, they cannot pass by devise in case where partition is to follow; for such things cannot receive any partition or division, therefore not divideable: for the statute enables the proprietary to give or devise two parts of his inheritance in three parts to be divided: as catalla felonum cannot be devised, for the reason aforesaid, quod fuit concessum per totam Curiam. But as to the rent, the Court was clear, that the same was deviseable by the said statute; and in respect of that, the mischief of many distresses which the common law abhors, is dispensed with, and is now become distrainable of common right. And as to the devise, he argued much upon the grounds of devises; and put a ground put by Fineux, 15 H. 7. 12. where every will ought to be construed and taken according as the words purport, or as, it may be, intended, or implyed by the words, what the intent of the devisor was: so as we ought to enquire the meaning of the testator out of the words of the will. And see also a good case, 19 H. 8. 8 & 9. And he much relyed upon the case of Bret and Rigden, Plow. Com. 343. See there the case. So in this case, for as much as such

intent of the devisor doth not appear upon the words of the will, that this rent shall pass; it shall not pass, for there is not any mention of any rent, in the whole will. Fenner, argued to the contrary; and he argued much upon the favourable construction which the law gives to wills. 14 H. 8. by reversion, for remainder, & e contra. 17 E. 3. 8. A man may make a feoffment in fee of a mannor, by the name of a knights fee, a multo fortiori, in the cases of devises: and in our case, the marchioness conceived, that the rent and services reserved out of the mannor of Fremmington, was the mannor of Fremmington, and that the law would give strength to that intent.

Walmesley conceived, that the rent did not pass by the name of the mannor, &c. for this rent nec in veritate nec in reputatione was ever taken for a mannor. Also the words, Of the mannor of **[167]** Fremmington and Hundred, are put amongst others which are mannors in truth. By which he conceived, that the devisor did not intend to pass but one mannor, and no other hereditaments, by this mannor of Fremmington. There is a rule in law, that in the construction of a will, a thing implyed, shall not control a thing expressed: but here, if by implication the rent shall pass, then the mannor of Camfield is not passed, which was the intent of the testator to pass, and that by express words. See 16 Eliz. Dyer, 330. Clatches Case. No implication of any estate in remainder can serve when a special guift and limitation is made by the devisor himself. See also, 16 Eliz. Dyer, 333. Chapman's Case. But in our case, here, there are not sufficient words to warrant any implication; for neither in truth, nor in common reputation was it taken for a mannor. 27 H. 6. 2. Greenacre may pass by the name of a mannor, although it be but one acre of land, because it is known by the name of a mannor. See acc. 22 H. 6. 39. And see, where before the Statute of Uses, a man had recoverors to his use, and he willeth by his will, that his feoffees sell his lands; they might sell. And he said, that if a man seised of a mannor, parcel in demesne, and parcel in service, and he granteth the demesnes to one and his heirs, and afterwards deviseth his mannor, peradventure the services shall pass; but this rent hath not any resemblance to a mannor.

Gawdy, This rent shall pass by the name aforesaid. Favourable construction is always given in wills, according to the meaning of the devisor, and no part of his will shall be holden void, if by any means it may take effect; then it here appeareth, that his intent was, that upon these words, something should pass to the devisee concerning the mannor of Fremmington; for otherwise, the words, Of the mannor of Fremmington, are void and frivolous; which shall not be in a will, if any reasonable construction may be made; for it is found expresly by the jury, that neither at the time of the will made, nor at the time of the death of the testator, the devisor had anything in the said mannor of Fremmington, but the said rent of 130l. per annum. And it may well be taken, that the devisor being ignorant what thing a mannor is, thought that this rent was a mannor, because that she had rents and services out of the said mannor. For in construction of a will, the words shall serve the intent; and therefore if a man deviseth, that his lands shall be sold for the payment of his debts, his executors shall sell them; for the intent of the devisor names the sellers sufficiently. And see Plowden, 20 Eliz. 524. L. after the statute of 27 H. 8. deviseth, that his executors shall be seised to the use of A. and his assigns in fee; whereas then there was no feoffees to use: the same was holden a good devise of the land to A. But the justices conceived, that the devisor was ignorant of the operation of the statute in that case, and therefore his ignorance was supplyed. See Br. Devises, 48. 29 H. 8. A. had **[168]** feoffees to his use; and afterwards after the statute of 27 H. 8. and 32 H. 8. he willed, that his feoffees should make an estate to B. and his heirs; it was holden by Baldwin, Shelley, and Mountague, Justices, that it was a good devise. And see, 26 H. 6. Fitz. tit. Feoffments & Faits, 12. A carue of land may pass by the name of a mannor; therefore a fortiori a rent; for rents and services have more affinity, and more resemble a mannor, than a carue of land. And it cannot be intended, that the meaning of the testator was, to grant the mannor it self, in which he had not any thing, especially by his will; for covin, collusion or indirect dealing, cannot be presumed in a will. Also, the marchioness for 4 years together before her death, had the rent and services of the said mannor; and she well knew, that she her self had not any thing in the said mannor but the said rent and services, and therefore it shall be intended, that the same was her mannor of Fremmington. A. seised of a capital

messuage, and great demesnes lying to it, leased the same for years, rendring rent, and afterwards devised to another all her farm in such a place: and it was ruled in that case, that by that devise, the rent and the reversion passed. See the case between Wrottesley and Adams, Plow. 19. 1 Eliz. by Anthony Brown and Dyer.

Periam Justice, conceived, that this rent might be divided well enough. But by Anderson, It is but a rent-seck. Periam, It is distrainable of common right; Anderson doubted of it. But all the justices agreed, that the rent might be divided; but there should not be two tenures. The Lord Mountjoy being advised, that this rent did not pass, but descended to the heir, being the full third part of the lands, entred into the residue, and made a lease of the manor of Camfield unto the plaintiff; upon which the ejectione firmæ is brought: and afterwards, the plaintiff seeing the opinion of the Court to be against him, and for the devise of the rent, for the reasons aforesaid discontinued his suit, &c.

2 Len. 41. Owen Rep. 88.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CCXIX. WILLIAMS AND DREW'S CASE.

The widow of Williams who was speaker of the Parliament, brought dower against Williams and Drew: upon the Grande Cape Williams made default; and now came Drew and surmised to the Court, that he is not tenant of the land: but further he saith, that the husband of the demandant leased the said lands to him for 50 years, and that this action is brought by covin to make him lose his term; and prayed to be received. And the opinion of the whole Court, was, that although he was party to the writ, yet he should be received, and that by the sta-**[169]**-tute of Gloucester, for he is in equal mischief. And the Court was also clear of opinion, that upon the default of Williams, the demandant should not have judgment for a moyety, for that the cause of the receipt trenched to the whole. And by all the justices, but Rhodes, if judgment had been given upon the deault of both, i.e. Williams and Drew, yet the term of Drew should stand, but Drew should be put out of possession, and put to his action. And Anderson conceived, that the resceit upon that statute did not lie, unless that covin be alleged betwixt the demandant and the tenant, to make him to lose his term; and that covin is traversable: which all the other justices denyed; for the covin ought to be averred, but ought not to be traversed. And also they all but Anderson, were clear of opinion, that in this case of receipt, the party shall not plead upon his receipt, as upon the statute of Westminster; but he shall be received, and have day to plead.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CCXX. DICKSEY AND SPENCER'S CASE.

The case between Dicksey and Spencer, see H. 29 Eliz. Notwithstanding the opinion of the Court of Common Pleas, the Mayor and Aldermen of London reversed the judgment given in an assise of freshforce; upon which, Dicksey sued a commission, directed to Anderson, Manwood, and Periam, to examine the said judgment, & ad errorem corrigendum. And the case was often argued; the principal matter was, that lessee for years in an action of debt brought against him for the rent reserved, claimed fee by bargain and sale of his lessor; the which bargain and sale the plaintiff traversed. And it was argued, because this bargain and sale was traversed, there was not any forfeiture in the case; for upon that, both parties are at large. As in a præcipe quod reddat, the tenant disclaims, and the demandant avers him tenant, he shall not enter for that disclaimer. But all the three justices were clear of opinion, that notwithstanding the traverse, it is a forfeiture; for the very claim is a forfeiture, which cannot be saved by matter subsequent. See 9 H. 5. 14. If tenant for life be impleaded in a writ of right, and joyns the mise upon the meer right, it is a forfeiture. Another error was assigned, because where it is found, that both the defendants

disseisiverunt the plaintiff, but Spencer only with force, and the judgment in the assise of freshforce was, that ambo capiantur, where no force is found in Clark, one of them; yet such a judgment is good enough: for the assise have found a joynt disseisin, and that Clark was present at the said force; and then he particeps criminis. And of that opinion were all the 3 Justices. And it was objected, that forasmuch as Clark is convicted of force upon the **[170]** matter, for both ought to be taken, therefore the damages ought to be trebled against both; and the Court was in some doubt of that: but clearly, the incrementum shall be trebled, as well as the damages taxed by the assise; and after many arguments, the said justices moved the parties to a friendly course, to compound the matter: for if we reverse the judgment given in the Hustings, then Spencer may have his writ of error upon the judgment in the assise of freshforce, & sic infinite. And afterwards, the parties put themselves to the mediation and order of the said 3 justices, who at length made an end of the matter betwixt the said parties.

MICH. 29 ELIZ. IN THE STAR-CHAMBER.

CCXXI. THE LADY NEWMAN AND SHYRIFF'S CASE.

The Lady Newman, sister of James Wingfield lately deceased, exhibited a bill of complaint in the Star-Chamber, against one Shyriff dwelling in Ireland, and two others; setting forth, that the said Shyriff had forged a deed, purporting, that the said James had by the same given to him all his goods; and also that the said James had assigned to the said Shyriff a lease for years of lands in Ireland: and also that the said Shyriff had procured the said two other defendants to depose upon their oath before the town-clerk of London, that the said deed was sealed and delivered by the said James as his deed. It was moved by the counsel of the defendant's, that these matters of forgery are not within the statute of 5 Eliz. nor also the perjury, or the procurement of it: whereupon the Lords of the Council referred the consideration of the said statute, to both the Chief Justices, who the next Court-day declared their opinions upon the said matters; 1. That the said statute did not extend to forgery of a deed conveying a gift of chattels personals: which see by the statute, which, as to that point, extends but to obligations, bills obligatory, acquittance, release, or other discharge. And also a deed of an assignment of a lease of land in Ireland, is not within the said statute. And also the said justices were of opinion, that this perjury, and the procurement of it, is not punishable by the said statute, because the oath was taken coram non Judice. For the town-clerk of London cannot minister an oath in such case, no more than a private person. But because the bill in the percluse and conclusion of it, was contrary to the laws and statutes of this realm, the said Chief Justices were of opinion, that the said Court might punish those offences as misdemeanors at the common law, but not according to the statute. And afterwards Shyriff paid for a fine 3l. and by order of the Court, was set in the pillory.

4 Len. 25.

[171] MICH. 29 ELIZ. IN THE KINGS BENCH.

CCXXII. MIDDLEMORE'S CASE.

Middlemore brought an action upon the case for these words; scil. Middlemore is a cosening knave; for he had me to Coventry, and there cosened me of 40s. And afterwards had judgment to recover; and now the defendant brought a writ of error in the Exchequer Chamber; and there the opinion of the whole Court was, that the said words were not actionable. And the case of one Egerton was remembred, Thou art a cosening knave coroner, for thou hast cosened me of my land. The plaintiff in that case could not have judgment; for he was not particularly charged in respect of his office. And note; that in this case of error, the defendant pleaded an outlawry in the plaintiff; and being barred in that, he pleaded now an excommengement in the plaintiff, and shewed the letters of excommunication: upon which it appeared,

that the plea was pleaded before the outlawry was pleaded: and it was ruled by the whole Court, that this plea lieth not for the defendant; for he cannot have two pleas to the person of the plaintiff, but where his second plea is matter of later time since the first plea: and afterwards the said judgment was reversed.

MICH. 29 ELIZ. IN THE EXCHEQUER.

CCXXIII. BARNS EXECUTOR OF THE BISHOP OF DURHAM AND SMITH'S CASE.

Emanuel Barns, executor of Barns late bishop of Durham, brought debt for arrearages of rent reserved upon a lease for years of certain mines demised to Smith; scil. mines called Argill, and mines called Greenbourn; and it was against the executors of Smith. The defendant pleaded, as to parcel, non detinet; and as to other parcel of the arrears, that in the indenture of demise, there is a covenant, quod si contigerit, that the said lessee impeditus fuerit quominus mineris prædict. gaudere possit, that then so much of rent should be deducted, amounting to the value of the mines he could not enjoy, &c. And pleads in facto quod impeditus fuit, quo minus gaudere potuit mineris prædictis, &c. And it was found for the plaintiff. And it was moved by Cook, in arrest of judgment, that here is not any place shewed, where these mines were, so as non constat from what place the visne shall come: as if in an action (as here) the plaintiff declares of a lease made of land called R. in such a county, the same is not good, causa qua supra. The issue here is non potuit fodere in prædicta minera de Greenbourn, by the space of 7 years **[172]** and a half. From whence shall the visne come for the tryal of this? Not from Durham where the lease was made, for there is no nearness between the place where the lease was made, and this issue: but if the issue had been, that the lessor had not any thing in the mines tempore dimissionis, it might have been tryed where the lease was made.

Another exception was taken, because the plea is, quod non potuit fodere in 3, 4, 5, 6, 7, 8. dimidio 10 & 11. and that appears to be 7 years and a half; and the jury find, Quod non potuit fodere per spatium 7 annorum tantum, without speaking of the half year, and so they have not given a full verdict.

As to the first exception, it was said by Cook, If a thing be alledged in pleading, which is issuable, and there is not laid down any place of it, although that no issue be joyned upon it; yet because he hath prevented the other of his plea to it, judgment given in such case shall be reversed: and so it was ruled between Matthew and Stransham. So upon the Statute of Usury, the informer charged the defendant, for that by way of corrupt bargain, he had received so much, and did not shew the place, although that no issue was joyned upon it, but they were at issue upon another point; yet if judgment in such case be given, it shall be reversed.

And in all actions upon the case, where request is necessary, and the plaintiff ought to alledge it, the place of the request ought to be shewed. And he said, that this issue ought to be tryed where the mines demised are, and here no place is alledged where the mines are, but only in com. Dunelmens. and yet a visne of the City of Durham hath tryed this issue, which ought not to be; but the visne should come de corpore comitatus.

Clark, Baron, If issue be joyned upon taking of the profits, it shall be tryed where the land is, but non debet or detinet where the lease was made: so ne lessa pas.

By Cook, The issue is, non potuit fodere, and that is local, therefore it shall be tryed where the mines are.

Manwood, Non potuit fodere, non potuit gaudere, are not local; but non fodit, non gavisus fuit, is local, and shall be tryed where the mines are. And here it is not shewed, how he was hindered to dig, &c. and the issue is, de potentia & non de actu.

Tanfield, As to that which Cook hath said, that the visne in this case shall come de corpore comitatus; it is not so, for such visne never shall be, but where the issue is, no such town, hamlet or place known. Tanfield, In another case, the tryal shall be de corpore comitatus; as in false imprisonment, the defendant justifies, that the common voice and fame was &c. there the visne shall be de corpore comitatus, 11 E. 4. 4 & 5. And see also, 21 Eliz. the case of Constantine and Gynne, (which see now

reported by the Lord Cook, in Dowdell's case) Cook 6. Part, 48. And as to the defect of the verdict, upon the half year, the record is not so, **[173]** for the record is, dimidio anni decimi, & undecimi, and so two half-years, make one whole year, and so but 7 years in which the disturbance is supposed to be done. And see as to the visne de corpore comitatus, 22. E. 4. 4. Fitz. Visne, 27.

Another exception was taken, because the declaration is, that the lease was made at Durham in comitatu Dunelm. and doth not say also in Setberg, for such is the name of the County Palatine. But as to that it was said, every writ of execution which goes into the County Palatine, is directed episcopo Dunelmens. & cancellario suo, quod det in mandatis vicecom. suo, &c. And Durham was called Setberg in ancient time, and the name of the County Palatine there is commonly called Dunelm. & Setberg; and their pleas there are entred, placita coram justiciariis Dunelm & Setberg, but the same is amongst themselves only, and all directions from hence to them are, episcopo Dunelm. without any mention of Setberg; and a president was shewed to the Court to such effect.

Manwood, Levied by distress, and so nothing arrear, shall be tryed where the lease is made.

Clark, That is true, for by the (so) the plea before is waived. And see 8 H. 5. 10. Where an issue is to be tryed in Lincoln, &c. or such a town which is a franchise, the venire facias shall be of Lincoln, and not de vicineto Lincoln; for then the jury should be as well of the county adjoyning, as of Lincoln it self; which the visne of Lincoln cannot do: but venire facias de suburbiis of Bristow, was awarded good.

And if in the case at Bar, the defendant had pleaded, that the plaintiff had entred into part of the mines, and so suspended his rent, upon which they are at issue, the some by Manwood, shall be tryed by a jury de corpore comitatus: the issue here is, if the defendant might enjoy these mines secundum veram intentionem dimissionis prædict. and that is referred to the demise which was made at Durham, and therefore this issue may be well tryed there. And afterwards at another day, it was holden, that all the issues are jeofails. But as to the want of the place, the same was holden a material exception. See the case of Mines, Plow. Com. 337. Exception was taken to the information, because it was not laid down there, in what town or hamlet Newlands lay. And it was holden, the same had been a material exception, if the defendant had not demurred upon the information; in which case, no tryal by jury is to be, &c. And he said, Misnosmer shall be tryed, where the writ is brought, &c. so never administred as executors, &c.

Manwood, Here the lease is laid to be made at Durham in a place certain. If then there be not any other local thing laid which may draw the tryal elsewhere, it shall be tryed at Durham where the lease is made. An enfant makes a lease for years, rendring rent, and afterwards re-enters, and avoids his lease by reason **[174]** of his nonage, and title is found against him by that lease, upon which he pleads nonage, it shall be tryed where the lease is made, &c. And afterwards, judgment was given for the plaintiff.

2 Len. 21.

Mich. 29 Eliz. In the Exchequer.

CCXXIV. Blunt and Ward's Case.

Where an order was made, that such a one should have the mean profits and issues of such lands; it was holden, the same is not to be intended, that the party shall have the crop which grows upon the land by the manurance of another, but the value of the land as it might be leased. And so it is where the sheriff returns issues, &c. for the corn there growing may be of the value of 40l. where the land is but of the value of 10l.

MICH. 29 ELIZ. IN THE KINGS BENCH.

CCXXV. WESHBORN AND MORDANT'S CASE.

In an action upon the case, the plaintiff declared, that whereas he was possessed of a piece of land containing 2 acres, called Parsonage, lying adjoyning to a certain river, from the 20th of May, 29 Eliz. usq; diem impetrationis istius brevis, &c. the defendant had the said 20th day of May estopped the said river, with certain loads of earth, and so continued estopped until the 14th of February, by reason of which his land was drowned, and so he had lost the profit of it for the said time. It was moved in arrest of judgment, that upon the declaration it doth not appear, that there is any cause of action, for the plaintiff hath made title to the land drowned from the 20th day, so as that day is excluded, and the nusance is laid to be done the said 20th day: and if so, then he cannot complain of any wrong, the nusance being laid to be before any possession of the plaintiff. To which it was answered, that although the stopping was made before the possession, yet the continuance of it after is a new wrong, for which an action lieth. As 5 H. 7. 4. It was presented, that an abbot had not cleansed his ditch, &c. by reason of which, the highway is estopped, the successor shall be put to answer to that indictment by reason of the continuance of it. See, that continuance of a nusance, is quasi a new nusance, 14 & 15 Eliz. Dyer, 320. And it may be that the plaintiff was not damnified, until a long time after the 20th of May, scil. after the estopping; and the words of the writ here are satisfied and true. Afterwards, judgment was given for the plaintiff.

2 Len. 103. 1 Cro. 191. 199. 1 Len. 247.

[175] MICH. 29 ELIZ. IN THE COMMON PLEAS.

CCXXVI. THE QUEEN AND SCOT'S CASE.

The Queen brought a quare impedit against the Bishop of London, and Scot; and the case was, A. seised of an advowson in gross holden of the Queen in chief, aliened the same by fine without licence of the King: the church became void; the conusee presented; the Queen without office found brought a quare impedit: the question was, If the Queen without office found, should present? It was agreed by the whole Court, that if the alienation had been by deed only, there the Queen without office should not have the presentment; for upon such alienation by matter in fait without licence, no scire facias shall issue without office found of the alienation. But upon alienation without licence by matter of record, a scire facias lieth before office. And in the last case, the Queen shall have the issues from the time of the scire facias retorned; but in the first case, from the time of the office found. See Stam. Prerogat. see 8 E. 4. 4. It was then moved, that if the Queen, being entituled to present ut supra, pardon the conusee all alienations without licence and intrusions, if the estate of the incumbent thereby be confirmed? But the Court would no argue that point.

1 Len. 40.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CCXXVII. SIR THOMAS HOLLAND AND BONIS'S CASE.

In a replevin, the defendant made conusans as baily to Tho. Lord Howard, and shewed, that the prioress of the late dissolved priory of Hallywell was seised of the mannor of Priors in the county of Hertford, and granted the same by words of dedi & concessi pro certa pecuniæ summa to the Lord Audley, Chancellor of England, and his heirs, who died thereof seised; and that the said mannor (inter alia) descended to Mary, daughter and heir of the said Tho. Lord Audley, who died thereof seised; by force of which, the said mannor descended to the said Tho. Lord Howard, &c. And shewed, that the conveyance by the prioress bore date, 4. Novemb. 29 H. 8. and then

enrolled in the Chancery. The plaintiff in bar of the said conusans, shewed, that after the making and inrolling of the said conveyance, the said prioress leased the lands to Sir Hen. Parker for 99 years, and conveyed the said lands to himself; and further shewed, that the said conveyance specified in the conusans, fuit primo deliberatum 4. November, 31 H. 8. without that, that the said prioress, the said 4. Novemb. 29 H. 8. dedit & concessit, the said mannor to the said Lord Audley. Upon which it was demurred. And it was the **[176]** clear opinion of the Court, that the averment de primo deliberatum against a deed enrolled, ought not to be received. For by the same reason, it might be averred, nunquam deliberatum; and so upon the matter, non est factum.

It was further objected, that a bargain and sale by a corporation is not good; for a corporation cannot be seised to another's use; and the nature of such a conveyance is to take effect by way of use in the bargain, and afterwards the statute draws the possession to the use: but the Court utterly rejected the said exception as dangerous, for that such were the conveyances of the greater part of the possessions of monasteries. And it was in this case said by Shuttleworth, Serjeant, that although such a corporation could not take an estate to another's use; yet they might charge their own possessions with an use to another.

1 Len. 183. 2 Len. 12. Owen Rep. 138, 139.

Trin. 29 Eliz. In the Kings Bench.

CCXXVIII. The Queen and the Bishop of Gloucester's Case.

The Queen recovered in a quare impedit against the Bishop of Gloucester, and one S. in which quare impedit, the bishop pleaded as Ordinary; scil. quod ipse nihil habet nec habere clamat in ecclesia prædict. neq; in advocatione ejusdem nisi admissionem, institutionem, &c. And now the bishop and S. the incumbent brought a writ of error; and, if this writ of error brought joyntly by the bishop and the incumbent, was well brought, was the question? Some held, that the bishop had not cause to bring error, for that he had disclaimed in the church, and the patronage of it: for if in a præcipe quod reddat the tenant disclaims, he shall never have a writ of error. 16 E. 3. 7. Fitz. Error, 78. And note, that in the writ of error at the Bar, the perclose was, ad grave damnum Episcopi; whereas the bishop could not be grieved by the said judgment, because he had nothing, nor claimed any thing in the church, &c.

Wray, The writ of error had been the better, if those words, (ad grave damnum Episcopi) had been left out, for the bishop hath lost nothing.

And it was objected by some, if the judgment in this case be reversed, the usual judgment cannot be given; scil. that the bishop shall be restored to all which he lost, &c.

Wray, The bishop shall joyn for conformity of law, and for privity of record; and the plea of the bishop is not so strong as a disclaymer: for in case of a disclaimer, the judgment is, that the plaintiff shall take nothing by his writ; but in the case of the bishop here, the judgment is, quod querens recuperet præsentionem suam versus dictum Episcopum ad ecclesiam prædictam. **[177]** See 35 H. 6. 4. Fitz. Error, 35. And afterwards in the principal case, the writ of error was awarded good.

Trin. 29 Eliz. In the Kings Bench.

CCXXIX. Williams and Linford's Case.

Edward Williams brought an action upon the case against Linford, for slanderous words concerning the title of the plaintiff's lands; viz. Williams is nothing worth? and do you think that the mannor of D. is his? It is but a compact betwixt his brother Thomas and him. And declared further, that at the time of the speaking of these words, there was a communication with one J. S. to give the said J. S. the said mannor of D. for his mannor of R. and that by reason of the said slanderous words,

the said J. S. durst not proceed in the said intended exchange. It was objected, that upon this matter, an action upon the case did not lie, because the slanderous words were not spoken to him who should be purchasor of the lands, but unto a stranger: for in the case betwixt Smith and Johnson; Johnson was in speech with one to sell his land to him, and Smith said to him who should be the purchasor of them, Will you buy Johnson's land, why, it is troubled with more charges and incumbrances that it is worth?

Wray, There is not any difference, be the words spoken to the parties, or unto a stranger; for in both cases, the title of the plaintiff is slandered, so as he cannot make sale of it. It was adjudged for the plaintiff.

2 Len. 111. 1 Cro. 346, 787.

CCXXX. Mich. 29 Eliz. In the Common Pleas.

A poor woman brought an action of trespass for breaking of her close, and declared of a continuance by 6 years: and upon nihil dicit, had judgment to recover: upon which a writ of enquiry of damages issued forth; and now came the woman and shewed to the Court, that the jury had found too little damages; scil. but 40s. whereas the land was worth 5l. per annum, and that the trespass had been continued for 6 years; and prayed, that the said writ might not be received, and that the Court would award another writ to have a better enquiry of the damages. But the whole Court denyed it; for so there might be infinite enquiries.

But some time at the request of the defendant, when excessive damages are found, or any misdemeanour is alledged in the plaintiff, in procuring, or using such a writ of enquiry of damages, we use to relieve the defendant with a new writ, but never the plaintiff, because it is his own act.

And by Rhodes, The late Countess of Darby brought a writ of dower, and had judgment to recover; and she surmised, that **[178]** her husband died seised, and prayed a writ of enquiry of damages, and had it: and because too small damages were found, she would have suppressed the said writ, and procured another; but she could not have it. And at the last, she was driven to bring in the said writ. Which she did accordingly.

Mich. 29 Eliz. In the Common Pleas.

CCXXXI. Lawson and Hare's Case.

In a replevin by Lawson against Hare of the Temple, who avowed, because he himself was seised of a hundred; and that he himself, and all those whose estate he hath in the said hundred, have used to hold a leet within the said hundred at such a place every year; and that at every time such leet should be holden, the inhabitants within the said precinct have used to pay to the lord of the leet, 16d. for the leet-fee; and that they have used to distrain for the same: and shewed, that at a leet there holden 5 July, 26 Eliz. &c. the plaintiff replied, absq; hoc, that they used to distrain; and it was found for the defendant. And it was moved in arrest of judgment, because the defendant in making his title to the leet by prescription, conveys the hundred to him by a que estate, without shewing a deed of it. See 11 H. 4. 242. Quod fuit concessum per Anderson & Windham. Periam and Rhodes, contrary; But if the hundred it self had been in question, then the exception had been material, but here the defendant intitles himself to a thing by reason of the hundred, and then it is sufficient for him to say, that he is seised of the hundred, be it by right, or by wrong. Admit, that by this not shewing, the avowry be vitious and defective, it is to be considered, if it be not helped by the Statute of Jeofail's, 18 Eliz. And therefore it is to be considered, if an avowry be within the meaning of the said statute.

Anderson, Although that the avowant be quasi an actor to have a retorn of the cattel, if the distress be adjudged lawful; yet in truth he is defendant, and not plaintiff; and

if the defendant will justifie the taking, and not avow, he is meerly defendant: and although that he avow to have a retorn, yet he cannot be said plaintiff, no more than the tenant who voucheth over another to recover in value, may be said plaintiff. And therefore an avowry cannot be said a count, or declaration, but a answer to the count, or declaration.

Windham and Periam conceived, that an avowry is within the statute; for it comprehends title: and an answer to an avowry, is said a bar to an avowry; and an avowry is in the place of a declaration. Admitting, that an avowry is within the statute; if the not shewing of the deed be such a defect which may be helped by the statute.

Anderson conceived, that it was: but the plaintiff might **[179]** have demurred upon the avowry, for not shewing of the deed, and have had judgment. But when he hath traversed the prescription as to the point of the distress, and the same is found against him, now it shall be intended that the avowant hath a deed, although he hath not shewed it.

Windham, The title of the avowant to the hundred, is the foundation and ground of the suit; for if the avowant hath not a deed to make him a sufficient title to the hundred, he cannot have the leet: and if no leet, then no leet-fee; and then the avowant hath no cause to distrain.

Another exception was taken to the avowry, because the avowant hath not shewed any seisin of the leet-fee.

And by Periam, Such a seisin ought to be shewed in some person certain. For although it needs not always to lay a seisin, in shewing by whose hands the seisin was had, (for the inhabitants are charged, and no person certain) yet the seisin ought to be laid in a person in such sort as it may be laid: and therefore in this case, forasmuch as the seisin cannot be shewed by the hands of the inhabitants, it ought to be layed in the lord. See 4 H. 6. 29. Br. Avowry, 71. In a recordare the defendant avowed, because the King is seised of the castle of C. in jure ducatus sui cornub. to which he had 20s. rent out of the town of D. solvend. annuatim at Michaelmas, of which rent, the King and all the Dukes of Cornwal aforesaid had been seised time out of memory, &c. by the hands of the inhabitants of the same town, &c. and the same was holden a good avowry. For although that seisin ought to be laid in some person certain by his hands; yet in that case it is good enough; for the seisin by one of the inhabitants, is the seisin of them all.

And in the principal case by Periam and Walmesley, it was agreed, that the seisin here was well enough confessed; for when the plaintiff hath taken issue, that they have used to distrain, all other matters are holden confessed, because that the plaintiff hath not saved them to him by protestation. Which Rhodes granted.

Another exception was taken to the avowry, because that the leet by it is supposed to be holden in July; therefore void: which see, Magna Charta, 35.

But it was holden by Anderson, Windham, and Rhodes, that by reason of this prescription, the Court is well holden in July, notwithstanding the said Statute of Magna Charta, and it might be holden at what day he pleased; for his liberty and election is not restrained by the said statute, and such is the common experience. And note the words of the same statute, Ita quod quilibet habeat libertates suas quas habuit, vel habere consuevit, tempore Regis H. avi nostri, &c. vel quod postea perquisivit, &c.

And Rhodes conceived, that the said statute is to be intended of turns only, and not of leets. Which see, 24 H. 8. Br. Leet. 23. in the end of the case.

But by Periam, A leet cannot be holden but according to the **[180]** said statute, for to that purpose was the said statute made: but if a leet hath been time out of mind, &c. holden at any other day than that which is limited by the statute, it is a good prescription, and it is saved by the statute. The prescription is, that he and all &c. have used to hold a leet once in a year, and hath not shewed when the said year begins; for it may be, that a leet hath been holden there in this year before July, and then this is a void leet, and so no leet-fee due; and of that opinion was Periam, viz. that the avowant ought to have shewed the beginning and end of the year, viz. that he held the said leet pro uno anno finito, such a day: for it may be he hath holden two leets in one year: but it was said by the other justices, that that shall

come on the other side; for prima facie it shall be intended that it hath been but once holden in the same year, until the contrary be shewed.

And note, by Anderson and Rhodes, if the King grants to one a leet to hold semel quolibet anno, without saying, at the liberty of the grantee, the grant is good, and the grantee may hold it at what day he pleaseth.

2 Len. 74. 1 Cro 217. 245.

MICH. 29 ELIZ. IN THE KINGS BENCH.

CCXXXII. PUTNAM AND COOK'S CASE.

In ejectione firmæ, it was found, that one Hawkins was seised of 3 messuages in Bury in fee, and had issue Robert his son, and Christien and Joan, daughters; and devised all his said messuages to his wife for life, the remainder of one of the said messuages to his son Robert and his heirs; the remainder of another of his said messuages to his daughter Christien and her heirs; the remainder of the third to Joan and her heirs; and further willed, that if any of his said issues died without issue of his body, that then the other surviving should have totam illam partem, &c. between them equally to be divided. The devisor died; the wife of the devisor died; Joan died having issue; Robert died without issue; Christien entred into the whole messuage of Robert, and died; and her husband held in as tenant by the curtesie.

Cook, The surviving child shall have the whole, and the issue of Joan shall have nothing. And he conceived, that by this devise they have an estate in tail; for the fee is not vested in them, for that it is incertain which of them shall survive; but when one doth survive, then he shall have the fee; for these words, totam illam partem, go to the whole estate, as well as to the whole land. If I devise my whole land to J. S. he hath a fee. And he conceived, that the three had an estate in tail with a fee expectant, each severally to the house limited to him.

Golding, contrary; Each of them hath an estate tail in the house devised to him, and but an estate for life expectant upon **[181]** the death of the other without issue; for there are no words by which it might appear what estate they shall have by the survivor, &c. I grant the case which Perkins denies, but Littleton affirms; scil. a devise of lands to one in perpetuum: for there the intent appeareth: but where there are not words of inheritance, nor words amounting to so much, then it shall be but an estate for life; and as to these words, totam illam partem, the same is all one, as if he had devised, totam illam, without partem. Also he conceived, that where one only survived, no estate further vested, for there ought to be two to take by the survivorship; for the words are, æqualiter inter eos dividend. And then if it cannot accrue by survivor, then it shall descend: and if it had accrued by survivor, they should thereof have been tenants in common, and not joynt-tenants, by reason of these words, æqualiter dividend.

Clench, Justice, The words, totam illam partam, go to the house, and not to the estate in it.

Shute, to the same intent, If both the daughters had survived, they should have fee in the house of Robert, but not by the will, but by descent in coparcenery. Also when two are dead, the son and one daughter, then it cannot be decided; therefore the will as to that is void, and then the common law shall take place, and put the messuage to the issue of one daughter, as to the sister surviving.

Gawdy, Justice, Here is but an estate for life in the survivor. It hath been objected, that then being but an estate for life, that estate is drowned by the descent of the feesimple, so as now the estate limited by the will, is void. To which it may be answered, that although now upon the matter it be void, yet ab initio, it was not so, for it became void by matter of later time; scil. by the descent of the feesimple; for if one of the daughters had died without issue before the death of Robert, so as the house of such daughter had come to Robert and the other sister; there had been no coparcener, for the son had all the fee, and the moyety of it is executed, and the

moyety expectant, and the sister hath the moyety for life; and then the devise is not good. Also here are two survivors, so as nothing is to be divided, and therefore the law shall say, that the house of Robert is descended, scil. the fee of it to the daughter of Christien and Joan. And so judgment was given against the husband, who claimed to be tenant by the curtesie of the whole land and messuage.

2 *Len.* 129. 193. 1 *Cro.* 52.

[182] MICH. 29 ELIZ. IN THE KINGS BENCH.

CCXXXIII. LARGE'S CASE.

[See S. C. 2 Leon. 82 (with note).]

In an action upon the case, the case was this; A. seised of lands in fee, devised the same to his wife, till William his younger son should come to the age of 22 years, the remainder when the said William should come to such age, of his lands in D. to his two sons Alexander and John, the remainder of his lands in C. to two other of his sons, upon condition, quod si aliquis dictorum filiorum suorum circumibit vendere terram suam before his said son William should attain his said age of 22 years imperpetuum perderet eam. And before such age, two of his sons leased their parts which accrued to them by the will of their father for 60 years; and so from 60 years to 60 years, till 240 years were expired: it was argued by Bois, that Alexander and John are joynt-tenants, and not tenants in common; notwithstanding the opinion of Audley, 30 H. 8. Br. Devises, 29. And he argued also, that the said leases from 60 years to 60 years, is not within the condition of the devise, for it is not a sale from which they only are restrained: and so is it of a joynture made by any of the sons to their wives.

On the contrary, it was argued, because this remainder doth not vest presently, for it is incertain if it shall vest or not; for if William should die before he came to the age aforesaid, it was conceived, that the remainder was void. 34 E. 3. Fitz. Formedon, 68. A man deviseth land to his wife for life, so that if the said wife be disturbed, that the land shall remain over in fee; scil. to D. here is not any remainder until the wife be disturbed. So a devise unto a woman so long as she shall remain sole; and that then it shall remain to B. here this remainder shall not begin till the marriage: and this condition of restraint of alienation is good, for he is not altogether restrained, but for a time, scil. until his son shall come to the age of 22 years: as a feoffment upon condition, that he shall not alien to J. S. See 29 H. 8. Br. Mortmain, 39. A lease made for 100 years, and so from 100 years, to 100 years, until 800 years be expired, is mortmain. And see the Statute de Religiosis, the words are, emere præsumat, & vendere. A lease for years is within such words, emere, & vendere. Also, by this lease, the will is defrauded; and where the statute of Gloucester, cap. 3. wills, that if a man aliens tenements which he holdeth by the law of England, with warranty, the son shall not be barred; and yet if tenant by the curtesie be disseised, to whom he releaseth with warranty, the same is within the said statute: and yet a release and an alienation are **[183]** not the same, because they are in the like mischief; and if the sons might make a lease for 240 years, they might make a lease for 2000 years. So if the sons had acknowledged a statute of such a sum as amounted to the value of the land, it had been within the condition. It was holden, that where the words are, circumibit vendere terram imperpetuum perdert, this word imperpetuum, should be referred to perdere, and not to vendere.

Fenner, This lease is not within the word (sell;) for if the custom be, that an enfant of the age of 15 years may sell his land; yet by that he cannot devise it.

Note: That afterwards the words of the condition set down in the will in English, were read, viz. shall go about to sell his part, shall for ever lose the same. And then it is clear, that this word imperpetuum, shall be referred in construction to perdere, and not to vendere; for this word (shall) is inserted betwixt both.

CCXXXIV. MICH. 29 ELIZ. IN THE COMMON PLEAS.

In a formedon, the tenant pleaded a fine with proclamations: the demandant replyed, Nul tiel record; and the truth of the case was, that the record of the fine which remained with the chirographer did warrant the plea; but that which remained with the custos brevium did not warrant it; and both these records were shewed to the Court.

And Rhodes, Justice, cited a president, 26 Eliz. where, by the advice of all the justices of England, where such records differ; the record remaining with the custos brevium was amended, and made according to the record remaining with the chirographer, which Windham concessit.

And afterwards, the said president was shewed, in which was set down all the proceedings in the amending of it, and the names of all the justices, by whose direction the record was amended, were set down in it; and that the said president was written, and the amendment of the said record recorded, by the commandment and appointment of the said justices in perpetuam rei memoriam.

And the reason which induced the said justices to make such order, is here written, because, they took it, that the note remaining with the chirographer, est principale recordum.

[184] MICH. 29 ELIZ. IN THE KINGS BENCH.

CCXXXV. SIR GERVASE CLIFTON'S CASE.

In a quo warranto against Sir Gervase Clifton, it was shewed, that the said Sir Gervase was seised of a mannor, and of a house, in which he claimed to have a court, with view of frank-pledge; and that he without any grant or other authority usurpavit libertates prædictas. The defendant pleaded, quod non usurpavit libertates prædictas infra messuagium prædict. modo & forma. And upon that, there was a demurrer in law; for the defendant ought to have said, Non usurpavit libertates prædictas, nec eorum aliquam; for he ought to answer, singulatim: and also he ought to have pleaded as well to the mannor, as to the house; for if the defendant hath holden court within any place within the mannor, it is sufficient. See 33 H. 8. Br. Franc. sans ceo, 364. An information was in the Exchequer, that the defendant had bought wooll of A. B. contra statutum. The defendant pleaded, that he had not bought of A. and B. The plea was not allowed; but he shall plead, that he had not bought modo & forma: for if he hath bought of A. B. or J. S. the same is not material nor traversable, which case, Cook denyed to be law. And he also conceived, that the information upon the quo warranto, is not sufficient; for by the same, the defendant is charged to hold a court, and it is not shewed what court; for it may be a court of pipowders, turn, &c. See 10 E. 4. 15 & 16. acc.

Shute, Justice, The quo warranto contains two things in it self; 1. A claim, and, 2. An usurpation; and here, the defendant hath answered but to the usurpation, but saith nothing to the claim. And it hath been holden in this Court heretofore, that he ought to answer to both.

And he said, that it had been holden in a reading upon the Statute of Quo Warranto, which is supposed to be the reading of Justice Frowick, that a quo warranto, doth not lie upon such liberties which do not lie in claim; as felons goods, &c. which lieth only in point of charter.

4 Len. 199.

[185] MICH. 29 ELIZ. IN THE KINGS BENCH.

CCXXXVI. VENABLE'S CASE.

The case was; A lease was made to A. and B. for their lives, the remainder to Tho. Venables in tail; who 3 Eliz. was attainted of felony: 23 Eliz. there was a

general pardon. Tho. Venables, 24 Eliz. levied a fine, and suffered a recovery to the use of Harris, Serjeant: office is found, Harris traversed the office; and thereupon was a demurrer: it was argued by Leake, that traverse did not lie in this case; 4 H. 7. 7 where the King is entituled by double matter of record, the party shall not be admitted to his traverse, nor to his monstrans de droit, but is put to his petition. Which see, 3 E. 4. 23. in the case of the Earl of Northumberland; where tenant of the King is attainted of treason, and the same is found by office. See also 11 H. 4. in the case of the Duke of Norfolk; and the same is not helped by the statute of 2 E. 6. cap. 8. for the words are, Untruly found by office, but here the office is true: by this attainder, Tho. Venables is utterly disabled to do any act; for by Bracton, A person attainted forisfacit patriam, regnum, & hæreditatem suam, 13 E. 4. One was attainted of felony: and before office found, the King granted over his lands. Also he is not helped by the general pardon; for before the general pardon, he had a special pardon; therefore the general pardon nihil operatur as to him: but by the justices, the forfeiture doth remain until the general pardon.

Harris, to the contrary. And he put the case of Sir James Ormond, 4 H. 7. 7. Where the King is entituled by matter of record, and the subject confesseth the title of the King, and avoids it by as high matter as that is for the King, traverse in that case lieth: and if the King be entituled by double matter of record, if the party avoids one of the said records by another record, he shall be admitted to his traverse; and so here we have the pardon which is a record, and that shall avoid the record for the King: and here the pardon hath purged the forfeiture in respect of the offence. And he said, That tenant in tail being attainted of felony, shall not lose his lands, but the profits only, for he hath his interest by the will of the donor, and it is a confidence reposed in him; and as Walsingham's case is he cannot grant over his estate. And see, in Wroth's case, annuity granted pro consilio impendendo, cannot be granted over, or forfeited, for there is a confidence. See Empson's case, Dyer, 2. and 29 Ass. 60. If the issue in tail be outlawed of felony in the life of his father, and gets his pardon in the life of his father, after the death of his father he may enter. But by Thorp, If the issue in tail gets his pardon after the death of his father, then the King shall have the profits of the lands during the life of the issue. And the case of [186] Cardinal Pool was debated in the Parliament, 27 Eliz. that he being Dean of Exeter, was seised of lands in the right of his church, and was attainted of treason. It was holden, he should forfeit the profits of such lands. But admit, that by this attainder, the land be forfeited; yet the party hath the freehold until office found. See Nicholls case, Plow. Com. And also the case of the Dutchy, in Plow. Com. acc. And here, the pardon hath dispensed with the forfeiture. A tenant of the King aliens in mortmain before office found, the King pardons it, it is good. The Lord Poynings conveyed all his lands to Sir Adrian Poynings who was an alien, and after made a denizen, and the King pardoned and released to him all his right in the said lands without any words of grant; and adjudged, the same did bind the King: and he said, he had a good president, 14 H. 7. where a general pardon before seisure into the hands of the King, was allowed good; contrary, after a seisure without words of grant. See Br. 29 H. 8. Br. Charter of Pardon, 52. If a man be attainted of felony, and the King pardons him all felonies & executiones eorundem, and outlawries, &c. and releases all forfeitures of lands and tenements, and of goods and chattels, the same will not serve but for life of lands, if no office be found, but it will not serve for the goods without words of restitution and grant; for the King is entituled to them by the outlawry without office: but the King is not entituled to land, until office be found. See Ibid. 33 H. 8. 71. The heir intrudes, and before office found, the King pardons, now the heir is discharged as well of the issues and profits, as of the intrusion it self. But a pardon given after the office found, is available for the offence, but not for the issues and profits. And he cited the case of Cole in Plowden, where a pardon was granted, mean between the stroak and the death. See 35 H. 6. 1. 16 E. 4. 1. 8 Eliz. Dyer, 249. Brereton's case. 11 Eliz. Dyer, 284, 285.

Egerton, Sollicitor, contrary, This traverse is not good, for he who traverseth, hath not made title to himself as he ought, upon which the Queen may take issue; for it is in the election of the Queen to maintain her own title, or to traverse the title of the party. At the common law, no traverse lay but where livery might be sued; but

that is helped by the statute of 34 E. 3. but where the King is entituled by double matter of record (as in our case he is) no traverse was allowed until 2 E. 6. cap. 8. And in such case, two things are requisite, 1. That the office be untruly found. 2. That the party who is to be admitted to his traverse, have just title or interest of estate of freehold, &c. But in our case, the office is confessed by the traverse to be true, although that the conveyance be not truly found. And also Harris, at the time of the office found, had not just title, but his interest came to him, long time after the office found. Also the traverse is not good, for he traverseth the matter of the conveyance, which is not traversable; for if the Queen hath title, non refert, quo **[187]** modo, or by what conveyance she hath it. As to the matter in law, tenant in tail in remainder is attainted of felony. If the King during the life of the tenant in tail, shall have the freehold. And he conceived, she should; for it shall not be in abeyance, and it cannot be in any other; for when he is attainted, he is dead as unto the King: the chief lord cannot have it; for the tenant for life is alive; and also he in the remainder in fee, &c. The donor shall not have it, for the tenant is not naturally dead, but civilly; and the land cannot revert before the tenant in tail be naturally dead without issue. But if there were any other in whom the freehold could vest, then the King should not have the freehold, but only the profits. So if the tenant be attainted, the lord shall have the land presently, 3 E. 3. 4 E. 3. The husband seised in the right of his wife, is attainted of felony, the King shall have but the profits, because that the freehold rests in the wife; and if the lord entreth, the wife shall have an assise. And tenant in tail may forfeit for his life, as he may grant during his life. See old N. B. 99. If tenant in tail for life, dower, or by the curtesie, be attaint of felony, the King shall have the land during their lives; and after their decease, he in the reversion shall sue to the King by petition, and shall have the lands out of the Kings hands: and there it is further said, that the lord by escheat cannot have it; for the party attainted was not his very tenant, but he in the reversion; for the term yet endures: but now is to see, if the freehold be in the King without office; and I conceive that it is, where the King is entituled to an action, there the King ought to have an office, and a scire facias upon it: as where the King is entituled to a cessavit, action of waste, &c. 14 H. 7. 12. Where entry in the case of a common person is necessary, there behoves to be an office for the King. As where the Kings villain purchaseth lands, or an alien born, &c. so is it, for a condition broken, mortmain, &c. In some cases an office is only necessary to instruct the King how he shall charge the officer for the profits, which may be supplyed as well by survey as by office: as if the King be to take by descent, or as the case is here. And it is true, that a person attainted of felony, may during his attainder purchase lands, and yet he cannot keep it against the King. And it is clear, that by the common law in such cases, the land was in the King, but not to grant. For the statute of 18 H. 6. was an impediment to that; but now that defect is supplyed by the statute of 33 H. 8. So as now the King may grant without office. See 26 Eliz. Cook 3 part, Dowty's case. And in our case, office is not necessary to entitle the King, but to explain his title. See 9 H. 7. 2. The lands of a man attainted of high treason, are in the King without office; so where the King's tenant dieth without heir; or tenant in tail of the gift of the King dieth without issue. See Br. Office before the Escheator, 34. See 13 H. 4. 278. A man attainted of trea-**[188]**-son, the King before office, grants his lands and goods; things which lie in grant, as advowsons, rents, &c. such things upon attainder are in the King without office. As to the general pardon of 23 Eliz. he conceived, that the same did not extend to this case, and that this interest of the Queen by this attainder did not pass by the pardon out of the Queen; so if the Queen had but a right and title only.

Popham, Attorny General, By this attainder, the estate of him in the remainder in tail accrued to the Queen for the life of him in the remainder; for by our law, felony is punished by the death of the offendor, and the loss of his goods and lands for the example of others, therefore nothing is left in him. Tenant for life is attainted of felony, the King pardons to him his life, yet he shall have his lands during his life; for he himself cannot dispose of them for his life: and so it is of tenant in tail, &c. for he may forfeit all that which he hath, and that is an estate for his life which is the freehold. If lands be given to one and his heirs for the life of another, and the

donee be attainted of felony, the King shall have the land during the life of cestuy que vie, for the heir cannot have it, because the blood is corrupt, and there is not any occupancy in the case: for 17 E. 3. the justices would not accept a fine of lands for the life of another, because an occupant might be in the case; but for a fine of lands to one and his heir for the life of another, they accepted a fine, for there is no mischief of occupancy. Land is given to A. for life, the remainder to B. for life, the remainder to the right heirs of A. who is attainted of felony: A. dieth; now the King hath a fee executed: and here in our case, if this tenant for life had been dead, no præcipe would lie against him in the remainder being in possession, but the party who had right was to sue to the King by petition. 4 E. 3. If one seised in the right of his wife of lands for life, be attainted, the King shall have exitus & proficua: but I conceive that case is not law: for see F. N. B. 254. D. The husband seised in the right of his wife in fee, is outlawed of felony; the King seiseth, the husband dieth; now shall issue forth a diem clausit extremum; the words of which writ are in such case, quia A. cujus terra & tenement. quæ ipse tenuit de jure & hæreditate N. uxoris suæ, adhuc superstites occasione cujusdam utlagariæ in ipsum pro quadum felonia inde indictatus fuit, &c. in manu domini H. patris nostri extiterunt, &c. therefore, the King hath not exitus tantum, but also the land it self. See to the same purpose, the Register, 292. b. And see also now in the Book of Pleas of the Crown, 186, 187. which affirmeth, that tenant in tail being attainted of felony, shall forfeit the land during his life. And he conceived, that this estate of Tho. Venables was in the King without office; not to grant, for he is restrained by the statute of 18 H. 8. but it is in him so before office, that he who hath right ought to sue to the King by petition, if he will have the same; yet he concei-**[189]**-ved, that before the said statute of 18 H. 6. the King might grant it before office; as it appeareth by Thirning, 13 H. 4. 278. which was before the statute. So if the Kings tenant makes a lease for years, the remainder over to another in fee, who dyeth without heir, the said remainder is in the King without office, because a common person in such case cannot enter, but a claim is sufficient; and therefore it shall be in the King without office. As to the pardon, he conceived, that it did not extend to this estate; for the same is a freehold, therefore not within the pardon: as if the Kings tenant be attainted of felony, and the King pardons him all offences, and all which he may pardon; these words will not go, or extend to freehold, but only to personal matters, and such punishments and pains which do concern chattels. But it may be objected, that in this pardon, title of quare impedit, and re-entries for conditions are excepted; and therefore if they had not been excepted, they had been released by the pardon; and therefore this pardon doth extend to inheritances and freeholds. As to that, I say, that such exceptions were not in use in the time of King Ed. 4. and such inheritances and freeholds were not taken to be within such pardons; and such exceptions began 5 Eliz. And he said, he had been of counsel in such cases, where it had been taken, that such pardons did not extend to freeholds. As, an abbot was disseised, and during the disseisin, the abby was dissolved; the King made such a pardon, the same did not transfer the Kings right. And in this case, there are divers exceptions of goods and chattels in many cases, and therefore it cannot be intended that this pardon doth extend to freeholds. And see the said act of pardon; there, the Queen gave and granted all goods, chattels, debts, fines, issues, profits, amercements, forfeitures, and sums of mony; which word (forfeiture) shall be intended personal forfeiture, and not otherwise, for it is coupled with things of such nature. And as to the traverse, he conceived, that it did not lie in this case; for the office is not untrue in substance, although it be void in circumstances: and also the King here is entituled by double matter of record; i.e. the attainder and the office. And he said, that the statutes of 34 & 36 E. 3. which gave traverse, are to be meant of offices found virtute officii, and not virtute brevis; for then escheators were very troublesome. And 2 E. 6. doth not give traverse, but where the office is untruly found. As if the Kings tenant be disseised, and the disseisor be attainted; the Queen seiseth the land; now the disseisee hath no remedy by traverse upon the statute of 2 E. 6. but is put to his monstrans de droit, for that the office is true: but if I be the Kings tenant, and seised of lands accordingly; and it is found that J. S. was seised of my land, and attainted, &c. whereas in truth, he had not any thing in my land, there traverse lieth; for the office is false; and so our

case for the traverse, is at the common law. And it is true, that Venables was seised, &c.

[190] Cook, to the contrary; and he conceived, that by the attainder, the Queen had gained but a chattel; and that notwithstanding this forfeiture, if Venables had been in possession, a præcipe should be brought against him. And whereas it hath been said by Mr. Attorny, that the writs set down in the register, are the best expositors of our law; the same is not so: for the register saith, that waste lieth notwithstanding a mean remainder, which is not now law, but it hath been clearly ruled to the contrary. See acc. 50 E. 3. The register therefore, and the writs, are subject to the judgments of our law. And the writ of diem clausit extremum, is not to the contrary: for I confess, that in such case, the land shall be seised into the Kings hands, but the King shall have but a chattel in it. It hath been argued, he may grant, therefore he may forfeit. Nego consequentiam; for a man, seised in the right of his wife, may grant, but not forfeit. Gardian in socage may grant, but not forfeit; the husband may grant a term for years which he hath in the right of his wife, but he cannot forfeit it. A woman enheritrix taketh husband, and afterwards is attainted of felony, the King pardons him, they have issue; the woman dieth, the husband shall be tenant by the curtesie, which proveth, that the King hath no freehold by this attainder. Before the Statute of West. 2. tenant in tail post prolem suscitatam might forfeit the land, but now the statute hath so incorporated the estate tail to the tenant in tail, that it cannot be devested; yea, a fine levied ipso jure est nullus, although as to the possession it be a discontinuance: and that is the reason, wherefore tenant in tail shall not be seised to another's use. See Stamford, 190 b. The husband seised in the right of his wife, is attainted of felony, the King shall have the issues of the land of the wife during the life of the husband, &c. So if tenant in tail be attainted of felony, that is but a chattel in the lands of the wife, and also in the lands of the tenant in tail; and if the possessions of a bishop be seised into the Kings hands for a contempt, in such case the King hath possession, and not only the profits: the same law of lands of tenant in tail or for life, being attainted of felony. So seisure for alienation without licence, or of the possessions of poor aliens. See Br. Reseisure, 10. So where the seisure is for idiocy. And he conceived, that nothing is in the King without office. And as to the case of 13 H. 4. 6. I confess it; for all that time many, and amongst them lawyers and justices, were attainted by Parliament; and so was Sir John Salisbury, whose case it was, and their lands by Act of Parliament given expresly to the King; and therefore I grant, that their lands were in the King without office. Tenant in fee of a common lord is attainted of felony, his lands remain in him during his life, till the entry of the lord; and where the King is lord, until office be found: but in the case of a common person, after the death of the person attainted, it is in the lord before **[191]** entry; and in the case of the King, before office, for the mischief of abeyance. And see the Lord Lovell's case, 18 Eliz. Plow. Com. 485, 486. where it is holden, that upon attainder of treason by Act of Parliament, the lands were not in the King without office in the life of the person attainted, upon the words of the Act, shall forfeit. See Stamford, 54, 55 acc. 3. He conceived, that this interest which came to the King by this attainder, was but a chattel, and then it is released by the pardon; and so he conceived, if it be a freehold. For the words of the general pardon are large and liberal; pardon and release all manner of treasons, &c. And all other things, causes, &c. and here forfeitures are pardoned; and also this word (things) is a transcendent, &c. And although it be a general word, yet by the direction of the general pardon it ought to be beneficially expounded and extended, as if all things had been especially set down. Also the words are, Pardon them and their heirs; therefore the same extends to inheritances for any offence not excepted, for there is the word heirs; and the third branch doth concern only chattels, and that is by the word grant; where the former is, by the words, release and acquit. See Br. Charter of Pardon, 71. 33 H. 8. Tenant of the King dieth seised, the heir intrudes, office is found; in that case by pardons of all intrusions, the offence is pardoned, but not the issues and profits. But by the pardon aforesaid, all is pardoned. And here in our case, the office is void; for the statute makes all precepts, conditions, void, &c. being awarded upon such forfeitures. See also in the second branch, vexed and inquieted in body, good, lands, &c. And see

also amongst the exceptions, that persons standing endicted of wilful murder, and forfeiture of goods, lands, tenements, grown by any offence committed by such person; by which he conceived, that if that exception had not been, the land of such a person, if he had been attainted upon such indictment, should be forfeited. As to the traverse, he conceived, that in as much as the office is true, our plea is a monstrans de droit, although it concludes with a traverse. We vary from the office in number of persons, and in the day of the feoffment; and every circumstance in the Kings case is to be traversed, and our plea in substance doth confess and avoid the office.

Although the King here be entituled by double matter of record; i.e. the attainder and the office; yet one of the said records is discharged by another record; i.e. the pardon, and then there is but one record remaining; scil. the office, and therefore our traverse doth lie. And he conceived, that at the common law there was a traverse; as where it was found by office, that the lessee of the King had done waste, or cessed for two years; and there it is said, that the lessee and tenant in an action brought against them, may traverse the office, therefore traverse was at the common law, where the king was entituled **[192]** by single matter of record. So upon an office finding an alienation without licence, traverse was by the common law. See traverse in such case, in the case of William de Herlington, 43 Ass. 28. See Br. Traverse, 54. Petition is by the common law, and traverse by the statute; Frowick in his reading. See Stamf. Prerogat. 60. That traverse in the case of goods was at the common law, but traverse for lands found by office, by 34 E. 3. cap. 14. therefore the remedy was by petition. See now, Cook 4. Part, the Sadler's case, 55, 56. Traverse was at the common law concerning freehold and inheritance, but that was in special cases, when by the office the land is not in the Kings hands, nor the King by that is in possession, but only by the office, and entituled to the action, and cannot make seisure without suit there: in a scire facias brought by the King in the nature of such an action to which he was entituled, the party may appear unto the scire facias, and traverse the office by the common-law.

1 Inst. 351. a. Hughs Queries 13. Hob. Rep. 342.

CCXXXVII. Mich. 27 Eliz. In the Kings Bench.

A writ was awarded out of the Court of Admiralty, against Sir Tho. Bacon, and Sir Tho. Heydon, to shew cause wherefore, whereas the Earl of Lincoln late High Admiral of England, had granted to them by patent to be vice admirals in the counties of Norfolk and Suffolk, the said letters patents ought not to be repealed and annulled. And so the said writ was in the nature of a scire facias.

It was moved by Cook, that although the admiral had but an estate for life; yet the patent did continue in force after his death: as the Justices here of the Common Pleas, although they have their places but for life, may grant offices which shall be in force after their death: and because the same matter is determinable at the common law, he prayed a prohibition; for in the admiralty they would judge according to the civil law: the Court gave day to the other side, to shew cause, why the prohibition should not be awarded.

CCXXXVIII. Mich. 29 Eliz. In the Kings Bench.

Accompt was brought by Harris against Baker, and damages were given by the jury: it was moved to the Court, that damages ought not to be given by way of damages, but the damages of the plaintiff shall be considered of by way of arrearges. But see the case, Hill. 29 Eliz. in C. B. betwixt Collet and Andrews. And yet, 10 H. 6. 18. in accompt, the plaintiff counted to his damage, but did not recover damages, 2 H. 7. 13. 21 H. 6. 26. The plaintiff shall not recover damages expresly, but the Court shall given quoddam incrementum to the arrearages.

[193] Cook said, that it had been adjudged, that the plaintiff should recover damages in an accompt ratione implicationis, & non detentionis.

1 Len. 302. Ante 150. Post. 230.

MICH. 29 ELIZ. IN THE KINGS BENCH.

CCXXXIX. LONG'S CASE.

Note: it was holden in this case, if a feoffment in fee be made of a mannor, to which an advowson is appendant, and livery is made in the demesnes, but no attornment; that in such case the advowson shall pass, but none of the services.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CCXL. BARNS CASE.

Barns brought an action of trespass, for taking of his sack of corn; the defendants justified in the behalf of the town of Lawson in the county of Cornwell; because, that King Phil. and Queen Mary granted to them of the said town, a market to be holden within the said town; and that the plaintiff came to the said town with a sack of corn, and the vendor would not pay toll, for which cause, they took the said sack of corn. And judgment was given for the defendant. Upon which, error was brought, and assigned for error, because that the defendant pleads the letters patents with the date of the place, year, and day, without saying, magno sigillo Angliæ sigillat. For it was holden, that (hic in curia prolat.) is but form. And afterwards the judgment was reversed, for default of the said matter, magno sigillo Angliæ (sigillat.). And by Anderson, Justice, patents are good without inrollment; and that was adjudged in Hungate's case.

CCXLI. MICH. 29 ELIZ. IN THE EXCHEQUER CHAMBER.

Debt brought upon an obligation; the defendant pleaded payment apud Lockington, in the parish of Killmerston: and the venire facias was awarded de Lockington. And that was assigned for error in the Exchequer Chamber, upon a judgment given in the Kings Bench, that the venire ought to be de Killmerston. See 6 H. 7. 3. 11 H. 7, 23, 24. 9 E. 4. 3. Trespass for entry in the mannor of D. in S. the visne shall come de vicineto de S. and not from the mannor. Contrary, if it be for the entry into the mannor of D. only, for there it shall be de vicineto manerii.

Cook said, there was a case very late adjudged in the Kings Bench; a lease was pleaded to be made at Ramridge End in Lu-**[194]**-ton; and that he himself was of opinion, that the venire ought to have been of Ramridge End, and not of Luton. But the Court overruled the same against him. It was said in the principal case, that Lockington shall be intended a town as this case is; for a parish may contain many towns. And afterwards, the judgment was affirmed.

Post. 266.

CCXLII. MICH. 29 ELIZ. IN THE COMMON PLEAS.

In trespass, for breaking his close; the defendant pleaded that heretofore he himself brought an ejectione firmæ against the now plaintiff of the same land in which the trespass is supposed to be done, and had judgment to recover, &c. and demanded judgment, if against, &c. It was moved, that the bar was not good, because that the defendant had not averred his title. And the recovery in one action of trespass, is no bar in another, &c. Quod Curia concessit. But as to the matter, the Court was clear, that the bar was good. And by Periam, whoever pleaded it, it was well pleaded: for as by recovery in an assise, the freehold is bound; so by recovery in an ejectione firmæ, the possession is bound. And by Anderson, a recovery in one ejectione firmæ, is a bar in another. Especially (as Periam said) if the party relyeth upon the estoppel. And afterwards, judgment was given, that the plaintiff should be barred.

1 Len. 313.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CCXLIII. PETER'S CASE.

William Peters, being plaintiff in an action of debt in the Common Pleas, came to London this term to prosecute his action; and afterwards he was committed to the Marshalsey by the Lord Hunsdon, chamberlain of the Queens houshold, and one of her Privy Council: and now an habeas corpus issued out to the keeper of the Marshalsey, to have the body of the said Peters in Court: and at the day, the keeper retorned the said writ, that the said Peters was committed to the said prison, by the said Lord, and shewed the warrant for it, there to remain and to answer before the Lords of Her Majesties Council to such matters, &c. Causa vero detentionis mihi omnino incognita est. The Court examined the said Peters upon his oath, if he came to London to prosecute his said cause? Who answered, that he did. And the Court also examined the said keeper, if he had acquainted the said Lord with the said writ? Who said, that he had so done; but he shewed him not any cause. Wherefore by the award of the Court, Peters was discharged of his imprisonment.

[195] CCXLIV. HILL. 29 ELIZ. IN THE COMMON PLEAS.

Serjeant Fenner demanded the opinion of the Court in this case; A. devised lands to his wife for life, and afterwards to B. his son, and his heirs, when he should come to the age of 24 years; and if his wife died before his said son should attain his said age of 24 years, that then J. S. should have the said land until the said age of the said son: A. died; J. S. died; the wife died, the son being within the age of 24 years: if the executors of J. S. should have the land after the death of J. S. until the said age of the son, was the question.

Anderson and Periam conceived, that he should not; for this interest limited to J. S. by the will, was but a possibility, which was never vested in him, and therefore could not by any means come to his executor. Rhodes and Windham doubted of it.

Fenner put the case, in 12 E. 2. Fitz. Condition 9. Where land is mortgaged to J. S. upon payment of mony to J. S. such a day, or his heirs; and before the said day, J. S. by his will deviseth, that if the mortgagor pay the money, that then A. B. should have them; that this devise of this possibility is good; quod omnes justiciarii negaverunt.

And Windham put the case between Weldon and Elkington, Plow. Com. 20 Eliz. 519. Where lessee for years devised his term to his wife for so many years of the said term as she should live; and if she died within the term, that then his son Francis should have the residue of the term not encurred: Francis died intestate; the wife died within the term; the administrator of Francis had the residue of the term, and yet nothing was in Francis the intestate, but a possibility. A lease was made to one Hayward, his wife, and one of his children; habendum to Hayward for 99 years, if he should so long live: and if he die within the said term, that then his said wife should have the said term for so many years which should be to come at the time of the death of her husband; and if she died also before the said term, that then the child party to the devise, should have it for so many years of the said term as should not be expired at the time of the death of the wife. And the case of Cicill was vouched, 8 Eliz. Dyer, 253. A lease was made to William Cicill, pro termino 41 annorum, si tam diu vixerit. Et si obierit infra prædictum terminum, extunc uxor prædicti William Cicill habebit & tenebit omnia & singula præmissa pro residuo termini præd. incompleto, si tam diu vixerit. Et si the said Eliz. obierit, infra prædict. terminum, tunc William Cicill filius, &c. And it was holden by Catlyn and Dyer, that these remainders were void; for the term is determinable upon [196] the death of William Cicill the father, and the residue of the said term cannot remain.

And by Anderson, the remainders of the term limited ut supra, are void; for every remainder ought to be certain, but here is no certainty; for it may be, that

the first possessor of the term may live longer, or die sooner, so as he in the remainder doth not know what thing he shall have.

And so also conceived Rhodes, Justice; and he put the case between Gravenor and Parker, 3 & 4 Mar. Dyer, 150. A lease was made to A. for life by indenture; and by the said indenture, a proviso was, that if the lessee died within the term of 60 years then next ensuing, that then his executors should have it in right of the lessee for so many of the years as should amount to the number of 60 years, to be accounted from the date of the indenture. And it was holden, that that secondary interest to the executor was void: and that the words concerning the same went only in covenant.

1 Co. 155.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CCXLV. THE LORD COMPTON'S CASE.

Note: it was holden by the Lord Anderson, Chief Justice, in this case, that if cestuy que use after the statute of 1 R. 2. leaseth for years, and afterwards the feoffees release to the lessee and his heirs, having notice of the use; that that release is to the first use: but where the feoffees are disseised, and they release to the disseisor, although that they have notice of the use, yet the same is to the use of the disseisor: and no subpœna lieth against the disseisor. See 11 E. 4. 8.

2 Len. 211. Kellow. 41. 4 Inst. 85.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CCXLVI. SIR THOMAS GORGE AND DALTON'S CASE.

Sir Thomas Gorge and the Lady Helene his wife, brought a quare impedit against Francis Dalton; who pleaded, that the Queen was seised of the mannor of D. to which the advowson, &c. was appendant; and so seised, the church became void: and that afterwards the Queen granted the said mannor with the advowson to J. S. who presented the defendant. It was the clear opinion of the Court, that by that grant of the Queen the advowson did not pass; although that the King by his prerogative, may grant a thing in action. Quod vide Dyer, 13 Eliz. 300. against F. N. B. 33 & 16 H. 7.

[197] CCXLVII. HILL. 29 ELIZ. IN THE COMMON PLEAS.

A copyholder with the leave of the lord leased for years, and afterwards surrendred the reversion with the rent, to the use of a stranger; who was admitted accordingly. It was moved, if in this case there needed any attornment, either to settle the reversion, or to create a privity?

It was holden in this case by Rhodes and Periam, Justices, that the surrender and admittance, ut supra, are in the nature of an inrollment, and so amount to an attornment; or at the least, do supply the want of it.

1 Len. 297. Hob. Rep. 177.

MICH. 29 ELIZ. IN THE KINGS BENCH.

CCXLVIII. CARTER AND MARTEN'S CASE.

Two men made an obligation joyntly for debt. The principal in the obligation made him who was surety only for him in the said obligation for payment of the mony, his executor, who payed the mony generally: and, whether it shall be said, that he paid it as executor, or as an obligor, was a quære, not resolved by the Court.

CCXLIX. MICH. 29 ELIZ. IN THE EXCHEQUER.

A. was endebted to B. who was endebted to the Queen; B. assigned his debt unto the Queen: by all the Barons, process shall be awarded out of the Exchequer, to enquire what goods A. had at the time of the assignment; and not what he had tempore scripti prædict. facti, &c.

CCL. HILL. 30 ELIZ. IN THE EXCHEQUER.

A. was accomptable to J. S. and afterwards J. S. was outlawed in an action personal: A. died; the Queen by her letters patents granted unto B. omnia bona & catalla, exitus, proficua, forisfactur. & advantagia quæcunq; which came to her, or accrued by reason of the outlawry of the said J. S. And now B. brought an action of accompt against the executors of the said A. as executors of their own wrong. The defendants pleaded, that they had letters of administration committed to them by the Ordinary, and demanded judgment of the writ. The plaintiff in maintenance of his writ, replyed, that the defendants did administer of their own wrong, before that administration was granted unto them. Upon which the defendants did demur in law. It was the opinion of some of the justices, that the wrong is urged by taking of letters of administration; and now **[198]** they are to be charged as administrators only, and not otherwise. See 50 E. 3. 9. 20 H. 6. 1. And see the case of the Cardinal of Canterbury, 9 E. 4. 33. If one administreth of his own wrong, and afterwards takes letters of administration, he shall be sued not as executor, but as administrator. See 21 H. 6. 8.

But Gawdy, Justice, conceived, that the defendants might be charged as executors. As to the grant of the Queen of this action of accompt. See Br. Pat. 98. 32 H. 8. that the King may grant a thing in action which is personal, as debt and damages, or the like; or a thing mixt, as the wardship of the body; but not a thing real, as an action concerning lands, rights, entries. But it was agreed on all sides, that if this action had been granted specially, it had been clearly good. And it was observed, that in the principal case the accomptant was dead before the grant; so that his executors were chargeable to the Queen, to render an accompt, and the Queen was entituled to it. It hath been objected, that this action of accompt came to the King by reason of his prerogative Royal, and in vertue thereof the executors are accomptable to her, and therefore the Queen cannot grant the same over to a subject: certainly the same is not an incident inseparable from the Crown, nor a flower of the Crown; as the King cannot grant over to a subject power to pardon felons, for that is proper and peculiar to the person of the King; nor that a subject may have a Court of Chancery: and although this matter of accompt is at the first, i.e. at the time of the grant, uncertain; yet by matter ex post facto, it may be reduced to certainty, i.e. by the accompt; and although the accompt be not expresly named in the letters patents, yet the words of the grant, ut supra, do amount to as much. And Gawdy, Justice, conceived, that this accompt ought to be brought in the name of the Queen: and all the justices were of opinion, that if the said A. had been living at the time of the said grant of the Queen, the grant had not been good; for then the action against the executors, which is the matter of prerogative, had not been vested in the Queen.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCLI. SPECOT'S CASE.

[See S. C. 5 Co. Rep. 57.]

Humphry Specot, and Elizabeth his wife, brought a quare impedit against the Bishop of Exceter, &c. of the church of Tedcole in the county of Devon: the bishop pleaded, that the plaintiffs presented to him one John Holmes, quem super examina-

tionem invenit scismaticum inveterat', and so non habilem to be instituted, vel ad acceptandum aliquod beneficium cum cura animarum, for which he refused him, and of such refusal gave notice to the plaintiffs, and of the cause of it; upon which the plaintiffs **[199]** did demur in law. It was argued by Fleetwood, Serjeant, for the bishop, but to little purpose, therefore I will report but certain passages of his argument: he conceived, that that general pleading of schismaticus inveteratus was good enough; as, if the bishop certifieth bastardy, it is sufficient to say, Bastardus, sive spurius, without other circumstances, as to say, On the body of such a woman begotten: Lollard derivatur à Lollio. i.e. Anglice, tares. Sampson was Dean of Christ Church in Oxford, and was convented before the Ordinary for schism, because he would not use a surplice; and for that he was condemned for a schismatick, and deprived of his deanery, in the time of the Queen that now is. Shuttleworth, Serjeant, for the plaintiffs, that the bishop in his plea ought to have shewed specially, how and in what point the presentee of the plaintiffs was schismaticus: there are divers manners of schisms. 1. In doctrine. 2. In manners; and of each kind there are many, &c. And therefore, for doubt of enveigling the metropolitan, who is to try that issue, the defendant ought to have shewed the schism in certain, in which the metropolitan was to examine the clerk readily. See 38 E. 3, 2. the case of the Countess of Arundel, where in a quare impedit the Ordinary pleaded, that the presentee was criminosus & perjurus, and shewed the cause in what and when he was perjured. And although this issue is to be tryed by the metropolitan, yet it ought to be formally pleaded in the Temporal Court, and with certainty: as where a divorce is pleaded, it is not sufficient to say, that a divorce was had; but the party ought to shew for what cause, and before what Judge the divorce was had, which see 18 E. 4. 29. where the divorce is specially pleaded for cause of consanguinity; for by one divorce the issues are bastardized, by others not. See as to the pleading of a divorce 11 H. 7. 9. Profession, although it be a spiritual thing, yet the general pleading of it, is not good; but he who pleads it, ought to shew, of what order, and under whose obedience, 40 E. 3. 37. which see the Book of Entries 444. Intravit religionem, viz. in Domo Carmelitarum de London, & ibi fuit professus sub obedientia R. prioris domus illius. So deprivation shall not be generally pleaded, which see Book of Entries 458. Ecclesia vacavit per privationem, &c. per J. S. legum doctor. delegat. &c. so of resignation, 7 E. 4. 16. Resignavit in manus I. L. Bishop of London, Ordinary of the said place. Now, it is to see, if by this general demurrer the matter in fact be confessed, scil. that the presentee was schismaticus inveteratus; and as to that, the rule is, that all matters in fait, which are well and duly pleaded, by a general demurrer be confessed; but that which is not well alledged, by no demurrer shall be holden confessed: which learning see in the Commentaries, in Partridge and Stranges case. And here for as much as scismaticus is not well pleaded, for the cause aforesaid, it shall not be holden confessed. Now, it is to see, **[200]** if upon the statute of 27 Eliz. this defect be helped; and he conceived it was not, for here the defect is in matter, and not in form: as if, in trespass of his close breaking, the defendant justifies by a lease for years, and doth not shew the place where the lease was made, and the plaintiff demurrs generally upon it; the said defect is not helped by the said statute, for that it is matter. So in a formedon in discender, the defendant pleads a warranty with assets, without shewing the place where the assets is, and the demandant demurrs upon it generally, the same defect is not helped by the said statute: see a good case adjudged upon the statute, Mich. 28 & 29 Eliz. between Henly and Broad. Periam and Windham, Justices, conceived, that the plea of the bishop is not good, because it is not shewed in what point the presentee was schismaticus; for by this genral pleading, if it should be allowed, the metropolitan, to whom the tryal of the cause belongeth, shall be driven to peruse all schisms, in the examination of the presentee, which is a thing infinite and inconvenient. Rhodes, and the Lord Anderson, to the contrary: and Rhodes vouched an old book, 30 E. 1. out of a written book of the Lord Catline. In a quare non admisit, the defendant pleaded, that the clerk presented was schismaticus & adulter, and the Court commanded, that he hold himself to one of them, for which he said, adulter; so as the Court did not mislike the plea for the generality, but for the doubleness. And by Anderson, Our case is not like the cases put by Shuttleworth; for they concern things

tryable by our law, in which case, to have convenient tryal, all matters issuable ought to be specially alledged; but here the case is otherwise, and no peril of tryal. And by the said statute of 27 Eliz. we ought to judge according to the right of the cause, and matter in law. See this case adjudged upon a writ of error brought in the Kings Bench. Hill. 32 Eliz. in Coke 5 Part, 57. Specot's case.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCLII. ESTRIGGE AND OWLES'S CASE.

In an action upon the case by Estrigge against Owles, it was holden by the justices, that forbearance per paululum tempus, is a good consideration. Then it was moved, that in the action, the request was not sufficiently laid in respect of the place and time.

And Cook said, that the difference had always been agreed, that where the promise is to do a collateral thing upon request, there in the declaration, the place and the time ought to be certainly set down; as it was holden in the case of Alderman **[201]** Pulison; where he promised to give a tun of wine upon request, in such case the request is traversable, and therefore it ought to be certainly shewed, for the request is parcel of the issue: but if such action be brought, and the plaintiff declares upon an indebitatus, then if the plaintiff prove the debt, it is not material to prove the promise; for every contract executory implyes a promise: and in such case, the request is not traversable. And the truth of the case was, that one Tickil was endebted to the plaintiff in 30l. and died intestate; B. his wife took letters of administration, and took to husband the defendant; and he, for the consideration aforesaid, and that the plaintiff would forbear his debt for a little time, promised to pay it: and further declared, that he had forborn, &c. from such a day, until such a day; but yet the defendant would not pay it, licet sæpius requisitus: and upon this declaration, the plaintiff had judgment: and now a writ of error was brought, and it was assigned for error because that in the declaration it is alledged, that the wife administred the goods of the intestate, and did not shew, that she was administratrix, &c. and took letters of administration. 2. It is not alledged, that the wife had goods of the testator at the time of the promise, for otherwise she shall not be bound. For it is but nudum pactum; for executors or administrators, not having assets, shall not be charged. And it was holden here, that request is not necessary, for the debt was before the promise, so as the request is not any cause of the action.

Ante 73.

PASCH. 30 ELIZ. IN THE KING BENCH.

CCLIII. MATTHEWS'S CASE.

Note; that a bill of perjury, upon the statute of 5 Eliz. was sued by the Queen and the party, because that the defendant being one of the homage, &c. did present with the rest of the homagers, that the plaintiff had cut down certain trees, &c. whereas in truth he had not cut down any. And it was holden by all the justices, that for this matter, the bill did not lie upon this statute; for this branch of the statute is to be intended of perjury in depositions only.

And by Tanfield, A bill doth not lie upon the statute upon perjury committed in an answer to a bill in Chancery. See 41 Eliz. Flower's case.

[202] CCLIV. TRIN. 30 ELIZ. IN THE COMMON PLEAS.

In a replevin, the defendant avowed for damage feasant; the plaintiff in bar of the avowry, shewed, that every inhabitant in every messuage in the said town had used to have common in the place where, &c.

Glanvile argued, that the prescription was not good, for want of capacity in the

party who pretends interest, for it is not certain, but applyed to a multitude: and he put divers cases in proof of it: 22 H. 6. 21 H. 7. 1. Mar. Dyer, 100. The King grants a rent probis hominibus of Islington; the same is void, for they are not capable.

Harris, I conceive, that the prescription is good; and he granted, that a confused multitude cannot prescribe in a matter of interest, but in an easement, or discharge; as in a way to the church, and that by reason of custom in the land, and not in the persons. See 7 E. 4. 26. where it is pleaded, that all the inhabitants within such a town time out of mind, &c. have used to have common there, &c. And for a township to have a way to the church; and good, by Danby. And by Littleton, it ought to be pleaded by way of usage. And, 18 E. 4. 3. all the inhabitants of such a town, may well prescribe. And he cited Bracton, 222, 223. Communia quandocunq; ex longo usu sive constitutione cum pacifica possessione continue & non intermixta, ex scientia, negligentia, & patientia dominor', ita etiam amitti potest per negligentiam, & non usum. And he vouched Britton, fol. 144. Common is obtained by long sufferance; and also it may be lost by long negligence, &c.

Co. Rep. Gatewards case.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCLV. PYE AND GRUNWAY'S CASE.

In trespass brought by Pye against Grunway, and one B. the plaintiff declared against Grunway only, who pleaded not guilty: and it was found for the plaintiff. And in arrest of judgment, it was moved, that the plaintiff in declaring against one only, had falsified his own writ. To that it was said, that at the uttermost it is but a discontinuance, so but matter of form, and so relieved by the statute of 18 Eliz. But it was said by the Court, that it may be, that B. was outlawed, at the plaintiffs suit, and then the proceedings is determined as against him. And the Court demanded of the clerks, if the use of the Court be not so in such case to declare, that Grunway simul cum B. utlagat. ad sectam querentis did the trespass? Who answered, Not in this action: but in an action of debt, it is otherwise: and afterwards, notwithstanding that exception, judgment was given against the plaintiff.

[203] TRIN. 30 ELIZ. IN THE COMMON PLEAS.

CCLVI. THORP AND WINGFIELD'S CASE.

In waste, the plaintiff declared upon a lease for years generally; and the truth of the case was, that the plaintiff had made a lease for years to one A. which lease being in force for two years, he leased the same lands for years, as he hath declared, to begin presently: and the waste which is assigned in the declaration, was done during the first lease; and now, if the defendant upon this matter might plead, no waste done, was the question. And it was said by the Court, that such a plea should be perilous for the defendant, for it shall be found against him; and if he pleadeth the special matter aforesaid, scil. the former lease in esse at the time of the waste committed; after the expiration of which lease, no waste was done: if the second lease be not by indenture, it should be a good plea; but if by indenture, then the plaintiff would estop him by the indenture, to shew, that the second lease hath another beginning than the indenture purports, and then the waste shall charge the defendant; and although the plaintiff had not declared upon a lease by indenture, yet if the defendant pleaded the special matter aforesaid, he by way of replication shall estop the defendant to plead any other beginning of the term than the letter of the indenture doth purport; and the same shall be no departure, for it is matter which strengtheneth the declaration.

PASCH. 30 ELIZ. IN THE COMMON PLEAS.

CCLVII. BOTHAM AND THE LADY GRESHAM'S CASE.

In a prohibition by Botham and Couper, against the Lady Gresham who had impleaded them in the Spiritual Court for tythe-hay, and made their suggestion, that time out of mind, &c. they had paid to the vicar of the said parish 4d. for the tythe of hay of every acre; it was moved, that upon that surmise a prohibition ought not to be granted, for that a modus decimandi shall never come in question: but the party ought to have pleaded the same matter in the Spiritual Court, scil. that the same doth appertain to the vicar, and not to the parson: and then if the vicar sueth for the tythe of the hay, the modus decimandi will come in question: and although that he hath averred in his surmise, that the tythe-hay belongeth to the vicar, yet that is not material: and afterwards a consultation was awarded.

1 Len. 94. 1 Cro. 71. 1 Len. 128. Post. 265.

[204] 30 ELIZ. IN THE EXCHEQUER.

CCLVIII. RUSH AND HEIGHGATE'S CASE.

Process was awarded out of the Exchequer, against Rush, for the levying of the sum of 200l. which he owed to the Queen; upon which, it was found by office, that Rush, 22 Junii, 22 Eliz. was possessed of lands for the term of divers years then and yet to come; and the debt of the Queen began 12 Feb. 17 Eliz. And upon the retorn of this office, came one Heighgate, and shewed, that the said Rush, 16 Eliz. was possessed of the said lease, and the same year assigned the same to the said Heighgate, and traversed the office.

Exception was taken to the inquisition, because that the lease is not certainly set forth; scil. the number of the years in certainty.

Cook, The office is sufficient enough, notwithstanding this exception, for the Queen is a stranger to the lease, and therefore she shall not be driven to set forth the certainty. See 7 E. 6. Plowden, 85. Partridge's case, upon the statute of 32 H. 8. concerning pretended titles, &c. there the informer declared, that the defendant had leased lands for years against the said statute, &c. without shewing the number of the years; and the information was holden good enough: for it is impossible, that a stranger have notice of every certainty, &c. and it is dangerous to meddle with such a particular certainty of the lease, and to miss it: and in this case, for as much as Heighgate comes to this lease not by voluntary contract, but by compulsory means; scil. by execution upon the statute, he cannot by common intendment have notice of every particular circumstance and article of the lease, as he may in case of a voluntary contract. And also, although in pleading, the number of the years ought to be expressed, yet in an inquisition such precise pleading is not requisite. See 15 H. 7. 7. An estate tail, and dying seised of it, was found by office, without shewing of whose gift it was; and good enough.

2 Len. 121. Co. 4. Rep. Palmers case.

CCLIX. TRIN. 30 ELIZ. IN THE EXCHEQUER.

One exhibited a bill in the Exchequer Chamber, upon the statute of 2 E. 6. cap. 13. to have the treble value, for not setting forth his tythes according to the said statute. But it was clearly holden by the Court, that the bill did not lie upon that matter; for the plaintiff hath his remedy for the same in the Court of Pleas in the Exchequer: and also for that there shall be no suit or proceedings according to the order of the Exchequer Chamber in cases of conscience, upon any penal statute.

[205] TRIN. 30 ELIZ. IN THE EXCHEQUER.

CCLX. BODY AND TASSELL'S CASE.

Note: that in the case between Body and Tassell, it was holden by Baron Clark, that if a man lendeth mony, and for the forbearing of it, contracts for more than 10l. in the 100l. that the bond made for it, is void presently; and that if he doth receive excessive interest, that he shall forfeit treble the value.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCLXI. MARKHAM AND PITTS'S CASE.

In an action upon the case upon a trover by Markham against Pitts; the defendant after an imparlance, pleaded an outlawry of the plaintiff: and it was holden by some, to be a good bar, and therefore it may be pleaded after imparlance; as 16 E. 4. 4. in debt upon a specialty: but not in debt upon a contract, trespass, battery, imprisonment, &c. for, such matters the King shall not have by outlawry.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCLXII. CRANE AND JUNIPER'S CASE.

Thomas Crane brought an action upon the case against Juniper, and one John Matthew, upon an assumpsit; and declared, that in consideration that the plaintiff took upon him, that whereas William Matthew was endebted unto him in divers sums of mony at the time of the death of the said William, that he would not molest the said defendants being executors of the said William Matthew before the 10th day of May next following, the defendants promised to pay to the plaintiff debitum prædict. at the said 10th day of May: and declared further, quod non molestavit: and yet, although sæpius requisit. the defendants had not paid him, &c. And upon non assumpsit pleaded, it was found for the plaintiff. And it was objected, that the plaintiff had not maintained nor averred his assumpsit; for the words of it are, Non molestavit nominatos executores testamenti & ultimæ voluntatis William Matthew; but he ought to have averred more specially, quod non molestavit Juniper & Matthew, named executors of William Matthew, nor any of them, by their names: also he ought to have pleaded, quod non molestavit, before the said 10th day of May, according to his promise. And also he ought to have shewed in his declaration, how that he did not trouble them for the debt of the testator, &c.

[206] PASCH. 30 ELIZ. IN THE KINGS BENCH.

CCLXIII. WALCOT AND POWELL'S CASE.

The case was, that in an action of debt brought against the husband and wife, the plaintiff declared upon an obligation made by the wife dum sola fuit; and the writ was in the detinet tantum: and upon judgment given in that action, a writ of error was brought in the Kings Bench; and that matter was assigned for error; and by Cook, The writ ought to be in the debet & detinet; for the husband hath the goods of the wife in his own right; and so is the Register, 140.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CCLXIV. WIGMORE AND WELLS'S CASE.

Three were bound in a bond by these words, Obligamus nos & quemlibet nostrum conjunctim. And it was holden by the Court to be a joynt bond, and not several; for the word quemlibet is expounded by the word conjunctim.

CCLXV. PASCH. 30 ELIZ. IN THE EXCHEQUER.

It was holden by the Court in this case, that if a stranger entreth upon the farmor of the Queen, that by such entry, he hath gained the estate for years: and if he doth make a lease unto another, his lessee may maintain an ejectione firmæ.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CCLXVI. ABBOT'S CASE.

Alice Abbot brought an action upon the case upon 5 several assumpsits, and in the close of her declaration, it was et prædict. J. S. licet sæpius requisitus, &c. and so there was but one licet sæpius requisitus to all the 5 assumpsits; whereas every several assumpsit ought to have his several demand; for one general request for all is not sufficient: for it hath been adjudged, where one is endebted to me severally in several sums of mony, made upon request, or demand made; and I go to him, and say to him, Pay me what you owe me; the same is not a sufficient demand or request. Wray, If one lendeth me mony, to repay it when he shall be required; licet sæpius requisitus is not sufficient: but if the plaintiff declareth upon a cum indebitatus fuisset, the defendant assumed to pay; there licet sæpius requisitus is sufficient.

[207] PASCH. 30 ELIZ. IN THE KINGS BENCH.

CCLXVII. STACKFORD'S CASE.

Stackford, was endicted for disclosing the counsel of the Queen, and of his companions, being sworn upon the grand enquest for the county of Middlesex in this manner: it was intended by the jury to endict the brother of the said Stackford as a common barrettor, and he disclosed the same to his brother, and upon that matter he was endicted, and exception was taken to the endictment, because it is not shewed in what thing he had disclosed their counsel; 2. It is said, in Trinity Term, 29 Eliz. he disclosed; but it is not said what day of the month it was done; 3. The endictment is that he being sworn coram justiciariis Dominæ Reginæ, &c. and it is not shewed in what Court he was sworn, but generally at Westminster. The justices were all of opinion, that it was a lewd part, and that he should be fined for it; but he was discharged from the endictment.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CCLXVIII. THE TOWN OF GREEN IN SUSSEX'S CASE.

The town of Green in Sussex was amerced for the escape of a felon, and that amercement was grounded upon an inquisition taken before the coroner by whom the escape was found; and it was moved for the town, that there is not any such escape found, for which the town ought to be amerced: for it is found that he who escaped 10 die Januarij. 30 Eliz. circa horam quartam post meridiem, with a pitchfork

mortally struck one A. which A. of the said stroak died 8 hours in the evening of the same day, and that then the other escaped; for which escape being done in the night, the town by the law ought not to be amerced, for it is not felony until the party dieth. Which see 11 H. 4. and in Cole's case 13 Eliz. Plow. Com. 401. And therefore the town nor any other was charged with the offendor before the party wag dead. Wray, It should be a hard thing that the town should be amerced upon this matter; for, although the town in discretion might have stayed the party, yet it is not bounden to do it, &c.

[208] MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCLXIX. BLAND AND RICCARD'S CASE.

The case was, that process of attachment issued out of the Chancery against the defendant, by force of which he was taken by the plaintiff being under-sheriff; who took bond of him, upon which bond debt was brought; the bond being for his appearance at the day contained in the attachment. It was the clear opinion of the whole Court, that the bond was void; for that the defendant was not bailable upon the attachment: see the case of Dive and Manningham, 4 E. 6. Plowden, 61, 62.
1 Cro. 225.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCLXX. FETHERSTONE AND HUTTCHINSON'S CASE.

[S. C. Cro. Eliz. 199. See *Lound* v. *Grimwade*, 1888, 39 Ch. D. 613.]

In an action upon the case, the plaintiff declared, that whereas one Hill had recovered in an action of debt against J. S. 10l. upon which a capias was awarded against J. S. that by force thereof he was arrested, and being under arrest, the defendant in consideration that the plaintiff would suffer the said J. S. to go at large circa negotia sua, and to go to his own house, and also in consideration of 2d. paid to the defendant, he promised to pay to the plaintiff the said 10l. It was holden by the Court, a void promise within the statute of 23 H. 6. For, the consideration to let a prisoner go at large is not lawful or good; and if part of the consideration be not good, the whole is naught, and so it was adjudged.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCLXXI. STRETTON AND BROWN'S CASE.

In a false imprisonment brought, the defendant justified, because at the time he was constable of D. and appointed the plaintiff to watch, and he refused, by reason of which he set him in the stocks; upon which the plaintiff did demur in law, because the defendant had not alledged, that the plaintiff was an inhabitant within the town; for the constable cannot compel strangers which pass, to watch: and it was moved, if for such a cause the constable might set one in the stocks; for it was said, he ought to complain of his refusal to a justice of the peace. Also the constable cannot appoint any to watch at his pleasure, but only in his turn, for otherwise the constable might upon a private revenge vex his neighbors. See 22 E. 4. 35. Wray, Chief Justice, The defendant ought to shew, that the plaintiff was [209] inhabitant in the town, and that it was his turn to watch: and if such inhabitant refuse to watch in his turn, the constable may set him in the stocks.

TRIN. 30 ELIZ. IN THE EXCHEQUER.

CCLXXII. PARAMOUR AND THO. ROBINSON'S CASE.

The case was, George Robinson lessee for years of the mannor of Drayton-Basset, the reversion to the King, devised his term to his wife, as long as she should keep her self a widow, the remainder over, if she married; and died, and made his wife and William his son his executors, the said William being within age; and therefore administration was committed to the wife alone, and she only proved the will: and afterwards the wife granted all her interest to the said William, and died.

Cook, Nothing passeth by the grant, for William had the term before; for every executor hath an entire interest.

Popham, contrary; For at the time of that grant, the son was within age, and had not administred, nor proved the will; therefore in effect the wife was sole executrix.

Egerton, Sollicitor, If during the sole executorship of the wife, one committeth a trespass upon the land, the wife alone shall have the action of trespass without naming her co-executor: which Cook denyed. And he cited the case, 16 H. 7. 4. If two executors be, and one of them only is possessed of the goods of the testator, and a stranger takes them out of his possession, to whom the other executor doth release; and afterwards the executor out of whose possession the goods were taken, brings an action of trespass against the trespassor, who pleads the release of the other executor; it was holden a good plea; for the possession of the one, was the possession of the other. The case was further, that Tho. Robinson the defendant in pleading had shewed, that George Robinson was possessed, and devised the same to his wife, who granted the same to William, who devised the same to the defendant. On the other side, it was shewed, that Tho. Robinson the defendant granted the said term to Paramour the plaintiff; upon which they were at issue. And the question now was, If Tho. against his own pleading might give in evidence, that Thomas did not grant; for if the gift by the wife to William was void, and he had the term as executor, then he could not devise it. And it was shewed also, that Thomas granted it by indenture to Paramour: and now, if against that indenture, he might give in evidence such special matter, was the doubt. And, if the party shall be concluded if the jury shall be concluded ad dicendum veritatem?

And by Popham and Egerton, as well the jurors as the parties are concluded by the confession of the parties in the record. For here, Thomas confesseth, that William devised to him; virtute cujus, he was possessed.

[210] To that the Queens Attorny said, that it is true, that Thomas Robinson was possessed; but it is further said, that Thomas granted it to Paramour, and so the interest of Thomas is confessed on both sides, and therefore the jury shall not be received to say the contrary.

But the opinion of Manwood, Chief Baron, was, that if the parties do admit a thing per nient dedire, the jury is not bound by it; but where, upon the pleading a special matter is confessed, there the jury shall be bound by it. And afterwards, the issue was found against Robinson the defendant.

2 Co. 4.

CCLXXIII. TRIN. 30 ELIZ. IN THE KINGS BENCH.

In an action of debt by A. against B. upon an obligation, the defendant pleaded tender of the mony according to the condition; upon which the parties were at issue. And after the defendant pleaded, that after the darrein continuance, the debt now in demand was attached in the defendants hands according to the custom of London, for the debt of C. to whom the plaintiff was endebted. It was the opinion of the Court, that the plea was insufficient, for it is altogether contrary to the first plea. And also the Court held, that in an action for the debt depending here in this Court, the debt cannot be attached; and the Court would not suffer a demurrer to be joyned upon it,

but over-ruled the case without any argument; for it was said by Wray, Chief Justice, that it was against the jurisdiction of the Court, and the priviledge of it.

CCLXXIV. TRIN. 30 ELIZ. IN THE KINGS BENCH.

Note: it was holden by the Court, that if a copyholder in fee dieth seised, and the lord admits a stranger to the land who entreth, that he is but a tenant at will, and not a disseisor to the copyholder who hath the land by descent, because he cometh in by the assent of the lord, &c.

CCLXXV. TRIN. 30 ELIZ. IN THE KINGS BENCH.

An ejectione firmæ was brought de uno cubiculo; and exception was taken to it: but the exception was disallowed. The declaration was special, viz. & leas unius cubiculi, per nomen unius cubiculi, being in such a house, in the middle story of the said house. And the declaration was holden good enough; and the word cubiculum, is a more apt word, than the word camera: and such was the opinion of Wray, Chief Justice. And it was said, that ejectione firmæ brought de una rooma, had been adjudged good in this Court.

[211] MICH. 30 & 31 ELIZ. IN THE COMMON PLEAS.

CCLXXVI. JOHNSON AND BELLAMY'S CASE. ROT. 824.

In an ejectione firmæ, it was holden by special verdict, that W. Graunt was seised of certain lands, and by his will devised the same to Joan his wife for life: and further he willed, that when Rich. his brother should come to the age of 25 years, that he should have the land to him and the heirs of his body lawfully begotten. W. Graunt died, having issue of his body who was his heir. Rich. before he attained the age of 25 years, levied a fine of the said lands with proclamations in the life and during the seisin of Joan to A. sic ut partes finis nihil habuerunt: and, if this fine should bar the estate in tail, was the question? And the justices cited the case of the Lord Zouch, which was adjudged, Mich. 29 Eliz. where the case was, tenant in tail discontinued to E. and afterwards levied a fine to B. that although that partes finis nihil habuerunt, yet the said fine did bind the estate tail. But the serjeants at the Bar argued, that there was a difference between the case cited, and the case at Bar: for in the case cited, the fine was pleaded in Bar; but here it was not pleaded, but found by special verdict. To which it was said by the Court, that the same is not any difference; for the fine by the statute is not any matter of estoppel or conclusion, but by the statute binds and extincts the entail, and the right of it. And fines are as sufficient to bind the right of the entail when they are found by special verdict, as when they are pleaded in Bar.

And Periam, Justice, said, A collateral warranty found by special verdict, is of as great force, as pleaded in Bar. And afterwards judgment was given, that the estate tail by that fine was utterly barred and extinct.

1 Cro. 122.

CCLXXVII. MICH. 30 ELIZ. IN THE KINGS BENCH.

The case was, A man made a lease for life, rendring rent at Michaelmas; and further leased the same to the executors of the lessee until Michaelmas, after the death of the lessee. It was affirmed by Cook, that in that case, it was adjudged, that the word (until) shall be construed to extend to the term unto the end of the Feast of St. Michael, and so the rent then due payable by the executors; for without such construction, no rent should be then due, because the term ended before Michaelmas.

[212] CCLXXVIII. PASCH. 30 ELIZ. IN THE KINGS BENCH.

One was bounden to stand to the award of two arbitrators, who awarded, that the party should pay to a stranger or his assigns 200l. before such a day: the stranger before the day died; B. took letters of administration. The question was, if the obligee should pay the mony to the administrator, or if the obligation was discharged. It was the opinion of the whole Court, that the mony should be paid to the administrator, for he is an assignee. And by Gawdy, If the word (assigns) had been left out, yet the payment ought to be made to the administrator; which Cook granted.

CCLXXIX. PASCH. 30 ELIZ. IN THE COMMON PLEAS.

The defendant in debt, being ready at the Bar to wage his law, was examined by the Court, upon the points of the declaration, and the cause of the debt; upon which it appeared, that the plaintiff and defendant were reciprocally endebted the one to the other: and accompting together, they were agreed, that each of them should be quit of the other. It was the opinion of Periam and Anderson, Justices, that upon that matter, the defendant could not safely wage his law; for it is but an agreement, which cannot be executed, but by release or acquittance.

CCLXXX. PASCH. 30 ELIZ. IN THE COMMON PLEAS.

Tenant in tail covenanted with his son to stand seised to the use of himself for life, and afterwards to the use of his son in tail, the remainder to the right heirs of the father: the father levied a fine with proclamations, and died. It was moved by Fenner, If any estate passed to the son by that covenant? for it is not any discontinuance, and so nothing passed but during his life; and all the estates which are to begin after his death, are void.

Anderson, Justice, The estate passeth until, &c. And he cited the case of one Pitts, where it was adjudged, that if tenant in tail of an advowson in gross, grants the same in fee, and a collateral ancestor releaseth with warranty, and dieth, that the same is a good bar for ever.

[213] PASCH. 30 ELIZ. IN THE COMMON PLEAS.

CCLXXXI. OGNELL'S CASE.

In a replevin against Ognel, who avowed for rent; the plaintiff was nonsuit; the question was, whether the Court might assess damages, without a writ of enquiry of damages? It was the opinion, that they might; for they are not in respect of any local matter, but they accrue to the avowant, for the delay in the non-payment of the rent: contrary, where judgment is given for the plaintiff, there, the Court shall not assess the damages, for he ought to recover for the taking of his cattel, of which the Judges cannot take notice; and the damages may be greater or less according to the value of the cattel, and the circumstances of the taking and delaying of them.

Clayton Rep. 91.

MICH. 30 & 31 ELIZ. IN THE KINGS BENCH.

CCLXXXII. HITCHCOCK AND HARVY'S CASE.

Hitchcock brought an action of trespass for breaking of his close, and spoyling of his grass, against Harvey: and the case was, that A. was seised of the land in which, &c. and granted to the plaintiff proficuum of such a mead called Tentry Mead, post

falcationem inde; scil. the ear-grass. And it was found by verdict, that ear-grass is such grass, which is upon the land after the mowing, until the Feast of the Annunciation after. It was moved, if such a grantee might have trespass, quare clausum fregit? And it was the opinion of the Court, that he could not; but for spoiling the grass he might.

Clench, Justice, If a man be outlawed in an action personal, the Queen hath the profits of the land, and lets the same to another, he shall have an action of trespass quare clausum fregit; which Shute granted: and afterwards because the jury had given damages entire, as well for the breaking of the close, as for the spoyling of the grass; the plaintiff could not recover the damages.

1 Cro. 421.

[214] HILL. 30 ELIZ. IN THE KINGS BENCH.

CCLXXXIII. CHARD AND TUCK'S CASE.

In an ejectione firmæ by Chard against Tuck, it was found by special verdict, that A. was seised of a messuage, and of a curtilage, and of a garden to the same belonging in fee; and that the curtilage was on the back-side of the said house, and the garden next beyond the said curtilage, the garden being divided from the curtilage by a wall, and a door through the wall into the garden from the said curtilage, and no way to either of them, but through the house. And it was further found, that the said A. by his will devised the said messuage to B. The question was, if by that devise, the curtilage and garden did pass. Vide inde Br. 23 H. 8. Feoffments, 53. Where a feoffment is made of such a messuage cum pertinentiis, they shall pass. Curtilage, is a member, at the least an appendix of a messuage. And by the clear opinion of the whole Court in the case at Bar, it was resolved, that by this devise, the curtilage and garden did pass.

And it was said by Wray, Chief Justice, It matters not, whether the curtilage and garden be before the house, or behind it; for in both cases they shall pass.

1 Cro. 41. 1 Cro. 15, 16, 114, 170, 130. Shep. Touch. 94. Bro. Tit. Judgment 83.

MICH. 30 ELIZ. IN THE EXCHEQUER.

CCLXXXIV. BAXTER'S CASE.

An information in the Exchequer, was exhibited against Baxter of Cambridge, upon the Statute of 7 E. 6. cap. 5. of Wines, and the selling of them against the purview of the said statute. To which the defendant pleaded, that King Rich. the Second in the 5th year of his reign, granted unto the Chancellor and his deputy, and the scholers of the University of Cambridge, custodiam assisæ panis, vini, & cervisiæ, & correctionem & punitionem eorundum; and that the Queen that now is, confirmed the said grant in the third year of her reign by her letters patents; which were after confirmed by Act of Parliament, 13 Eliz. And so pleaded to the jurisdiction of the Court. Upon which, it was demurred in law.

Harris argued for the Queen; and said, that the defendant could not plead that matter to the jurisdiction of the Court at that time, for it is now too late, for that he hath oftentimes imparled, and that generally: in which case, the Court having general and ordinary jurisdiction and authority to hold plea of such matters, shall have conusans of them, notwithstanding the matter which hath been shewed, and set forth. On the other side, it hath **[215]** been said, quod assisa venit de assidendo; that is, to have the assise, as well in respect of the price, as of the measure: which although it be admitted, yet the same shall not help them; for they of Cambridge have not assisam ipsam; but only, custodiam assisæ, i.e., that the assise, set down by the Queen and her councel, be well kept; and that no other price, or measure be used in the uttering of wines.

Popham, the Queens Attorny, to the same intent. The statute of 51 H. 1. ordains, that when wheat is at such a price in the market, then every penny loaf is to weigh so much; and so when barley is at such a price, then so much beer shall be sold for a

penny: and that was the general assize limited by the said statute: in these cases, the university cannot appoint another assise, than that which is set down by the said statute; but to take care, that the said statute be well executed in such assise. See the Statute of 31 E. 1. of Wines, scil. that wines shall be sold according to the assize of the King; i.e. 12d. the gallon: and in that matter, the university hath custodiam only; i.e. the survey of the assize, and the execution of it, and authority to punish the offences against the said statutes, as well in the price, as in the measure according to the said statutes, and not otherwise, &c. And as to the statute of 7 E. 6. cap. 5. by which it is provided, that the said statute shall not be prejudicial to any of the inhabitants of Oxford, or Cambridge, or unto the Chancellor, or scholars there to impair their liberties, &c. The same ought to be intended, that the liberties and franchises which the universities had before by the grant, ut supra, &c. i.e. to punish such offences against the assise, according to the old statutes. For the said statute of 7 E. 6. cap. 5. being in the affirmative, doth not take away the punishment appointed by any other statute; but doth continue the same. And a further penalty is appointed, propter ulteriorem pœnam.

And as to that which hath been said, that by the said grant of Rich. the 2d, they have granted to them cognitionem omnium actionum personalium inter partem & partem, that will not help the university in this case: for the informer by the statute, hath liberty to sue in what Court he will in any of the Kings Courts of Record. And in this case, the Queen is quodam modo a party; for she is to have the moyety; and so this cause is not meerly betwixt party and party, &c.

4 Inst. 229. 3 Cro. 52, 62.

[216] TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCLXXXV. WILLOUGHBY'S CASE.

William Willoughby, and two other were endicted, that where the parson of the church of D. and all his predecessors have used to have common in such a place; the said defendants, Willoughby and others, had enclosed the same, and that enclosure was upon their own land.

It was moved, that upon this matter they ought not to have been endicted; but the party grieved was put to his action; as, where a presentment is made of a disseisin. See 27 Ass. 20. And it was the case of one Marden, 29 Eliz. upon the stopping of a high-way upon his own land; and if it were upon other land, it were not material; for it is but an impeachment to take common, which cannot be vi et armis, &c. Also this endictment is recorded and certified as found before Justices of Assize and Gaol-delivery, and they cannot take such presentment. And although the Justices of Assize and Gaol-delivery were in rei veritate also justices of peace; yet the endictment being recorded and certified to be taken before them in quality of justices of peace, shall not help it; for the Court shall not respect any authority but that which appears upon the record. And for these causes, the parties were discharged.

2 Len. 117.

PASCH. 30 ELIZ. IN THE KINGS BENCH.

CCLXXXVI. GATES AND HOLLYWELL'S CASE.

A man having issue two sons, devised, that his eldest son with his executors should take the profits of the lands, until his younger son should come to the age of 22 years; and then the younger son should have the lands to him and his heirs of his body: it was the clear opinion of all the justices, that the eldest son should have a feesimple in the lands, until the younger son came to the said age of 22 years.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCLXXXVII. CONY AND BEVERIDGE'S CASE.

In debt upon an obligation, the case was, that the plaintiff leased to the defendant certain lands in the county of Cambridge, rendring rent; and afterwards, the defendant became bounden to the plaintiff in an obligation for the payment of the said rent: upon which bond, the plaintiff brought an action of debt in the county of Northampton. To which the defendant **[217]** pleaded payment of the rent, without shewing the place of payment, and upon that they were at issue. And it was found by nisi prius, in the county of Northampton for the plaintiff; it was moved in arrest of judgment, that the issue is mis-tryed; for here the payment of the rent being pleaded, without shewing the place of payment, it shall be intended, that the rent was paid upon the land, which is in the county of Cambridge, and there the issue ought to be tryed. See 44 E. 3. 42.

And it was the opinion of Anderson Chief Justice, that no judgment should be given for the plaintiff, for the cause aforesaid.

But Rhodes and Windam Justices, were of a contrary opinion; for it doth not appear, that the issue is mis-tryed, because that no place of payment is pleaded, and it may be, for any thing that is shewed, that the rent was not paid in the county of Northampton.

2 Len. 146.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCLXXXVIII. THE BLACKSMITH'S CASE.

A blacksmith of South Mimmes, in the county of Middlesex, took an obligation of another blacksmith of the same town, upon condition that he should not exercise the trade or art of a blacksmith within the same town, nor within a certain precinct of the same. And upon that obligation, the obligee brought an action of debt in the Common Pleas; depending which suit, the obligor complained to the justices of peace of the county against the obligee, upon which the matter being found against him by examination, the justices committed the obligee to prison; and now, upon the whole matter, Puckering Serjeant prayed a habeas corpus for the said obligee to the Sheriff of Middlesex, and had it. And Fleetwood Recorder of London being at the Bar, the Court openly admonished him of that matter; for by the law, justices of peace have not conusans of such offences, nor can entermeddle with them; for their power is limited by the commission, and the statutes. And the recorder relyed much upon the opinion of Hull. in 2 H. 5. 5. But it was said by the Court, Although that this Court be a high Court to punish such offences appearing before them of record; yet it doth not follow, that the justices of peace may also do so: but as to the obligation it self, the Court was clear of opinion, that the same was void, and against the law.

[218] MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCLXXXIX. RUSSELL AND BROKER'S CASE.

In trespass, for cutting down of 4 oaks; the defendant pleaded, that the place where, &c. and that he is seised of a messuage in D. and that he, and all those whose estate he hath, &c. habere consueverant rationabile estoverium suum for fuel, ad libitum suum capiendum in boscis, subboscis & arboribus ibidem crescentibus, and that in quolibet tempore anni, unless in fawning time. The plaintiff by replication said, that the place where is in the forrest of D. &c. and that the defendant, and all those whose estate, &c. habere consueverunt rationabile estoverium suum de boscis, &c. per liberationem forestarii, aut ejus deputati, prout boscus pati potuit, & non ad exigentiam petentis, and upon that replication, the defendant demurred in law. And it

was the clear opinion of the Court, that judgment should be given against the plaintiff: for if he would have ousted the defendant of his prescription by the law of the forrest, he ought to have shewed the law of the forrest in such case: lex forestæ talis est; for the law of the forrest, is not the common law of the land; and we are not bounden to take notice of it, but it ought to be pleaded; or else the plaintiff ought to have traversed the prescription of the defendant; for here are two prescriptions, one pleaded by the defendant by way of bar; the other set forth by the plaintiff in his replication, without any traverse of that which is set forth in the bar, which cannot be good. But if the plaintiff had shewed in his replication, lex forestæ talis est, then the prescription of the defendant had been answered without any more; for none can prescribe against a statute.

Exception was taken to the bar, because the defendant hath justified the cutting down of oaks, without alledging, that there was not any underwoods: but that exception was not allowed, for he hath his choice, ad libitum suum.

Another exception was taken to the bar, because he hath not shewed, that at that time of the cutting, it was not fawning time; for at the fawning time his prescription doth not extend to it, and that was holden to be a material exception: but because that the plaintiff had replyed, and upon his replication, the defendant had demurred; the Court would not resort to the bar, but gave judgment upon the replication, and therefore nihil capiat per breve.

2 Len. 209. Poph. 158. 2 Cro. 637, 679.

[219] MICH. 30 ELIZ. IN THE KINGS BENCH.

CCXC. BROCAS'S CASE.

Brocas, lord of a mannor, covenanted with his copyholder, to assure to him and his heirs, the freehold and inheritance of his copyhold; and the said copyholder in consideration of the same performed, covenanted to pay such a sum: it was the opinion of the whole Court, that the said copyholder is not tyed to pay the said sum, before the assurance made, and the covenant performed: but if the words had been, In consideration of the said covenant to be performed, then he is bounden to pay the mony presently; and to have his remedy over by covenant.

1 Roll. 415.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCXCI. IRELAND AND HIGGINS'S CASE.

In an action upon the case, the plaintiff declared, that he was possessed of a greyhound ut de bonis suis propriis; and that such a day he lost it, and that it came to the hands of the defendant by trover; and that the defendant afterwards in consideration thereof, promised the plaintiff to deliver the said greyhound to the plaintiff: and shewed his request.

Ley, The action doth not lie; for of those things which are feræ naturæ, the plaintiff hath not any property, but ratione fundi, as of deer, &c. And in trespass for them, he cannot say (suos,) but only quare clausum fregit, & lepores cepit, without saying (suos.) And to that purpose were cited, 3 H. 6. 56. 18 E. 4. 14. 10 H. 7. 19. 22 H. 6. 12. 14 Eliz. Dyer, 106. Sir John Spencer's case. And it was holden, that the action did not lie; and if not for a hawk, much less for a hound.

Owen Rep. 93.

MICH. 30 ELIZ. IN THE STAR-CHAMBER.

CCXCII. OGNELL AND TRUSSELL'S CASE.

A bill was exhibited in the Star-Chamber, by Ognell of London, against one Trussell of Warwickshire; setting forth such matter, that whereas the said Trussell

had for good consideration sold and assured unto the said Ognell a mannor: now, to gratifie a great person who earnestly desired the said mannor, he for effecting thereof, practised by fraudulent means to avoid the said assurance; and practised by other persons to be indicted of a **[220]** robbery supposed to be committed before the said assurance; and compounded with the lord of the fee, that if he be attainted, so that by such attainder, the said mannor should escheat to the said lord, that he upon request should reassure to the said Trussell the said mannor in fee after pardon obtained, which was promised to him by the said great parsonage: upon which indictment, Trussell was arraigned, and convicted upon evidence; which he himself procured to be falsly given against him; and all that was, to extort the land which was lawfully sold before. And upon the bill, Trussell demurred in law, because he is a person attainted of felony, and so dead in law, and therefore shall not be put to answer.

Hatton, Lord Chancellor, It is not reason that he be put to answer, for nemo tenetur seipsum prodere: and thereupon the bill was referred to Anderson and Periam, Justices, to consider, if the defendant should be put to answer, or not? Who certified unto the Court, that although the defendant be attainted, ut supra, and so, quodam modo, dead in law to all intents; yet in criminal causes, he shall answer, wherefore it was ordered, that he answer accordingly.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCXCIII. CARDINAL AND ARNOLD'S CASE.

Cardinal brought an action upon the case against Arnold, and declared, that the Dean and Chapter Ecclesiæ Cathedralis Cantuar. per nomen Decani & Capituli Ecclesiæ Cathedral. & Metropolitan. Christian. Cantuar. leased unto Seckford for years the mannor of Hadley, by force of which he was possessed; and so possessed, granted to the plaintiff the office of stewardship of the said mannor, and the defendant disturbed him. The defendant pleaded a lease, absq; hoc, that the said Seckford granted. And it was found for the plaintiff.

And it was moved in arrest of judgment, that that lease being made in the manner aforesaid, was void: for, the declaration is, that the Dean and Chapter Ecclesiæ Cathedralis Cantuar. where the lease is made by the name, ut supra. Here are two several names; therefore two several corporations, therefore Decanus & Capituli Ecclesiæ Cathedralis Cantuariensis did not lease; but Decanus & Capituli Ecclesiæ Cathedralis & Metrapolitan. Christi, did lease.

[221] PASCH. 30 ELIZ. IN THE KINGS BENCH.

CCXCIV. ANDERSON AND HAYWARD'S CASE.

A copyholder of inheritance of a mannor in the hands of the King, is ousted. It was holden in such case, that he hath not gained any estate, so as he may make a lease for years, upon which his lessee may maintain an ejectione firmæ; but he hath but a possession against all strangers. And also in that case, it was holden, that if a copyholder dieth, his heir within age, he is not bound to come at any Court during his non-age, to pray admittance; or to tender his fine. Also, that if the death of his ancestor be not presented, nor proclamation made, he is not at any mischief, although he be of full age.

PASCH. 30 ELIZ. IN THE EXCHEQUER CHAMBER.

CCXCV. BRIGHTMAN'S CASE.

Upon a writ of error brought upon a judgment given in the King Bench; the matter was, A. leased for 20 years to B. two acres of land, rendring rent, with

condition of re-entry, who leased one of the said acres to C. for 10 years; and afterwards, granted the reversion of the said term in the said acre to A. It was holden by the justices, that the same was no present suspension of the said condition, because there was not any possession.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CCXCVI. FITZHUGH'S CASE.

In dower against Fitzhugh who pleaded in bar a fine with proclamations, and 5 years passed after the death of the husband, of whose seisin she demanded dower. To which the demandant said, that within the 5 years after the death of her husband, she brought a writ of dower against the now tenant, and delivered the same to the sheriff, &c. but did not shew that the writ was returned; upon which, the tenant did demur in law.

It was holden by Periam, Justice, that the fine is not avoided by such manner of claim; for the words of the statute are, (so that they pursue their claim or title by way of action, or lawful entry within the five years,) but here the demandant hath not pursued, &c. therefore she shall not be retained by the said statute.

[222] MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCXCVII. MOUNSON AND WEST'S CASE.

In the case of Mounson and West; which see, in Leon. 1 Part, 88. where the case was in trespass, the parties were at issue; and at the return of the pannel, the defendant challenged the array, because it was made by B. A. who took to wife the cosen German of the plaintiff, et ex ea had issue living, the mother being dead: upon which it was demurred in law. Now this term came the plaintiff, and offered to relinquish his demurrer, and confess the cosenage, and prayed a writ to the coroners. It was the opinion of the Court, that he might so well do by the law, because the demurrer is not made up: which matter the prothonotaries excused, because the demurrer was not subscribed with a serjeants hand.

To which it was said by the Court, that a demurrer upon a challenge, is not like to a demurrer upon a plea; for in case of a demurrer upon a challenge, as soon as the demurrer is agreed upon at the Bar, it is good enough without other circumstance, and the prothonotaries of right ought to enter such demurrer.

1 Len. 88.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCXCVIII. FETHERSTONE AND HUTCHINS'S CASE.

In an action upon the case upon assumpsit, the plaintiff declared, that whereas one Hill had recovered in an action of debt against J. S. 10l. upon which a capias was awarded against the said J. S. by force of which the plaintiff arrested him: and so being under his arrest, the defendant in consideration that the plaintiff would suffer the said J. S. to go at large, circa negotia sua, and to go to his own house: and also in consideration of 2d. paid to the defendant, he promised to pay to the plaintiff the said 10l.

It was holden by the Court, that the same was a void promise within the statute of 23 H. 6. for the consideration to let the prisoner go at large, is not lawful; and if part of the consideration is naught, so is the whole: and adjudged accordingly.

[223] HILL. 30 ELIZ. IN THE COMMON PLEAS.

CCXCIX. GORE AND WINGFIELD'S CASE.

In debt upon an obligation; the obligation was written in this form: Know all by these presents, that I. H. Wingfield, am bound to William Gore, &c. in the sum of, &c. For the payment of which sum, I give full power and authority to the said Gore, to levy the said sum upon the profits of the bailiwick of Swinsted from year to year, until the same be paid. To which the defendant pleaded, that the plaintiff had levied parcel of the said sum, &c. and did not shew how; and therefore the pleading was void and vitious: and it was clearly agreed by the whole Court in this case, that the plaintiff at his liberty might bring his action upon the said obligation; or levy the said mony according to the clause aforesaid.

4 Len. 208.

HILL. 30 ELIZ. IN THE COMMON PLEAS.

CCC. SECKFORD'S CASE.

Henry Seckford was impleaded in the Court of Common Pleas at the suit of a widow in an action of debt, and now came an injunction or writ of priviledge out of the Exchequer, reciting the said Seckford to be one of the grooms of the Queens Privy-Chamber, and Keeper of the Privy-Purse, and so accomptable to the Queen; and that they do not hold plea of the said action; but that the plaintiff sequitur pœnas Scaccar. But the writ was utterly disallowed by the Court. See 16 Eliz. Dyer, 328. Hunt's Case.

TRIN. 30 ELIZ. IN THE EXCHEQUER.

CCCI. THE QUEEN AND LITTLETON'S CASE.

Instruction by the Queen against Littleton, and upon the general issue, as to the house, the defendant pleaded, not guilty; and as to the land and park made title, that Anne Talbot leased the same to him for years, &c. and the jury found this special matter, scil. that Anne Talbot was seised, and leased the said house, land and park, to the defendant for years, rendring rent, with clause of re-entry; and that after the said lease so made, the said Anne said to the lessee, although I have not excepted it in my lease, yet I mean to have the chamber over the kitchin to lay my stuff in, until my son come of years. To whom the lessee answered, that he was well contented with that: upon which the said Anne put in her houshold-stuff there, and after-**[224]**-wards she took to husband Sir Robert Stapleton Knight; after which, all the houshold-stuff is removed out of the said chamber by the said Sir Robert Stapleton and his wife; who afterwards by their warrant authorized J. S. to demand the rent due at Michaelmas, who at the last day, limitted for the payment of the rent, went to the premises, and demanded the rent; to whom the lessee said, that if the said J. S. would shew to the lessee his name, and make an acquittance, and also shew his warrant, he would pay him the rent, otherwise not; but the said J. S. utterly refused, &c. wherefore the lessee would not pay any rent: and as to the other rent (for several rents were reserved), the lessee said to J. S. upon demand of the same, I here say, that there is already a forfeiture committed upon the last demand, and therefore it is to no purpose to pay the rent; and further said, he had not any monies. It was moved by Popham Attorny General, that these demands made in manner, &c. were good; and that he who made the demand, is not bound to shew his warrant; for he may be sufficiently authorized to make such demand without any warrant in writing, no more than to tell his name, or make an acquittance; but the lessee ought to pay his rent at his peril, sub conditionis periculo, as in case of an obligation: and as to the speech of Anne

Talbot, concerning the chamber over the kitchin, and the answer of Littleton to that; the same doth not amount unto a surrender, nor was it their intent, but only a permission, or sufferance for the said Anne Talbot to lay her stuff there for a time as appeareth; for after the stuff removed, the lessee entred into the chamber, and occupied the same as he did the rest. And afterwards exception was taken to this verdict, because that here are two issues, and but one verdict, scil. as to the land and park, of not guilty; and as to the house, he makes a title by lease; and the jury have found the lease, the condition and the re-entry for the breach of the same: if the special matter aforesaid doth amount to the same, and if, &c. then they say, that the defendant is guilty of the whole: it was moved, that here is but one verdict for the lease; and the other issue is not enquired of, and then all is discontinued. See 5 H. 5. 3. in dower, the tenant pleaded as to one part, non tenure, and as to the residue, ne unq; seisie: and afterwards the seisin was found by the verdict, but nothing found of the non tenure, and therefore a venire facias de novo was awarded, &c. But it was answered by the Court, that this verdict had determined both the issues; for, the changeableness of the entry, as the Court conceived upon the special matter aforesaid, did determine both the issues.

Shep. Touch. 387.

[225] PASCH. 31 ELIZ. IN THE KINGS BENCH.

CCCII. SCOT AND SCOT'S CASE.

The case of Scot and Scot in a replevin, the which see Mich. 29 Eliz. Leon. 2 Part, 129. was argued again by Egerton, Sollicitor General; and he said, in some case, this word (proviso) is not a condition, but only an explanation of the sentence precedent: if it be in the negative, and makes restraint of the common law, then it is a condition: as a lease for years, proviso, that he shall not alien, or do waste. And if the proviso be in the affirmative, and by that the party be bound to do a thing, which of common right he is not bound to do, it is a condition. A lease for years, or for life, proviso, that he shall pay such a sum. Lessee for years, proviso, that the lessee shall pay his rent generally, without limitation of any day; it is on condition. And he held by way of argument in the principal case, that cestuy que use should take advantage of conditions, which are knit to estates, as for payment of rent, but not concerning collateral things; and such exposition of the statute of 32 H. 8. hath been made there before. And admit it be a condition, yet the lessor cannot re-enter, for the rent was not well demanded; for 20l. rent is reserved yearly, payable at four feasts, and here the lessor hath demanded 10l. scil. the rent of two several quarters, whereas only rent was demandable in point of the condition. Cook conceived, that it was a condition; but every proviso did not make a condition; the lessor covenants, that the lessee shall take sufficient wood, proviso, that he shall not take great timber; that proviso doth not make the covenant conditional, but only explains the same: a lease without impeachment of waste, proviso, that the lessee shall not do voluntary waste, is not any proviso, but a restraint of the liberty given before, and doth but qualifie the liberty: as Littleton's case, grant of a rent-charge, proviso, that it shall not extend to charge the person of the grantor, that proviso doth not make the grant conditional, so that, if the grantee bring a writ of annuity against the grantor, the grant be determined, &c. A lease for years, proviso, that if the lessee shall be disposed to alien, that the lessor shall have the first offer, &c. The same is not a condition, which see by Fitzherbert and Baldwin, 28 H. 8. Dyer 13. A lease for years upon condition, that if the lessee will hold over his term, that then he shall pay so much rent, the same is no condition, for it is at the pleasure of the lessee, &c. and it is not compulsory. A feoffment in fee with warranty, proviso, that the feoffee shall not vouch; the same doth not make the warranty conditional, but only abridgeth the warranty. Sir Richard Pecksall leased certain lands for years, and covenanted, that [226] the lessee should take at his pleasure the trees there growing; proviso, that he should not take trees of such a bigness: it was holden in that case to be no condition. So in the covenant for further assurance, proviso, that the bargainor shall not be com-

pelled to travail for the making of the assurance above ten miles, &c. But admit that it be a condition, yet the lessor upon the matter cannot take advantage of it; for he hath not demeaned himself in the demand of the rent as he ought. For he hath demanded rents due to him at several quarters; and that he cannot demand in point of forfeiture, for then the lessor may leave his rent in the hands of the lessee until it amount to a great sum of 200 or 300l. and then upon a sudden demand of the rent, when the lessee is not so well furnished, nor can be at so short warning, to pay the same. And it may be likened to the case in 27 H. 6. A. granteth to B. ten loads of hay percipiend. annuatim, out of his meadows in C. for 21 years: there the grantee cannot stay and take all his hay, and the arrears of it in the later year; but he ought to take his hay every year according to his grant, causa qua supra. And although the lessor here hath demanded more rent than he ought, yet the law shall construe the demand good for so much of the rent, which by the law is demandable in point of forfeiture; as where a man is bound to perform the award of such an one; who awards, that he and another shall be bound to another party for the payment of, &c. Although that the same award be void as to the stranger, yet it is good as to the party himself, and he ought to be bound by it. Dr. Mollins case, A lease for years rendring rent to be paid at two days in the year; proviso, that if the said lessee do not pay the said yearly rent, that then a re-entry; that rent is not demandable upon pain of forfeiture, but the last day of every year only, and not every year according to the reservation of it. The words of our condition are; Provided, that if the lessee do grant his term to his eldest son, that he shall pay but so much rent, the same without doubt is not any condition; yet [he shall pay so much rent] doth amount to so much. Note, In the argument of this, this case was put, A. is bound to make such an assurance to B. of such land as C. shall devise; C. deviseth, that A. and his wife shall make such assurance, A. is bounden upon the peril of his obligation to do it. See as to this point of the proviso, 5 Eliz. Dyer 222. The Archbishop of Yorks case: it was adjourned.

1 Cro. 73. 2 Len. 128. 4 Len. 70.

CCCIII. Mich. 31 Eliz. In C. B.

This case was put to the Court, A copyholder did alledge the custom of the mannor to be, that the lord of the manor might grant copies in the remainder, only with the assent of the tenants, and not otherwise, and that copies in remainder otherwise granted should be void: it was demanded of the **[227]** Court, if this were a good custom or not; the justices did forbear to deliver any opinion in the case: Walmesley Serjeant, that it was a void custom; for that the law doth not take notice of copyholders estate, they being but tenants at will, in the judgment of the common law; and therefore it was not reasonable, that their wills and pleasures should limit the lord of the mannor in granting of estates by copy, and therefore he said, such a custom was void; and he compared it to the case in 2 H. 4. 27. that a custom, that a commoner shall not use his common before that the lord hath put in his cattel, was holden to be a void custom; on the other side, it was said, that this custom might have a lawful beginning, and that it might be grounded upon the reason of the common law, that a remainder should not be without the assent of the particular tenant, and therefore that the custom might be good; and it was said, that wife should not have her dower, unless she claimed it within a year and a day; that the same was adjudged to be a good custom: the Court delivered no opinion in the case; but the case was adjourned to another time.

CCCIV. Mich. 31 Eliz. In C. B.

The case was, A man devised socage lands to his brothers son in tail, to have the same at his age of 25 years, and died, having issue a daughter: the nephew after 21 years entred, and levied a fine, and afterwards accomplished his age of twenty-five years. It was the opinion of the whole Court, that the issue of the devisee was barred by this fine. For the heir in tail, and the heir in fee, are all one by the statute of 4 H. 7. And it was holden, that this was not a fine which doth enure by way of

estoppel; but that it passeth the very right: it was said to be the same law, if one who hath but a condition levyeth a fine, and afterward entreth for the condition broken, &c.

HILL. 31 ELIZ. IN THE KINGS BENCH.

CCCV. PALMER AND SMALBROOK'S CASE.

In an action upon the case, the plaintiff declared, that the defendant had recovered a certain debt against one A. and thereupon took forth a capias against the said A. to arrest his body, and delivered the said capias to the plaintiff, being then sheriff, and prayed a warrant for the serving of the capias, and that he would name to him one B. for a special bayliff, and promised the plaintiff, that if B. arrested A. by force of the said capias, and suffered him to escape, that he would not sue him for the said escape; and further declared, that he made a warrant according to the said capias, and therein named and appointed the **[228]** said B. his special bayliff, who arrested A. accordingly, and afterwards suffered him to escape; and that the defendant notwithstanding his promise aforesaid, sued the plaintiff for the said escape, and it was found for the plaintiff: and it was moved in stay of judgment, that that promise was against the law, to prevent the punishment inflicted by the statute of 23 H. 8. upon the sheriff, and that it is meerly within the said statute, and so the promise void. Cook, This is not any bond or promise taken of the prisoner, nor of any for him; and therefore it is not within the statute, and it was Davies case: Wray, A promise is within the statute as well as a bond. But the statute doth not extend, but where the bond or promise is made by the prisoner, or by some for him; and afterwards, judgment was given for the plaintiff.

1 Len. 132. Owen 97. 1 Cro. 178.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCVI. WOOD AND PAYN'S CASE.

In an ejectione firmæ, for entry into a messuage sive tenementum, and 4 acres of lands to the same belonging: upon not-guilty pleaded, it was found for the plaintiff. It was moved by Cowper, Serjeant, that the declaration is uncertain, messuagium sive tenementum, quod fuit concessum. Cook, We will release our damages. Kemp, Then your costs are gone also. Cowper, You cannot have judgment of the 4 acres; for the declaration is 4 acres to the said messuage or tenement belonging, and for the incertainty to which thing belonging. But to that it was said, that as to the 4 acres, it is certain enough; for the words, To the same belonging, are meerly void. And afterwards the plaintiff released damages, and had judgment.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCVII. BENNINGTON AND BENNINGTON'S CASE.

Bennington brought an action of trespass against Bennington, for breaking of his close, &c. The defendant pleaded, that long time before the trespass supposed, that it was the freehold of one Joan Bennington, and that he as her servant, and by her commandment entred; upon which they were at issue. And it was found, that for two parts of the land where, &c. in three parts to be divided, it was the freehold of the plaintiff; and for the other part, that it was the freehold of the defendant: and by the clear opinion of the whole Court, the plaintiff could not have judgment, for now it appeareth, that the plaintiff and defendant are tenants in common, betwixt whom

an action of trespass doth not lie; and although this tenancy in common [229] be not pleaded, but found by verdict; yet it was the opinion of the Court, that it is all one.

HILL. 31 ELIZ. IN THE KINGS BENCH.

CCCVIII. BRERETON AND AUSER'S CASE.

John Brereton of the Inner-Temple, brought a writ of error against Auser, to reverse an outlawry; and the case was, that the said Auser had caused the said Brereton to be endicted, upon the Statute of Magna Charta, and divers other statutes; for that, whereas the said Auser had sued the said Brereton in a bill of debt in the Court of Request against the said Brereton; and by the said suit procured the said Brereton to be imprisoned; upon which endictment, Brereton was outlawed; and error was assigned in the outlawry, because whereas the endictment was taken in Middlesex, the exigent upon it was in London; whereas it ought to issue out of Middlesex; but the proclamations issued in the county whereof he was named Nuper; and that was peremptory, for if he make default upon that process, he shall encur the danger of a præmunire: and for that cause, the outlawry was reversed. Also, the party was discharged of the endictment; for this suit in the Court of Requests, as it appeareth upon the endictment, was before judgment in the bill of debt.

HILL. 31 ELIZ. IN THE KINGS BENCH.

CCCIX. CONSTABLE AND FARRER'S CASE.

In an action upon the case upon an assumpsit, the plaintiff declared, that whereas the defendant had brought an action against him, the issue in which ought to be tried at the next assises at N. the defendant in consideration that the now plaintiff should confess the action aforesaid at the assises holden the 4th of August, promised that he would stand to the arbitrament of J. S. for the said matter: and upon non assumpsit, the jury found that the defendant made such a promise the 5th of August, but not the 4th of August.

Cook, I conceive, that upon this verdict the plaintiff shall have judgment; for in truth the assises began the 4th of August; and the consideration was, that the now plaintiff should confess the action at the same assises; which although they continue divers days, yet in law, all is but one day; and all the assises shall be said to be holden the 4th of August; so as of necessity, we must lay the promise accordingly. And it is a clear case, that the plaintiff in an action upon the case, shall declare upon a promise the first day of May; and if it be found, that it was made at another day, yet the plaintiff shall recover.

[230] MICH. 31 ELIZ. IN THE KINGS BENCH.

CCCX. HAMPER'S CASE.

Hamper was endicted upon the Statute of 5 Eliz. of Perjury; and in the body of the endictment, the record was, that he falso & deceptive deposuit: whereas the statute speaks (wilfully;) and although in the perclose of the endictment, the conclusion is, et sic commisit voluntarium perjurium: yet the opinion of the Court was, that the same did not help the matter; and for that cause the party was discharged: for contra formam statuti, will not help the matter; and yet it was moved and urged, that contra formam statuti did supply such defect. And in this case, it was holden by the Court, that if a witness deposeth falsly, but the jury do not give credit to his oath, but give their verdict against his oath, although the party grieved cannot sue him for the perjury; yet at the suit of the King, he shall be punished.

2 Len. 211. 1 Cro. 147.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCXI. COLLET AND ROBSTON'S CASE.

Arthur Collet and Thomas Andrews recovered against Robston in a writ of accompt, Hill. 29 Eliz. And now Robston brought a writ of error, and assigned for error, that whereas the said writ of accompt was brought against the defendant as receivor of monies to render accompt quando ad hoc requisitus fuerit, the said writ ought to have been more special: but the writ in its generalty was holden good enough without any special matter. And so it was adjudged in the case of one Gomersell; scil. quod reddat ei rationabilem computum suum de tempore quo fuit receptor denariorum ipsius A. Another error was assigned; for that the jury had assessed damages, which ought not to be done in an action of accompt. Which see, 2 Ric. 2. Fitz. Accompt, 45. and 2 H. 7. 13. But see the Book of Entries, 22. In a writ of accompt against one as receivor, for to render accompt, damages were given by the jury for the plaintiff: and in the case of an accompt against one as bailiff, damages shall be given: for if my bailiff by the imployment of my monies whereof he was receivor, might have procured profit and gain unto me, but he neglects the same, he shall be chargeable to me to answer the same. And here in our case, damages shall be given ratione implacitationis. And afterwards, notwithstanding the exceptions, the judgment was affirmed.

Ante 149. 192. 2 Leo. 118.

[231] TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCCXII. YATES'S CASE.

Yates and another brought a writ of error upon a judgment given in a writ of partition; and assigned for error, that the partition was not sufficient for it is there set forth, that the plaintiffs insimul & pro indiviso tenent cum defendente, &c. and doth not say what estate. See F. N. B. 61 & 62. insimul et pro indiviso tenent de hæreditate, which was of A. matris of the plaintiff and defendant. And yet see F. N. B. 62. a writ of partition betwixt strangers, without naming de hæreditate in the writ. And see also, that partitions of lands in London, without shewing of what estate. See Register, 67. 6 Eliz. in partitione facienda by Courtney against Polyweel, no estate shewed in the writ. 26 Eliz. between the Lord Cheney and Bell. So between Finch and Tirrell; and so between Fry and Drake, 14 Eliz. And 4 & 5 Phil. & Mary, it was holden, that it is not necessary in such writ to shew the estate: but tenants in common ought to shew the same in their declaration.

2 Leo. 118. 1 Cro. 759, 760.

CCCXIII. HILL. 31 ELIZ. IN THE KINGS BENCH.

An action upon the case was brought for these words, scil. Thou hast forged my hand: it was holden by Gawdy and Wray, Justices, that such words are not actionable, because too general, without shewing to what writing: and by Wray, These words, scil. Thou are a forger, are not actionable, because it is not to what thing he was a forger.

Godfery, Between Warner and Cropwell; scil. She went about to kill me; an action lieth for them: for if they were true, she should be bounden to the good behaviour.

And by Gawdy, for these words, scil. Thou hast forged a writing; they are not actionable, because they are incertain words: which Wray, concessit: but if the declaration had been more certain, as (innuendo) such a deed, then it had been good enough.

Fuller, A case was betwixt Brook and Doughty; scil. He hath counterfeited my

Lord of Leicester's hand unto a letter against the Bishop of London; for the which he was committed to the Marshalsey for it. And it was holden, not actionable. And afterwards, in the principal case, judgment was, nihil capiat per billam.

[232] MICH. 31 ELIZ. IN THE KINGS BENCH.

CCCXIV. DELABROCHE AND BARNEY'S CASE.

Delabroche was sued in the Admiral Court, upon an obligation supposed to be made and delivered in France; and now he prayed a prohibition. It was holden by the whole Court, that such a bond might be sued here: but being begun in the Court of Admiralty, we cannot prohibit them; for that perhaps, the witnesses of the plaintiff are beyond sea; which may be examined there, but not here.

MICH. 31 ELIZ. IN THE KINGS BENCH.

CCCXV. MOULTON'S CASE.

This case was moved to the Court by Cook, that one Robert Moulton tenant in tail, having issue two sons, Robert and John, died seised; and that Robert his son and heir, levied a fine thereof; and afterwards levied another fine, and died without issue. And John brought two several writs of error, to reverse both fines: and the tenant to the writ of error brought upon the first fine, pleaded the second fine in bar of it: and in bar of a writ of error brought upon the second fine, he pleaded the first fine. The Court advised him to reply, that the fine pleaded in bar, was erronious. See 7 H. 4. 107. Where a man is to annul an outlawry, his person shall not be disabled by any other outlawry.

MICH. 31 ELIZ. IN THE KINGS BENCH.

CCCXVI. BABINGTON AND BABINGTON'S CASE.

In debt brought, the defendant pleaded an attachment made in London after imparlance. It was adjudged, that it was not any plea And Wray said, that the same should be observed for a rule in other cases. After that plea was disallowed; the defendant pleaded variance betwixt the obligation and the declaration; for the obligation was Randal Bab. And the declaration was ad respondend. Randulpho B. alias Randal B.

Cook said, that Randulphus is Latine for Randal. Owen, Serjeant, shewed divers presidents, where Randulphus was taken for Randal. But the Court did not agree upon it.

Wray advised the plaintiff for his more speed to bring a new writ. But Gawdy said, that the writ brought was good enough.

[233] MICH. 31 ELIZ. IN THE KINGS BENCH.

CCCXVII. PIKE AND HASSEN'S CASE.

An action upon the statute of 32 H. 8. touching buying of titles; and the bargain was laid in Norfolk; but the land, &c. was in Suffolk; and the issue was tryed in Norfolk, and the value of the land also: and as to the 5 acres they found the defendant guilty; and found also the value of them: and for the residue, a special verdict was given; and for the 5 acres, the plaintiff had judgment presently: and by the special verdict it was found, that the defendant had occupied the residue of the

land for two years before, &c. as tenant at sufferance; and afterwards sold the inheritance.

Wray, Chief Justice, Tenant at sufferance is in truth a tort feasor, by which his taking of the profits is not such as is intended by the statute: but yet he afterwards looking into the words of the verdict, which were, that the defendant tenuit the lands for two years ex permissione of another; thereupon it ought to be intended, that he was tenant at will.

MICH. 31 ELIZ. IN THE KINGS BENCH.

CCCXVIII. SPARRY AND WARFIELD'S CASE.

In false imprisonment against the defendant and others; they pleaded, the charter of Bridewell; and that the plaintiff was mali nominis & famæ, and that certain goods were stollen from J. S. and upon search, the plaintiff was found suspitiously, &c. and that thereupon they put him into Bridewell. It was the opinion of the Justices, that the plea was not good.

PASCH. 32 ELIZ. ROT. 318. IN THE KINGS BENCH.

CCCXIX. BRAGG'S CASE.

In an action of trespass by Strait against Bragg, quare clausum fregit, containing one acre in C. in the county of H. and for the taking of a horse, the defendant pleaded, that long time before the trespass, the Dean and Chapter of Pauls were seised of the mannor of C. in the said county, in fee in the right of their church, whereof the place where is parcel, &c. and so seised, King E. 4th by his letters patents dated anno 1 of his reign, granted to them all the fines pro licentia concordandi of all their homagers and tenants resiants, or not resiants, within their fee; and shewed, that for all that time they have used to have such fines of their tenants: and shewed further, that, 29 Eliz. a **[234]** fine was levied in the Common Pleas between the plaintiff and one A. of 11 acres of land, whereof the place where the trespass was done was parcel, and the post-fine assessed to 15s. And afterwards Scambler the forreign opposer allowed to them the said 15s. because the said land was within their fee; and afterwards in the behalf of the said dean and chapter, he demanded of the plaintiff the said 15s. who refused to pay it, for which he, by the commandment, and in the right of the dean and chapter, entred and took the said horse in the name of a distress as bailiff to the said dean and chapter for the said 15s. and afterwards sold it, &c. upon which the plaintiff did demur in law; and it was moved, that here it is not averred, that the land whereof the fine was levied was within their fee; but they say, that Scambler allowed it because it was within their fee. And that is not a sufficient averment quod Curia concessit: and also the opinion of the Court was, that the dean and chapter cannot distrain for this matter, but they ought to sue for the same in the Exchequer, as it appeareth, 9 H. 6. 27. in the Duchess of Summersets case.

Gawdy Justice, The grant doth not extend to the post-fine: for the fine pro licentia concordandi, is the Kings silver, and not the post-fine.

Wray Justice, All passeth by it; for it is about one and the same matter; and they in opinion, to have given judgment for the plaintiff. Quære of it.

Ante 56. 2 Len. 179.

MICH. 32 ELIZ. IN THE EXCHEQUER.

CCCXX. SOUTH AND MARSH'S CASE.

Note: it was holden by the Court, that where Marsh was endebted unto South, without any obligation for it, but only by a note in writing signed with the hand of

Marsh; scil. By me, W. Marsh; but not sealed, that such a debt might be assigned to the Queen; although that before the assignment against a creditor he might have waged his law; for, in as much as by these notes and bills the certainty of the debt appeareth, and being true debts, they may well be assigned. See 21 H. 7. 9. An obligation may be assigned to the Queen without deed enrolled; and where the obligee is not endebted to the Queen: but it cannot be assigned to a subject, if not for a debt due by the assignor to the assignee; for otherwise it is maintenance. And in this case it was holden, that where the King sues for a debt assigned to him, the obligor cannot plead nihil debet; for now by the assignment it is become matter of record.

Noy 52.

[235] MICH. 32 ELIZ. IN THE KINGS BENCH.

CCCXXI. TRAPP'S CASE.

Robert Trapps, 1 Eliz. seised of 15 messuages in Clarken-well, in the occupation of 15 several persons; viz. A. B. C. &c. and named them certain, demised them to one Cox; and afterwards, conveyed the inheritance of them to one Brian Trapps, in fee; who afterwards demised to J. S. all those 15 messuages in Clarken-well, which Robert Trapps did demise inter alia to Cox by indenture dated 1 Eliz. now in the occupation of A. B. C. &c. And one of the occupiers names was left out in the recital: and it was holden by the whole Court, that notwithstanding the said omission, the said messuage did pass; for there was sufficient certainty before; and the falsity came after the verity.

MICH. 32 ELIZ. IN THE KINGS BENCH.

CCCXXII. BREWIN AND MANSFIELD'S CASE.

In an action upon the case, the plaintiff declared, that A. was endebted to him in 10l. and made the defendant his executor, and died; and that the defendant in consideration, that the plaintiff would forbear the defendant for a certain time, promised to pay it at two several days, and shewed which in certain. And it was found for the plaintiff. It was moved in arrest of judgment, that it is not set down in the declaration, by what portions the 10l. shall be paid.

Clench, Justice, conceived, that the defendant had liberty to pay it in what portions he pleased.

Gawdy, He ought to pay it by equal portions, as a rent reserved payable at two feasts, without saying by what portions it shall be paid. And he said, that if the plea for the cause aforesaid had been defective; yet now after verdict all is helped, for it is but form. And afterwards, the opinion of the whole Court was, that the matter shewed was not good to stay judgment. Wherefore the plaintiff had judgment to recover.

CCCXXIII. MICH. 32 ELIZ. IN THE COMMON PLEAS.

The case was; The plaintiff in a second deliverance is nonsuit, and a writ awarded to enquire of the damages, and returned; and the defendant had a writ de retorno habendo; upon which the sheriff returned quæ averia elongata: upon which, a withernam is awarded; by which all the other cattel of the plaintiffs were delivered to the defendant: and after a years time, the plaintiff came into Court, and paid the damages and **[236]** costs recovered against him. And the opinion of the Court was, that he should have a special writ to the sheriff, reciting the whole matter, to restore the plaintiff his goods taken in withernam, without any allowance for the keeping in the mean time; for it is intended, that their labour, or other profits by them, doth countervail such charge. And Brooker, Prothonotary, said, that he had a president to that purpose, of 12 Eliz.

1 Len. 220.

MICH. 32 ELIZ. IN THE KINGS BENCH.

CCCXXIV. DALTON AND SELBY'S CASE.

Upon an attachment removed out of London, a procedendo was prayed; and the case was, that one Brooks was endebted to Dalton, and Selby was endebted as much unto Brooks: Dalton attached the debt in the hands of Selby, and the debt of Brooks was not yet due. And it was said, that that debt not being yet due, was not attachable by the custom; for Dalton could not affirm a plaint of debt against Brooks, before that the debt was due; but if the principal debt had been due, Dalton might have attached the said debt that Selby owed to the said Brooks, although that debt was not due. And such was the opinion of the whole Court. See 21 E. 4. 67. 22 E. 4. 30, 31. 22 H. 6. 47.

MICH. 32 & 33 ELIZ. IN THE KINGS BENCH.

CCCXXV. MEAD AND BIGOTT'S CASE.

In an action upon the case by Mead against Bigott, the plaintiff declared, that W. Arnold had levied a plaint of debt in the court of the mannor of Stepney against Stokes; and whereas the said Arnold had procured a warrant directed to the plaintiff being bailiff of the mannor, and minister of the said court, to attach the said Stokes by his goods to answer to the said Arnold at such a court, &c. And whereas by vertue of the said warrant, the plaintiff had attached the said Stokes by two quarters of wheat, being the goods of the said Stokes, to answer the said Arnold in the said plaint: and whereas the plaintiff had delivered the said wheat to Jane, wife of the said Arnold, to keep until the next court: the defendant in consideration thereof, promised to save the plaintiff harmless concerning the said corn. And it was holden that here is not any consideration: for it is against law, for such an officer in such a case to deliver a thing attached, ut supra, to the plaintiff or to his wife. Also the consideration was a thing executed before the promise: also a man cannot be attached by corn. And afterwards judgment was given against the plaintiff.

[237] MICH. 32 & 33 ELIZ. IN THE EXCHEQUER.

CCCXXVI. BROUGHTON AND PRINCE'S CASE.

Broughton, an apprentice of the Inner-Temple, being farmor to the Queen, exhibited a bill in the Exchequer, quo minus, &c. against Prince, a practicer of the law in the marches of Wales, for maintaining one J. S. in a suit, against the Statute of Maintenance.

To which the defendant pleaded, that he was consiliarius & in lege eruditus, &c. and so justified. And now it was moved by Atkinson, on the part of the defendant, that by the statute of 18 Eliz. cap. 5. that no informer shall sue any person upon any penal statute, but by way of information, or original action, and not otherwise, and here the suit is by bill, which cannot be warranted by the statute. And he conceived, that this suit is brought upon the statute of 1 R. 2. cap. 4. upon which statute, no prosecution shall be in the name of the subject only, but it may be in the name of the King only. See the Book of Entries, 393. Where the suit is, tam pro Domino Rege, quam pro seipso: and there by the King only, and there by the party only. And as to the statute of 32 H. 8. cap. 9. suit upon the same ought to be, tam pro Domina Regina, quam pro seipso: which see in the Book of Entries, 395. Also by the statute of 31 Eliz. cap. 5. the suit brought, ought to begin within one year after the offence committed: and in our case, the offence upon which the suit is conceived, was committed 3 years before the information brought; and it cannot be added,

because that the plaintiff is the party grieved; for every statute made against maintenance is popular.

Broughton said, We have replied to the defendant, that he is a lay man, et non in lege eruditus; and prayed, that the same might be enquired of by the country: and the defendant Prince likewise, and so issue is joyned: and because you have such objections, they shall be saved to you to move in arrest of judgment.

Atkinson, I may offer them as well now to the jury, as well as in arrest of judgment. And afterwards it was moved, that the defendant might demur upon the replication, if he would; and if not, the issue should be tryed: and if then it pass against the defendant, that then he shew the matter in arrest of judgment; for no exception shall be allowed for staying of the enquest, if it be not an apparant fault, and not only a doubt.

At another day the matter was moved; and then it seemed to the Barons, that the plaintiff here being pars gravata, was not restrained to any year after the offence committed, but that restraint did extend only to common informers. The defendant pleaded, that he was admitted in Societatem interioris Templi, and there remained a student for so many years; and that he was **[238]** homo eruditus in lege, and a counsellor, and took his fee; &c. The plaintiff by replication, said of his own wrong without that, that the defendant is homo conciliarius & in lege eruditus, & hoc petit quod, &c. ut supra. And Atkinson took exception to the traverse and conclusion of it, et hoc petit quod inquiratur per patriam; for that cannot be tryed by the country, but by the Judges: for here is a question of the learning of the defendant, and that is to be tryed: and his sufficiency in this learning is to be discerned by those who are skilful in the laws of the land; for if a matter in law is to be tryed by the Judges, a multo fortiori, the learning of the law is to be tryed by them; for that is more difficult to be judged. As, where the Ordinary refuseth a clerk for insufficiency in learning, upon which they are at issue, the same shall not be tryed by the country, but by the bishop: which see Articuli Cleri, cap. 13. de idonietate præsentata ad beneficium ecclesiasticum pertinet examinatio ad Judicium Ecclesiasticum, 40 E. 3. 25. And see the statute of 18 Eliz. that pars gravata in the case of maintenance, is not tyed to a year. And this suit is conceived to be in such quality, being a private grievance to the party himself; the King not being party, but only the party grieved: but where the penalty is expressly given to the King, and him that shall sue, there all the proceedings ought to be in both their names.

And Manwood, Chief Baron, said, that this issue shall be tryed by the country. Which see in the Book of Entries, 396.

1 Cro. 728. Tryal per pays 175. Owen Rep. 128, 227.

Mich. 32 & 33 Eliz. In the Exchequer.

CCCXXVII. Owen Morgan's Case.

Owen Morgan exhibited an information upon the Statute of Usury, for an usurious mortgage made; and charged the defendant, that cepit ultra 10l. in Cl. for the forbearance for one year, and that was out of the issues, rents, and profits which he took in Middlesex, of lands in Glamorganshire in Wales mortgaged to the defendant.

Manwood, Chief Baron said, that one might take the rents of lands in Wales in the county of Middlesex, but a man cannot take the issues and profits of the lands, but where the lands are: and Leak's case was cited, where an information was brought for cutting down of wood, and converting it into coals: and Leak the informer laid the cutting to be in the county where the wood grew, but the conversion of it into coals in the county of Middlesex.

And Manwood said in the principal case, that the taking of the issues and profits ought to have been layed where the land was. And such was the opinion of the whole Court.

[239] MICH. 32 & 33 ELIZ. IN THE EXCHEQUER.

CCCXXVIII. CURSON'S CASE.

Curson acknowledged a statute to Starkey, alderman of London; and afterwards he acknowledged another statute to one Hampden, who assigned the same to Fitton, who assigned the same to the Queen: Starkey sued forth execution upon his statute; and thereupon the land is extended of Curson; and he hath a liberate of it. It was agreed by all the Barons, that if Starkey had execution upon the statute before the Queen, his execution should stand against the Queen, and the Queen should not put him out. And it was further agreed by them, that if A. recovers a debt in the Common Pleas, so as he hath title to sue forth execution by elegit, and the defendant sells his lands, and afterwards A. assigns his execution to the Queen, that the Queen should not have prerogative against the feoffee to have execution of the whole land.

And it was also holden by Manwood, Chief Baron, that if execution be had upon a puisne statute, and the same is afterwards avoided by more ancient statute; and afterwards, the ancient statute is satisfied, that now the puisne recognisee may re-enter without suing forth any new execution.

4 Len. 10. Ante 239.

MICH. 32 & 33 ELIZ. IN THE EXCHEQUER.

CCCXXIX. BUTLER AND LIGHTFOOT'S CASE.

In this case, it was holden by the Barons, that if tenant for life be of a copyhold, the remainder over in fee to another, he in the remainder may surrender his estate, if there be not any particular custom to the contrary; for, the estate of tenant for life and him in the remainder, are but one estate; and the admittance of the particular tenant, is the admittance also of him in the remainder.

4 Len. 9.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCXXX. KNIGHT AND NORTON'S CASE.

It was holden in this case, that duress of imprisonment is not intended but where the party is wrongfully imprisoned until he make the bond; and not where a man is lawfully imprisoned for another cause, and for his delivery he makes a bond; for that is not per duritiam imprisonamenti; and if in such case duresse be pleaded, the other may say of his own accord sine duritia imprisonamenti, without saying absq; hoc, that it was per duritiam imprisonamenti. And so it was also holden in the King's Bench. See 4 E. 4. 17. 12 E. 4. 7.

[240] TRIN. 32 ELIZ. IN THE EXCHEQUER.

CCCXXXI. HUNGATE AND HALL'S CASE.

The case was, Curson acknowledged a statute to Alderman Starkey, and afterwards acknowledged another to Hampdem, which was assigned to the Queen; afterwards, the lands of Curson were extended for Starkey, and a liberate thereof. It was holden by the Court, that the same was a good execution, and that the Queen should not avoid it: but if the land had been extended at the suit of the Queen, then the execution of the Queen should hold place, although it were a statute of a puisne date.

And by Clark, Baron, if a recognizance acknowledged by a subject be assigned to the Queen, it hath been a question, if all the lands of the conusor shall be extended, or but the moyety, as it shall be at the suit of the conusee himself? It was holden, that all the lands should be extended.

Ante 239. 4 Len. 10.

TRIN. 32 ELIZ. IN THE EXCHEQUER.

CCCXXXII. THE LORD GRAY'S CASE.

The Lord Gray, tenant of the King of lands holden in capite by licence of the King, made a feoffment of the lands in fee, and afterwards levied a fine for further assurance: and upon process, the party came into the Court, and shewed this matter: and the party was advised by the Court to aver, that the said fine was for further assurance: and then upon such averment, he should be discharged without any pardon sued forth for the fine, &c.

TRIN. 32 ELIZ. IN THE EXCHEQUER.

CCCXXXIII. SIR WALTER WALLER'S CASE.

In Sir Walter Waller's case, it was holden in the Court of Exchequer, that a debt of record, as upon a judgment, &c. could not be attached by the custom of London. And so it was holden in the case of Sir John Perrot, in the Common Pleas.

And it was said by Cook, that such a debt could not be assigned upon the Statute of Bankrupts.

1 Len. 29. 4 Len. 44.

[241] MICH. 32 ELIZ. IN THE EXCHEQUER.

CCCXXXIV. SIR BRIAN TUCKE'S CASE.

In this case, it was holden by all the barons clearly, that the executor of an executor should not be charged with a devastavit made by the executor of the first testator, no not in the case of the King, because it is a personal wrong only.

Office of executors, 232. Roll. 920. Savile 40.

MICH. 32 ELIZ. IN THE EXCHEQUER.

CCCXXXV. FINES AND THE LORD DACRE'S CASE.

The case was; Tenant in tail, the remainder of lands in chief, levyed a fine of them without licence of the King; and, if the tenants of the Lord Dacres should be charged for the fine, was argued: for the case was, that the Lord Dacres was tenant in tail, the remainder in tail to Philip Fines. And it was holden by all the barons, that the tenants lands should be discharged: but it was holden, that if the conusor had any other lands within England, the fine might be levyed thereupon; but then the question was, if the tenants should be put to plead the same in discharge, or that the same should be discharged without pleading; because it appeareth upon record, that he who alienes was but tenant in tail, in remainder: for there was an office found of that which was pleaded by another in another cause. The opinion of the Court was, where such matter appeareth of record; as by office, livery, &c. there the party needs not to plead such matter in discharge; for the pleading of it is to no other purpose, but to satisfie the Court by the record, that the matter is so as the party hath alledged; and therefore the barons gave order, that the process against the tenants of the Lord Dacres should be stayed.

Post. 261. 4 Len. 97.

TRIN. 32 ELIZ. IN THE EXCHEQUER.

CCCXXXVI. GEORGE AP-RICE'S CASE.

In the case of one George Ap-Rice, the matter was, that tenant in tail after possibility of issue extinct, assigned over his estate unto A. against whom he in the reversion brought a quid juris clamat; and judgment was given, that he should attorn; and upon his refusal, he was committed to prison, and divers fines set upon him, and estreated in the Exchequer; it was moved, that these fines were imposed upon the party against law. And the opinion of the Court was, that when judgment is given in a quid juris clamat for the plaintiff, distresse infinite shall be against **[242]** the defendant to bring him in to attorn; and when he comes in, if he refuse, he shall be imprisoned, until he attorn. It was also holden by the Court, that the fines were not lawfully assessed and imposed upon him; and it was said, that it had been adjudged in a Court of Wales, that the assignee of tenant in tail after possibility of issue, should attorn; upon which judgment, a writ of error was brought in the Kings Bench; and there, upon good advise, the said judgment was affirmed. For although it be true, that tenant in tail after possibility shall not be compelled to attorn; yet that is a priviledge which is annexed to his person, and not to the estate; and, by the assignment of the estate, the priviledge is destroyed.

Ante 121.

MICH. 32 ELIZ. IN THE KINGS BENCH.

CCCXXXVII. HARRIS AND WING'S CASE.

In the case between Harris and Wing, the first point was, that the lease made by Queen Mary was void. 1. Because a former lease of record was not recited in the letters patents of it: the reason wherefore such recital ought to be, is not, as hath been alledged by Cook, quia circa solium Regis subsistunt justitia & veritas; and then when there is a former lease in esse, the King makes a lease in possession, the same cannot stand together, so as there is not justitia & veritas; but the very reason thereof is so high, that he cannot take, &c. but by matter of record; and if that be mistaken, it makes all void: and therefore, in petitions of right, and monstrans de droit; if the King be not enformed of all the titles, all is void. And therefore in the case between Sir Moyle Finch and Throgmorton, which now depends in the Exchequer; which was this, the Queen made a lease for years rendring rent, with a proviso, that if the rent be behind, that the estate shall cease: the rent is behind, the King granted the same over to Sir Tho. H. It was first moved, if the same lease should cease without office. And it was holden by Popham, and many other grave and learned men, upon a conference, that the said lease should cease without office; for the contract which is upon record is determined and ceased, by which the estate which was created by the said contract shall also cease without office. But yet the lessee continued in possession notwithstanding that, and took the profits; but thereof after office found, he rendered recompence to the Queen: and it was holden there, upon the said conference, that the Queen in her grant to Sir T. H. of the said estate which was now ceased, ought to recite that lease; for the tenant is in possession, and could not be punished for his occupation before office. So in the case of the vicarage of Yatton, 17 Eliz. Dyer 339. The presentment being devolved to the Queen by lapse, the Ordinary collated A. and afterwards the **[243]** Queen presented B. who brought a quare impedit; depending which, A. proved another presentment of the Queen, without mention or recital of the first presentment, and the same was holden void; for, in that, the first presentment is not recited, nor the pleasure of the Queen to revoke it; and therefore it was in disceit of the Queen. So the case 18 Eliz. Dyer 352. An abbot leased for 60 years; the lessee made a lease for 80 years, the reversion came to the King; the 60 years expired, the second lessee surrendred to the King ea intentione, that the King would re-grant the same to him

for 20 years remaining. The King reciting the indenture and surrender, ex certa scientia granted for 20 years: it was holden by the Court, that the grant was void, because the King was misenformed, &c. It hath been objected, that here needs no recital; for that the lease to be recited is ended, eo instante that the new lease beginneth. Sed distinguenda sunt temporaz aliud est facere, aliud perficere; the first lease is ended, when the new is perfected, and the Great Seal put to it. The second reason wherefore the lease shall be void, is, because otherwise the grant of the Queen shall enure to two intents. 1. To make a lease. 2. To accept a surrender; and how can the Queen accept a surrender of an estate, of which she hath not notice? for she is not enformed of it by any record, without which she cannot take notice of any thing. See 7 E. 4. 30, 31. Baggotts assise, the King granted an office to an alien, the same shall not enure to make him a denizen, for then it shall enure to two intents, &c. The words of the grant of Queen Mary, are, omnia tenementa nostra; and, if by that a reversion shall pass, was the question: certainly, in verbis ambiguis intentio sumenda est; then here in our case, by this patent, is other land which should pass, and the reversion is nostra; but in property, not possession: wherefore here (nostra) shall be restrained to that which is in possession. Where there are general words in grant of the King, they ought to be served; but if they can be served, they shall be taken in a common and general sense; but the words shall not be stretched. But if they cannot be served, then they shall not be void, but the King shall be rather prejudiced; and always the grant of the King either may be served or taken to a common intent, 2 H. 3. 4. Quælibet concessio Domini Regis capi debet stricte contra Dominum Regem, quando potest intelligi duabus viis: as if two be joyntly endebted to the King, and the King pardons to one of them omnia debita, the same shall not extend to joynt debts, but to those debts of which he is only debtor, 40 E. 3. The King granted to a subject the fines and amercements hominum suorum; all which hold of him by homage, may be said homines suos; and also his villeins are, homines suos; but because the general words may be served, the said grant shall be taken to extend to his villeins only. So in our case the general words may be served with lands in possession, and shall not extend to **[244]** lands in reversion. At another day the case was argued by Popham Attorny General, and he conceived, that by the lease made 2 Mar. both the former leases, as well that which was made by Henry the eighth, as that which was made in reversion by the Bishop of Bath and Wells, are gone. Lessee form term of years to begin at a day to come, accepts a new lease in possession, which is to continue until the future interest shall commence, the future interest is gone; and in Barkings case, 2 Eliz. it was holden by Dyer and Brown, that where lessee for two years accepts a new lease to begin two years after, this new interest of a term determines the present interest. For as the lessor cannot contract with a stranger for the interest of a term, which is to have continuance during a former term; by the same reason, when the first termor will accept an interest of a term from his lessor to begin at any time during his former estate, this new interest determines the first. So, if one hath an interest of a term to begin at a day to come, and he before the beginning of that interest accepts a lease for life, his first interest is gone. The words of the patent are, all her interest, lands and tenements, in the parish of St. Cutbert in Wells, and parcel of the possession of the late priory of R. and if these general words will carry lands in reversion, where other lands in possession pass, &c. was the question. General words shall have a special understanding, if the special construction may agree with the proper signification and sense of the general words, as the case, 2 H. 3. 4. before cited; and yet in the case of a common person, all manner of debts were released thereby, for that it shall be taken strongest against the party: also he conceived, that the lands in reversion should pass as well as the lands in possession. And he said, all former leases of record needed not to be recited, &c. but such leases only which are made by the King; for subjects may have leases of record, as by fine, deed enrolled, &c. but such leases need not to be recited; for such leases may determine without matter of record, as surrender, re-entry, &c. and then to compel the King or the party to search for such leases which might be so determined by any act in pais, should be as absurd, as to compel him to search by what means, and for what matter in pais such leases are determined. And he conceived, that this lease needed not to be recited (which was

made by King Henry the 8th) for after the said lease made, the King granted the reversion to the Bishop of Bath and Wells, and his successors, and during the time that the said land was to the bishop; it might be, that the lease was determined by matter in suit in pais, by surrender, forfeiture, &c. and then, notwithstanding that the King obtained the reversion after, and will make a new lease; if he should be driven to recite the former lease, whereas perhaps it is determined by an act in pais, it should be very inconvenient. Also here, if any recital should be in the case, how might the party interested know such former leases, but by **[245]** search? and how long ought the party search? for his search ought to have an end, non excrescere in infinitum tempus. And in our case, the most equal time for search is the beginning of the last title of the King, and no further; that is, from the present time till the time of the title of the King begins; and in this case the title of the King doth begin from his repurchase from the bishop; and if the law be such, then here nothing is to be recited; for no lease is mean between the re-purchase and the new lease: for no lease made before the re-purchase, need to be recited. For admit, that King Henry the 3d had made a lease of a mannor for 500 years, and afterwards granted the reversion to an abbot, and afterwards the mannor by suppression came again to the King; and he will grant a new lease of the same, such lease shall be good without any recital of the lease made by King Henry the 3d for such lease might have been determined in the hands of the abbot by surrender, or other matter in fact. So King Edw. the 2d made a gift in tail, and afterwards granted the reversion to another, the grantee disseised the tenant in tail: one who was heir to the grantee, was attainted of treason, the grantee died, by which the land came again to the King, who made a new patent of the same, without recital of the gift in tail, and the patent holden good for the cause aforesaid. And in some cases there needs no recital of leases. As if the King makes a lease for years, rendring rent to his receivor, and for default of payment, that his estate shall cease. Now if at the day the lessee tendreth the rent, and the receivor will not accept of it; and afterwards it is found by office, that the rent was not paid, by which the lease should be void (yet he may traverse the office;) and afterwards the King grants this rent to a stranger, there he needs not to recite the lease; for it appeareth by the office, that the same is void, and yet in truth the lease was in esse, &c. and so a lease of record in esse in some case needs not to be recited. So if the King lease for years to J. S. and he assigns his interest over, and afterwards surrenders the same to the King; now if the King will make a new grant of it, he need not recite that lease; for the surrender of it appeareth of record, and the assignment of it is but matter in fait, which cannot be known by any search. So on the other side, void leases which are not in esse, shall be cited until it appear, as in the case of Throgmorton cited before by Egerton; and in such case where the Queen granted the same to Sir T. H. the grant ought to be in possession, and not in reversion, because then void, for the King had not a reversion. Also this lease ought not to be recited, for the second patent is granted to the first lessee; and so by acceptance of this new lease, the first lease is determined. And now we are to see, if the things in the former grant are necessary to be recited, the estate in the land and the tenant, not necessary; the reservation, condition, covenant, and the date. The reason **[246]** wherefore the estate ought to be recited, is to this purpose, that the King might know, and be enformed how far the land is encumbred with other estates, &c. but that reason is of no effect in our case, when the second patent is made to the first lessee; for by the acceptance of the new estate, the first interest is gone, wherefore of that there needs no recital. The second reason, wherefore such former lease ought to be recited, is to the intent, that the new patentee may not have colour or countenance by reason of his patent to do wrong to the first patentee who hath the present possession by disturbing of him by entry, or suit; for all the truth of the matter appears in his own letters patents, and the true estate of the tenant in possession: but that reason hath not any force in our case; for the second estate is made to him, who hath the former estate. The reason wherefore the present tenant ought to be mentioned in the second letters patents, is, so as the Queen may be ascertained what manner of person he is, who is the present possessor; for it may be he is such to whom the Queen hath given such estate upon special favour for his good service, and in recompence thereof; and that she will not

disgrace the party so much, as to give his farm to another over his head, which might be much to the discomfort and prejudice of him in possession: which the Queen peradventure would not do, if she had full intelligence of it; but rather advantage him with it, and not let it to any other person. But in our case here, there is not any such matter of mischief; but it is good to consider what tenant ought to be specified in the recital; assuredly, the most sure way is, the patentee himself to whom the lease was originally made; although he be dead, or hath assigned his interest over. For it may be dangerous to rely upon the tenant, who hath the possession; for it may be, that another hath the interest, although he hath the possession, and then the recital is false; wherefore it is best to say by way of recital, Cum dimisimus, &c. And as to the land, the same also ought to be recited by the same name in such form, and by the same words as it was granted before in the former grant; and yet if the name was mis-recited in the former grant, it ought not to be so in the second. As if the King grant the mannor of Little-Court by the name of the mannor of Litt-cote, or the mannor of Wellington, by the name of the mannor of Welton, the same is good by the statute. But if a new grant is to be made of the same, in which the first grant is to be recited; now the former mis-recital shall not be put in ure, but the very name; but in this special manner, that is, where the King hath demised the mannor of Little-cote, by the name of the mannor of Litt-cote, &c. So where a mannor is known by two names, and the Queen leaseth the same by one of the said names, and afterwards grants the same by the other name; the recital ought to be, that whereas the Queen hath demised the mannor of D. by the name of the mannor of S. &c. And as to the recital of the estate, the habendum in the first patent ought **[247]** to be recited, and all that which preceeds the reddendum; for, in that, the estate is fully contained. But here, in our case, such recitals are not necessary; for it is impertinent to make recital of the same, which is determined eo instante, that the new patent is made, and that by reason of a matter precedent, although that all be done eodem instanti; and as to an instant, the same is not to be considered in law, as it is in logick, as a point of time, and no parcel of time. But in our law, things which are to be done in an instant, have in consideration of law a priority of time in them: as lessee for life makes a lease for years, they both surrender to him in the reversion; the same surrender which is made in an instant, shall in law be understood to have degrees. The surrender of lessee for years to the tenant for life, and then the surrender of tenant for life; so in our case, the determination of the first lease shall be first, 1 E. 3. 6. The tenant took the seignioresse to wife, had issue, the wife died; the husband shall not be tenant by the curtesie; for, although the seigniory was in him at the time of the marriage, yet by priority in law it ceased, so as no seisin of the seigniory was during the coverture. So in our case, eo instante that this new patent is made, the first estate is determined; yet in construction of law, the surrender shall be said precedent, and then the said estate needs not to be recited. For if there had been an express surrender in fact, there had not been any doubt, that recital was not necessary; ergo, neither in the case of a surrender in law. As to that which hath been objected, that the grant of the Queen cannot enure to two intents; scil. to make a surrender, and also to make a new lease, the same rule is true, where both intents enure, and work against the King; but whereas the one intent serves and works for the benefit of the King, it is otherwise: as in our case, this surrender is for the benefit of the King; therefore it shall be taken, &c. as 6 H. 8. the King grants land to another, durante beneplacito, and afterwards the same patentee purchaseth a new estate from the King; here needs not any recital of the former, for the second estate is made to the first patentee, and the first estate is determined by the acceptance of the second, 3 Eliz. The case of the Earl of Arrundel was this, The Lord John Gray being lessee for years of a house called Hull-rake, of the lease of the Queen, afterwards took a grant from the Queen of the custody of the same messuage, with a fee for it, and that was without recital of the former lease, and the grant holden good, and yet it did enure to two tenants; to a surrender of the lease, and a grant of the custody, but both the intents were not against the Queen, for the surrender was for her benefit. As to the lease made 13 Eliz. it is utterly void, for mis-reciting of the date of the former lease made 2 Mar. for the very date of the said lease was the 11th of May, and in the recital it is the 21 of May. For although the date is not necessary

to be recited, yet here, as this **[248]** case is, the same ought to be truly recited. For the surrender of the said estate which passeth by it, is the consideration of the new grant; then, if the same be false, the patent is void, for it was made by reason of that: for there is a more ample lease recited, than in truth it is by ten days. And so the consideration, scil. the surrender, not so beneficial as the Queen expected; also this new patent doth contain in it self a grant of such lands as were demised formerly by letters patents, dated 21 of May, scil. Omnia præmissa, in forma prædict. dimissa, and nothing was demised in forma prædict. scil. by patent bearing such date; ergo, nothing passed by the later patent. For the patent of 13 Eliz. is in consideration of a surrender of a lease made and bearing date 21 of May, whereas no such lease was, and then no surrender, and then no consideration. Also here the consideration is false; for the lessee who is supposed to have surrendred his lease, before the same surrender assigned parcel of his term to one Hagget, and afterwards purchased a new lease in consideration of the surrender of the former, and of his full interest in it, whereas he had not the whole interest; and so this false consideration destroys the whole grant. For in all cases, where the considerations are real, and savour of the land, or extend to such a real thing; if it be false, it destroys the patent: but where the consideration is personal; as in consideration of mony paid, or for service done, although it be false; yet the patent may be good. So here, forasmuch as the consideration is real, in respect of this surrender, and is false as appears before, the patent is void: and as to this point, there is not any difference between consideration and suggestion; for if it be real and false, the patent is void; contrary, where personal. But in some cases where the letters patents are, ex certa scienta, &c. such falsity in the reality shall not hurt. Which see 18 Eliz. Dyer, 352. So the case between Manxel and Turvil, where lessee for years, his lease being expired, supposing that he had twenty years of his lease not entred; in consideration of such interest, took a patent de novo, the same was void. So Owens case: Terril being lessee for years of the parsonage of P. in the county of Sommerset, of the grant of the King for certain years; in consideration of his said interest, obtained a grant of the Queen of lands in Wales, whereas in truth he had before assigned his interest in the said parsonage to another; and it was adjudged, that the said grant of lands in Wales was void, for the consideration was void; and so the consideration being real, was false. And in some cases, a consideration personal, if it be false, shall destroy the patent, if it be future and executory; as if the King grants lands to J. S. ea intentione, that he shall pay to J. D. 10l. Now if he do not pay it, the patent is void, and the estate given by it void also. It hath been objected by Godfrey, that by this surrender, the patent was cancelled, and so the parcel of the term **[249]** which was assigned to Hagget, was defeated and avoided, forasmuch as the original letters patents out of which the estate of Hagget was derived, are cancelled, and so there is a good surrender, and then the consideration is true; especially, forasmuch as Hagget being assignee but of parcel of the term, cannot have a constat by the statute of 4 E. 6. As to that I conceive, that the assignee of part of the interest may have a constat by that statute, notwithstanding the surrender of the letters patents, and the cancelling of them: and for that matter the difference is, if the roll remains a constat may be, although that the patent be cancelled. See Brook, Patents, 89. 32 H. 8. If a vacat be entred upon the roll, then no constat can be afterwards; and therefore in Sydnies case, the assignee could not have a constat, because there was a vacat entred upon the roll. But a constat had before any vacat entred upon the roll; such a constat is good, notwithstanding the vacat afterwards: and it doth not appear, that any vacat is entred upon the roll; so for any thing that appears, Hagget may have a constat, and then his interest is saved to him, and then the surrender is void, and the consideration false; and although there be other considerations in the letters patents, which are true and good, yet that shall not help the matter. For if any part of the consideration be false, the patent is void in all; and so it was holden in Manxell's case, cited before, and so he prayed judgment for the plaintiff. Egerton Sollicitor, to the contrary. Where the words ex certa scientia, are not put in letters patents; they shall be intended to be made at the suggestion of the patentee, and so the grant shall be taken beneficially for the King, and strictly against the patentee: but where such words are put in the letters patents, there the grant shall be taken beneficially for the

subject; these words, ex speciali gratia, imply the bounty of the King, certa scientia excludes all ignorance, and mero motu shew the voluntary and liberal benevolence of the King, without suit of the party; and where the words in such letters patents are general, they shall be construed liberally for the subject, but with limits and bounds, that nothing pass in such case, but such things which are aptly signified by such special words; as to pass two things, where the meaning of the King was to pass but one. And if the patent be conceived utroq; modo tam ex certa scientia, &c. as upon the suggestion of the party; if the suggestion be in any part false, the whole patent is void, for the suggestion extenuates the force of the other words, juris forensis est, siquid falsis precibus obtentum acquirenti non proderit; and to that purpose he cited the case, 18 Eliz. Dyer 352. before cited. And he conceived, that the lease made by Queen Mary is utterly void. 1. Because the first lease of record is not recited. 2. If the same shall be good, the Queen should accept a surrender, where she knew not of it; and so the patent should enure to divers intents. 3. This lease is made by general words; that is, of all the **[250]** lands in the parish of St. Cuthberts: for these general words may be well satisfied with the lands which the King hath in possession; and therefore they shall not extend to the lands which are now in question, of which the Queen at the time of the grant had but a reversion; and first I conceive, that general words without any restraint or limitation, will pass nothing: as, if the King pardons all demands, or grants omnia terras & tenementa sua; but, general words qualified with a restraint, where the limitations are effectual; as, if the King grants omnia terras & tenementa sua in D. which he hath by the attainder of J. S. or which were the possessions of such dissolved monasteries, such grants are good; and where the case is, that Queen Mary hath the lands in possession, of the annual value of 19l. and other land there in reversion of the annual value of 6l. and then she grants omnia terras & tenementa nostra, rendring 19l. per annum. I conceive, that upon these words the land in possession only passeth, because that the said general words may be aptly served and satisfied with the lands in possession, if no other lands pass. And I agree that the word (nostra) extends as well to the lands in reversion, as to lands in possession; but most properly to lands in possession: for land in reversion cannot dici simpliciter nostra, but quodam modo tanquam terra revertens, and not to take the natural profits of it; for the termor hath such properly, that he shall have an action of trespass, quare clausum fregit: but the intent and meaning of the Queen is to be regarded, and that is the surest way to have right intelligence of the grants of the King; for here the Queen hath reserved but 19l. rent, which is the proper and ancient rent of the lands in possession; and if lands in reversion should also pass, the rent of which was 6l. per annum, then upon the whole grant but 19l. being reserved, the Queen should lose 6l. per annum of her ancient rent; which should be contrary to the intent and meaning of the Queen; and the intent of the grantor, even in the case of a subject, shall direct the construction of grants. As 9 H. 6. Br. Grants 5 by Babington. A man grants common in his whole lands, he shall not have common in his orchards, gardens, or meadows, for such was the meaning of the grantor, a fortiori in the case of the King. It hath been argued, that the former lease ought not to be recited, because that after the first lease made by King Henry the 8th, the inheritance hath been in a subject, that is, the Bishop of Bath and Wells; but the same is not so: for if the King makes a lease for years, and afterwards grants the reversion upon condition, which after is broken, and so found by office, by which the reversion is reduced to the King; if now the King will make a new lease, he ought to recite the former estate, notwithstanding the mean grant of the reversion, or else such second lease is void. Another matter hath been objected, wherefore the former lease ought not to be recited; **[251]** and that is, because it is determined by surrender in law, before that the new lease takes effect; Sir, the same is not so, for the former lease is in being, as the case betwixt Fulmerston and Steward, 1 Mar. Plow. Com. 106. upon the Statute of Monasteries, 31 H. 8. See the words of the statute, whereof and wherein any estate or interest for years at the time of the making of any such lease had his being or continuance. And an abbot made such a lease to one, who had a term for years of a former grant; although here be a surrender, yet this case is within the said statute, and the said former lease shall be said to have his being at the time of the making of the later lease; and the surrender shall not be said so to preceed the making of the

lease, but that the former lease shall be said in esse at the time of the making of the later lease. And in our case, it shall not be taken for any surrender, for then the Queen shall lose 6l. of her ancient rent and revenue; and always when the title of the King and of the subject concur, the title of the King shall be preferred; as 43 E. 3. The King lord, mesne and tenant; the tenant pays his rent at the day to the mesne before noon, and then the same day before the night the mesne dieth, his heir within age, the King shall be paid the rent again; for here the title of the King and the subject concur together at one time, and in that the King shall be preferred; and so he prayed judgment for the defendant. And afterwards at another day the justices declared their opinions, and by Wray, Chief Justice, we all agree, that the first lease ought to be recited; and the reason which hath been urged against that point, hath reduced us to be of that opinion, scil. that the second lease was made to the first patentee, and the King doth not make the recital; but the party ought to inform the King of all former estates of the said lands; and that he might well do, for he is well knowing of them; and although that the reversion after the first lease made hath been conveyed to a subject, the same is not material here, forasmuch as the second estate is made to him who had the first estate, and might know whether the first estate were determined or not; also by the re-purchase, the King is in statu quo prius. Gawdy Justice, Although that the former term be drowned by the taking of the second lease; yet it was in being at the time of the taking of it, as it is holden by Bromley, in the case of Fulmerston and Steward. And it is determined by the second lease, and yet it was in being at the time of the making of it. Fenner Justice, to the same intent. Clench Justice, If the grant of the Queen shall enure to two intents, then the Queen should lose 6l. per annum of her ancient revenue. It was agreed by all the justices, that the general words in as much as they are restrained to a certainty would pass the thing si cætera essent paria; contrary, if they had remained in the generalty; and afterwards judgment was given: quod querens nihil capiat per billam.

More Rep. 4. 5. Ante, 5. 6.

[252] CCCXXXVIII. Trin. 32 Eliz. In the Common Pleas.

A man 30 Eliz. made a feoffment in fee to the use of himself for life, and afterwards to the use of his son and his heirs; the father and the feoffees before issue for money by deed, granted and enfeoffed J. S. and his heirs, who hath not notice of the first use; the tenant for life hath issue, and dieth, the issue entreth. Glanvil, The use limited to the first son is destroyed; for without regress of the feoffees it cannot rise, and it is gone by their livery. See the case in Plowden 349. and also he vouched the case of the Earl of Kent, where by the release of the surviving feoffee, a sleeping-use was destroyed, and could not after be revived. Harris, The use may rise, without entries of the feoffees; and he put a difference between an use created before the statute, and a use created afterwards; for in the first case they ought to enter; and if they be disabled by any act, as in the case between Gascoign and the Earl of Kent, it shall never rise; but in the later case, the whole authority and confidence is by the statute taken out of the feoffee, and the contingent use shall rise without aid of the feoffees, by the operation of the law; for there the land is bound to the uses, and charged with them: as upon a judgment in a warrantia chartæ, the land of the defendant is bounden pro loco, & tempore; and according to the common experience in conveyances for payment of the Kings debts; as in the case between Proctor and Dennis, the debtor of the King makes a feoffment in fee unto the use of himself and his heirs, until he makes default of such a payment to the Queen at such a day, and upon default to the use of the Queen and her heirs. Cowper, There needs no entry of the feoffees; and he put the difference put before by Harris, betwixt a use created before, and a use created after the statute; and now the feoffees have not any power to revive or to stand seised to such uses, but are only as instruments to convey the uses. For the use is created upon the livery, and is transferred by the statute, if the person to whom the use is limited be capable of it at the time of the limitation; but if not, the law preserves it until, and it cannot be by any means prevented; and he cited the case, 30 H. 8. Br. Feoffments to uses 50 and there is a great difference betwixt a use limited

before and after the statute: for now after the statute, the feoffees by reason of their seisin cannot be vouched; for they have not such a seisin, whereof they may make a feoffment, and he put the case between Cheny and Oxenbridge; Cheny leased to Oxenbridge for 50 years, and afterwards enfeoffed Oxenbridge to the use of Cheny himself, and his wife for their lives, with divers remainders over; and it was adjudged in the Court of Wards, that by the feoffment the term is not extinct; and he put the case of the Lord Pagett, adjudged in the Kings Bench. **[253]** A feoffment was made to the use of the feoffee for life, the remainder to him whom the feoffor should name at his death in fee, and the feoffor and feoffees for good consideration levy a fine to a stranger, and afterwards the feoffor nameth, and dieth: the party named by the feoffor shall have the land, notwithstanding the fine, &c. Beamount, The contingent use is here utterly destroyed by the feoffment aforesaid; and it appeareth by the preamble of the Statute of 27 H. 8. of Uses, that the motives of that Act did not favour uses; but it was their meaning utterly to root them out: and if contingent uses, which are not, nor can be executed by the statute, should stand in force; the mischief should be, that no purchaser should be secure of his purchase, but should be in danger of a new born use not known before. And he grounded his further argument upon the reason of Manwood and Dyer, where a man makes a feoffment in fee to the use of himself and his wife which shall be, and afterwards he and his feoffees, and those in remainder make a feoffment to divers other new feoffees, and to new uses, and afterwards he takes another wife, and dieth: the said justices were of opinion, that by the said feoffment, the contingent uses were destroyed: for when the estates which the feoffees take, is taken away, which was the root and foundation of the uses, and the branch and fruit of the said tree; it necessarily followeth, that they also be taken away; and also because the feoffees by their livery, are barred for to enter, for to re-continue the estate would continue these uses, they also are gone and extinguished. Yelverton, I conceive, that notwithstanding the feoffment, that the use shall rise in his due time according to the limitation of it, &c.

4 Len. 233. 2 Roll. 797. Plow. 347.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCXXXIX. THE SERJEANT'S CASE.

Tenant in tail, and he in the remainder in fee joyn in a grant of a rent-charge in fee, to the issue of tenant in tail a year before the Statute of 27 Eliz. of Fraudulent Conveyances; and afterwards the tenant in tail, and he in the remainder sell the land; and afterwards a præcipe is brought against tenant in tail, who voucheth him in the remainder, who voucheth the common vouchee, and so a recovery is had, and seisin accordingly; the issue in tail dieth without issue, tenant in tail dieth, the uncle distraineth for the rent. Glanvil Serjeant argued, that this grant of the rent is altogether the grant of the tenant in tail, and that nothing passed from him in the remainder; and that it doth enure as one entire grant, and not as several grants: as where tenant for life, and he in the reversion joyn in a lease; it is one entire lease, and the lease of them both; and they shall both joyn in an action of waste. But admit that here are several **[254]** grants, yet the estate out of which the rent was granted, continuing the rent, shall continue also: and now the recoveror comes in the post, and in the affirmation of the estate of tenant in tail; and the remainder is utterly defeated and destroyed by the recovery, and the rent always issueth out of the particular estate, and he cited, Littl. 125. If a rent-charge be issuing out of land, and the tenant of the land leaseth the same for life, and afterwards the rent is granted over; now he who hath the freehold, ought to attorn, scil. the tenant for life, for a rent-charge lieth always upon the possession; and if tenant for life granteth a rent-charge, and afterwards makes a feoffment in fee, the rent shall continue until the possession be recontinued, &c. Harris Serjeant contrary, This grant is the grant of them both, scil. of the tenant as long he hath issue of his body, and afterwards it is the grant of him in the remainder: where a man derives his interest from two, the one being a particular tenant, the other a recoveror, or a remainder in

fee; the donee takes of each of them that which he may lawfully give, and no more; and the particular estate being then ended, the donee shall be then accompted in by him in the reversion, &c. See 2 E. 4. 1. And he vouched the case of the Lord Mountjoy, the Lord Mountjoy took to wife a woman enheretrix, she had issue, and so he was intituled to be tenant by the curtesie, and acknowledged a statute, and afterwards he and his wife levyed a fine, and died; now the conusee shall hold the land discharged of the statute; for after the death of the husband, the conusee is in by the wife only: and so paramount the charge. Also he said, that this grant of the rent by the father to the son, is fraudulent, and so shall be intended, if the contrary be not shewed and averred. And so it was of late adjudged in the Court of Wards, where a man alieneth to his son and heir for mony, (and mony in truth is paid) yet notwithstanding it shall be intended fraudulent, unless the contrary be shewed and averred.

Hanham Serjeant, This grant shall enure first as the grant of tenant in tail; and after the death of the tenant in tail without issue, it shall be the grant of him in the remainder. And to this purpose, he put Newdegate's case, 7 Eliz. Dyer 234. Lessee for life, and he in the reversion, lease for years by indenture, that during the life of lessee for life, is his demise only, and the confirmation of him in the reversion; but after the death of the lessee for life, it is the lease and demise of him in the reversion, and he shall have an action of waste ex dimissione sua propria, without shewing the special matter in the count. And if tenant in tail granteth a rent in fee, and he in the reversion confirm the grant, it is good. See Litt. 121. And he said, that the recoveror is in the per; for it was holden in Winter's case, that if a man makes a lease for years, rendring rent, with clause of re-entry, and afterwards suffereth a common recovery, that **[255]** such a recoveror is an assignee within the statute of 32 H. 8. to take benefit of a condition; and recoveries are now common conveyances. And if tenant for life be, the remainder over in fee, and tenant for life grants a rent-charge, and afterwards ceaseth, and the lord recovereth in a cessavit, he shall hold the land charged. And as to the collusion, it is not shewed in the pleading, that the grant was made by collusion: for if the collusion be not apparent, the justices, without averment of it, are not bounden to take notice of it.

Cowper, Serjeant, Here are two several grants, and one grant intire in the letter, may enure as several grants, as if two tenants in common grant a rent of 10s. here are several grants, and he shall have several rents of 10s. And if A. disseiseth B. of Black-Acre, and C. disseiseth B. of White-Acre, and afterwards by one deed releaseth to A. and C. the same shall enure as several releases upon their several possessions. And he in his argument relied much upon the collusion, and this grant shall be taken by the justices to be fraudulent; for it was made 20 Eliz. and the recovery was 21 Eliz. and in 27 Eliz. came the statute.

Beamount Serjeant, This grant shall enure as several grants; i.e. as a grant of tenant in tail, and afterwards as of him in the reversion: two joynt-tenants enfants make a feoffment, they shall have several writs of dum fuit infra ætatem, as upon several feoffments. 19 H. 6. 43. Two coparceners take husbands, who discontinue, and die; their wives shall have several writs of cui in vita: and yet the discontinuance was joynt. And 15 H. 7. 14. if 3 coparceners be, and upon partition one of them granteth to the two others rent of 20s. per annum for equality of partition, that rent shall be in the nature of coparceners, and so shall descend; and shall not go to the survivour but by descent. See 21 E. 3. 50. Also admit that it is the confirmation of him in the remainder, yet after the death of the tenant in tail without issue, now it is become the grant of him in the remainder. And to that purpose, he cited Newdegate's case, 7 Eliz. Dyer, before cited. But posito, that it be the sole grant of the tenant in tail, yet here is not any covin apparent; for covin apparent ought to be averred and approved; otherwise the Judges of our law cannot adjudge upon it: for they cannot judge upon probabilities, as the Judges of the civil law do; for so they should many times minister injustice in the place of justice: and, that the same is not covin apparent, although it be made to his son, he vouched 19 H. 6. 30. and 47 E. 3. 16. where such a feoffment to re-enfeoff the heir of the feoffor when he cometh of full age, is not in it self covin apparent, but it ought to be expresly averred. And he cited also Warnford's case, 3 Eliz. Dyer 193. And also he cited 17 Eliz. Dyer 341.

upon the Statute of 27 H. 8. of Monasteries, where there is a proviso, forasmuch as some of the chief governours of **[256]** such religious houses have lately fraudulently and craftily made leases, &c. to the great decay and diminution of their houses, that all such leases, &c. made within one year before the making of this Act, shall be void, &c. And also there is a proviso, that such persons as have leases whereupon the old rent is reserved, shall enjoy their leases, &c. The case was, that an abbot made a lease for 60 years, 47 days before the making of the said Act, upon which the ancient rent was not reserved: it was holden there, that although the lease was within the words of the statute, (because made within a year) yet it shall not be intended covinous, without an express averment of it; for it may be it was made bona fide. See Librum.

Yelverton Serjeant, This is a joynt grant; but yet it shall charge the several estates when they come into possession. Also he put this case, cestuy que use, and the feoffees after the statute of 1 R. 3. and before 27 H. 8. joyn in a grant of a rent; it shall enure as several grants in respect of their several authorities; scil. one by the statute of 1 R. 3. and the other by the common-law. And as to the covin, he conceived, that it is covin apparent, and needed not to be averred: and that appeareth by the suffering of the common recovery.

Hill. 32 Eliz. In the Common Pleas.

CCCXL. Brokesby and Wickham's Case.

A quare impedit was brought by Bartholomew Brokesby, against the Bishop of Lincoln and Wickham, Pasch. 30 Eliz. Rot. 1815. The case was, that Robert Brokesby was seised of the mannor of Sholby in fee, to which the advowson was appendant; and, the church being full, granted to Humphrey Brokesby and the plaintiff his two sons, the next avoidance of the said church; afterwards the church became void; Humphrey by deed released all his right, estate, and interest which then he had of and in the advowson of the church aforesaid for the said avoidance. Bartholomew sole presented, and the defendants did disturb him. The bishop pleaded, that he claimed nothing but as Ordinary. Wickham pleaded a lease made of the mannor with the appurtenances, by the said Bartholomew, to one Starkey for years, before the grant made, ut supra, to Humphrey and Bartholomew; which Starkey presented him: upon which they were at issue, and found for the plaintiff, that the grant was before the lease. It was holden by the Court, that this release was meerly void, for here was not any interest to be released, but a power to present, and an authority annexed to the person. And afterwards by the award of the Court the writ was abated. See 11 Eliz. Dyer 253.

1 Len. 167. 3 Cro. 173. Owen Rep. 85, 86.

[257] Hill. 32 Eliz. In the Kings Bench.

CCCXLI. Woodward and Bagg's Case.

Woodward libelled in the Spiritual Court against Bagg and Nelson, for tythes of certain lands called Christen Hill. The defendant sued a prohibition, and surmised, that one Pretiman was seised of the said land; and in consideration of 5l. by him paid to the said parson, it was agreed betwixt them, that the said Pretiman and his assigns should be discharged of tythes of the land, during his life, and afterwards the said Pretiman leased the same to the defendants: upon which a prohibition was granted.

And it was holden, that the party need not to make proof thereof within 6 months, for it is not within the statute, because a composition with the same parson: but now a consultation was granted, because the agreement is shewed, but no deed of it, which cannot be any discharge: but if it had been for a time; scil. unica vice, it had been good; but for life, not. Also it is not an express grant of the tythes, but

only a covenant and agreement, that he shall be discharged; upon which he may have an action of covenant, but not a prohibition.

It was said on the other side, that although without deed, tythes cannot pass in point of interest; yet by way of discharge they might.

Cook, It was holden betwixt Pendleton and Green, that upon such words of covenant and agreement, the party should hold the land discharged of tythes; which was denyed. For if the grantee of a rent-charge will grant it to the tenant of the land, the same without deed is not good. And there was very lately a case between Westbede and Pepper, where it was agreed betwixt the parson and one of his parish, that for 20s. rent by the year, the parishioner should be discharged of tythes for 20 years, if he so long lived. And it was holden, that no prohibition should lie upon it; a fortiori, where the estate is for life.

Gawdy, In the case of grant of tythes for life, a deed is requisite, but here it is not, but a contract for mony, &c. See 21 H. 6. 43.

Wray, If it had been for years, it had been good enough; but here is not any contract, but only a discharge for life; which cannot be during his life, without deed. And afterwards, the record was read; which was, that concordatum & aggreatum fuit between the parties pro omnibus decimis during the time, that the one should be parson, and the other occupier of the said land, that in consideration of 5l. the said Pretiman and his assigns should hold the said land discharged of tythes.

Wray, The same is no contract, but a promise, for he doth not grant any tythes. Afterwards a consultation was awarded.

Roll. 63. 2 Len. 29. 3 Cro. 188. Owen Rep. 103.

[258] MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCXLII. SANDERSON AND EKINS'S CASE.

In debt upon a loan by Sanderson against Ekins, who waged his law; and at the day being ready to wage his law, the Court examined him: and upon examination it appeared, that the plaintiff and defendant were reciprocally endebted the one to the other; and upon conference betwixt them before the action brought, there was an accord betwixt them, that the plaintiff should give to the defendant such a sum, (which he had done) and that the one should go quit against the other. And it was the clear opinion of the whole Court, that upon the matter the defendant could not wage his law; for a debt cannot be extinguished by word.

MICH. 32 ELIZ. IN THE EXCHEQUER.

CCCXLIII. THE DEAN AND CHAPTER OF WINDSORS CASE.

In this case, it was moved, if he, who hath a rectory impropriate, and by the Statute of 26 H. 8. is to pay an annual rent for the same in the name of a tenth, and thereby is discharged of all first-fruits and tenths, shall have the priviledge of the Exchequer; for he is to pay the same sum yearly.

And it was the opinion of the Barons, that he should not; for so every one who is to pay any tenths or first-fruits, should draw other who have sued him into the Exchequer: and so all controversies concerning tythes and parsonages should be drawn thither; which should be a great prejudice to the Spiritual Courts.

But Egerton, Solicitor, vouched a case, viz. Conier's case. The King gave a parsonage to a priory in frankalmoign and the tythes, thereof being withdrawn, the prior impleaded him who withdrew the tythes in the Exchequer; and it was holden, that the prior should have the priviledge, for the King is endangered to lose his patronage, or rather his foundership, if the rectory be evicted.

Gent, Baron, The Kings tenant in chief, or he who pays first-fruits, or he who holds of the Queen in fee-farm, shall not have in such respect the priviledge here.

1 Len. 146.

[259] MICH. 32 ELIZ. IN THE KINGS BENCH.

CCCXLIV. SLEDD'S CASE.

Sledd of Great Melton in the county of Oxon, was assessed to 7s. for a fifteenth: and upon refusal to pay the same, the collector distrained the beasts of Sledd, and sold them. Thereupon Sledd brought trespass against him the in the Kings Bench. And the collector exhibited a bill against Sledd; who shewed by his counsel, that the statute of 29 Eliz. which enacted this fifteenth, provides, that the said fifteenth shall be levied of the moveable goods, chattels, and other things usual to such fifteenths and tenths, to be contributory and chargeable. And shewed further, that his beasts distrained fuerunt tempore districtionis, upon the glebe-land of a parsonage presentative, which he had in lease; which glebe-land is not chargeable usually to fifteenths granted by the Temporalty, nor the cattel upon it. It was the opinion of the justices, that although the parson himself shall pay tenths to the King, yet the lay-farmor shall pay fifteenths, and his cattel are distrainable for the same upon the glebe-lands of the parsonage. And therefore it was awarded, that the distress and the sale were lawful.

2 Len. 146.

PASCH. 32 ELIZ. IN THE EXCHEQUER.

CCCXLV. SIR WALTER WATER'S CASE.

It was moved in this case, that if one hath a judgment in debt, and upon the same within the year sueth forth a capias ad satisfaciendum, although that he doth not prosecute it by the space of 2 or 3 years; yet when he pleaseth he may proceed upon it, and shall not be put to a scire facias. And of that opinion was Philips.

Manwood, I grant, that if one hath sued forth a writ of execution, and the same be continued by, Vicecomes non misit Breve for 2 or 3 years; yet the plaintiff may proceed upon it, and shall not be put to a scire facias: but if such a writ be sued forth, and not continued, but discontinued by a year and a day, he shall be put to a scire facias; for it is the negligence of the plaintiff of not continuing it; which within the year and day he may do without order of the Court; but not after the year by any order of the Court, &c.

2 Len. 77. 4 Len. 44.

[260] MICH. 32 ELIZ. IN THE KINGS BENCH.

CCCXLVI. EVANS, GODFREY, AND ARNOLD'S CASE.

The case was, Evans and Godfrey were bail for one Kemp, at the suit of Alice Arnold. Kemp was condemned, and a capias ad satisfaciend. awarded against the sureties: by which process, Godfrey was taken; and he suggested to the plaintiff, that Evans the other bail was sufficient to satisfie him, but that he himself was not sufficient, but utterly unable to do it. Upon which surmise, the plaintiff was content, that Godfrey should go at liberty, so as he did procure Evans to be arrested; who did it accordingly. And now Evans, being arrested, sued an audita querela upon that escape of Godfrey; and they were at issue upon the escape. And afterwards, it was espied, that the venire facias was to summon 12 in actione transgressionis super casum; whereas it should be, in audita querela. It was said by Kemp, secondary, that the venire facias upon every original writ in this Court (as this audita querela is) ought to contain in it the issue: but when the suit is upon a bill, then the words are, ad recognoscend. in actione transgressionis super casum. And afterwards, by the advice of the Court, a juror was withdrawn by assent, and so the matter was stayed.

MICH. 32 ELIZ. IN THE EXCHEQUER.

CCCXLVII. CHENEY'S CASE.

Note, by the Barons in this case, if rent-corn be reserved upon a lease for years, and it is behind for 2 or 3 years, that the lessor may have debt for the corn, and shall make his declaration of so much corn, and the same shall be in the detinet; but yet he shall not have judgment to have corn, but so much mony as the corn was worth every several year being accounted.

Clark, Baron, doubted, if he should recover the price of the corn, as corn was at the time of the contract, or according to the price which it was at the time when it was payable; or as it was at the time of the action brought.

Manwood, The law is clear, that the lessee shall pay according to the price which was at the time of the payment and delivery limited by the lease.

Clark, A. is bound to deliver to the obligee 10 bushells of wheat, and no place is limited where the payment shall be made; the obligor is not bounden to seek the other party wheresoever, as in case of paymene of money; for the importableness of it shall excuse him. Which Manwood granted.

Roll. 591.

[261] MICH. 32 ELIZ. IN THE EXCHEQUER.

CCCXLVIII. PHILIP FINES AND THE LORD DACRE'S CASE.

The case was, Tenant in tail of lands, the remainder in chief, levied a fine without the Kings licence: and, if the tenants of the Lord Dacres should be chargeable by the fine, (for the case was, that the Lord Dacres was tenant in tail, the remainder in tail to Philip Fines,) was the question? It was holden by the Barons, that the tenants should be discharged: but it was holden, that if the conusor had any other land within England, the fine might be levied thereof. But the question was, if the tenants shall be put to plead in discharge of that which would be a great charge; or should be discharged without plea, because it appeareth by record, that he who aliened, was but tenant in tail in remainder; for there was an office of it which was pleaded by another in another cause. It was said, where such matter appeareth of record, as by office, livery, &c. there he need not to plead such matter in discharge, because the pleading of the same is to no other purpose but to satisfie the Court by a record, that the matter is so as the party in his discharge hath alledged. And therefore, in this case, the Barons gave order, that the process against the tenants of the Lord Dacres should be discharged.

4 Len. 97. Ante 241.

CCCXLIX. HILL. 32 ELIZ. IN THE COURT OF WARDS.

The case was, A. gave land to B. in tail, rendring rent; B. suffered a common recovery with voucher unto the use of a stranger and his heirs; it was the opinion of some, that the rent remained. And it was resembled to Littleton's case, 231, 232. Lord, mesne, and tenant; the lord purchaseth the tenancy, now the mesnalty is extinct; yet he who was the mesne shall have the surplusage of the rent of the lord now tenant of the land as a rent distrainable of common right.

And it was said by Heskith, late Attorny of the Court of Wards, that it was lately the case of the Lord de la Ware, that in such case, notwithstanding such common recovery, the donor should have the rent, although that his reversion was gone.

But Cook was of opinion, that the rent was gone; for the rent was incident to the reversion, and there is not any question but that the reversion is gone.

[262] MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCL. GARDINER AND THE HUNDRED OF READING'S CASE.

Andrew Gardiner brought an action upon the Statute of Winton of Hue and Cry, against the inhabitants of the hundred of Reading in the county of Berks; and declared of a robbery committed by persons unknown on his house: it was the clear opinion of the whole Court, that the action would not lie; for that this offence is not properly a robbery intended by the said statute to be pursued, but rather a burglary: and robberies, committed in the high-way only, are relieved within this statute. And by Anderson, Every man is bounden to guard his house at his peril for his own safety.

CCCLI. MICH. 32 ELIZ. IN THE COMMON PLEAS.

In a replevin, the defendant made conusans as bailiff to Greves and Rockwood, and said, that one A. was seised; and 6 Eliz. enfeoffed certain persons in fee, to the use of his last will: by which he willed, that his feoffees should stand seised of the said lands, until Greves had levied of the profits thereof 100l. And against this conusans, it was objected, that here is no devise; for A. at the time of the devise had not any feoffees. But the exception was disallowed by the Court. And they cited the case, 15 Eliz. Dyer 323. Lingen's Case, A. made a feoffment in fee to his use; and afterwards devised, that his feoffees should be seised to the use of his daughter; that the same was a good devise of the land. See 29 H. 8. Br. tit. Devise 48.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CCCLII. HAMBLEDEN AND HAMBLEDEN'S CASE.

Note, the case of Hambleden and Hambleden, (for the principal case, see Mich. 31 Eliz. Leon. 166. Lib. 1.) was this term adjudged, upon the devise, that the survivour shall be each others heir. It was holden, that all the surviving brothers are joynt-tenants, and although this word (survivour) be in the singuiar number; yet in sense, upon the whole matter it shall be taken, and construed, as for the plural number; (survivour shall be each others heir) i.e. each survivour, i.e. every survivour; i.e. all the survivours: and then in this case, the plaintiff and the defendant being joynt-tenants, cannot maintain an action of trespass one against the other.

1 Len. 166. 3 Cro. 163. 1 And. 38.

[263] CCCLIII. MICH. 32 ELIZ. IN THE COMMON PLEAS.

By the statute of 32 H. 8. cap. 37. the executors of a grantee of a rent-charge, may distrain for the arrearages of the said rent in the life of the testator, so long as the land charged doth continue in the seisin, or possession of the tenant in demesne, who ought immediately to have paid the said rent; or in the seisin of any other person or persons claiming the said lands only by and from the said tenant by purchase, gift, or descent, in like manner as the testator might or ought to have done in his life-time.

It was now moved, if A. grant a rent-charge to B. the rent is behind: B. dieth; A. enfeoffeth C. in fee, who divers years after enfeoffeth D. who divers years after enfeoffeth E. It was holden in this case by Walmesley, Periam, and Windham, Justices, that E. should be chargeable with the arrearages to the executors.

Anderson, Chief Justice, held the contrary. But they all agreed, that the lord by escheat, tenant in dower or by the curtesie, should not be chargeable; for they did not claim by the party only, but also by the law.

TRIN. 32 ELIZ. IN THE KINGS BENCH.

CCCLIV. LEVERETT AND TOWNSEND'S CASE.

In an action upon the case, for disturbing him of his common; the plaintiff declared, that he was seised in fee of a messuage and certain lands; and that he and all those whose estate he hath, have common of pasture in 16 acres of lands called D. from the time that the corn is reaped, until it be sowen again: and also common of pasture in land called R. omni tempore anni, as appendant to the said messuage and land; and that the defendant had plowed the said lands and so disturbed him of his common.

It was moved in stay of judgment, that it appeareth here, that the plaintiff was seised in fee, and so he ought to have an assise, and not an action upon the case.

But the exception was disallowed by the Court. Vide inde, 2 H. 4. 11. 8 Eliz. Dyer 250. 11 R. 2. Tit. Action upon the Case, 36.

3 Cro. 198. 2 Len. 184. Ante 13.

[264] MICH. 33 ELIZ. IN THE KINGS BENCH.

CCCLV. THE CHAMBERLAIN OF LONDON'S CASE.

The Chamberlain of London brought an action of debt in the Mayors Court in Guild-hall, grounded upon an Act of Common Council. See C. 5 Part, the matter was removed into the Kings Bench by corpus cum causa; Fleetwood, Recorder of London, prayed a procedendo. It was objected, that they of London could not make ordinances to bind the subjects, as an Act of Parliament. To which, it was said by Fleetwood, that the custom of the city is, that the mayor and aldermen, and four persons chosen out of each ward, by the communalty, may make ordinances, which they call Acts of Common Council, and they shall bind every citizen and free-man, and all their customs are confirmed by Act of Parliament, and by Magna Charta, which hath been confirmed 52 times; and also by the statute of 7 R. 2. For that King seised their liberties, and drove them to pay for the redemption of them 100000 marks, and then the said King confirmed them unto them for ever; and therefore this ordinance being made according to our custom, ought not to be impeached: as in case of matters of the forrest, if one be punished for offending against an ordinance made for the governing of the affairs of the forrest; you cannot remove the matter before you. So is the law called Lex Idumæa, concerning rivers and fishing, in which are divers ordinances, that none shall kill salmons at certain seasons of the year, and so of other fishes: if one be punished by force of such law, he shall not be relieved here; for the law of the land hath always allowed such particular customs. And see F. B. If two merchants put their stocks together, and so traffick together, and the one dieth, the survivor shall not have the whole stock, as the common law is, but the executor of him that dieth shall have an accompt against the other; and that is per legem mercatoriam. Cook, to the same intent. This Act of Common Council is good, and according to the law, that is, of common right. There are divers statutes made for the true making of cloth, and to take away the abuses and deceit in the making of it, and this Act of Common Council is for the well executing of the said statutes; and I conceive, there is a difference in making of laws by a corporation; a corporation may make an Act for the better executing of any law established at the common law, but new laws they cannot make; as those of a town, who have used to have common in certain lands, they cannot make a by-law, that such a one in such a town shall not have common there; but that none shall use his common, but at such a **[265]** time; such a by-law made, is good. See 15 H. 7. 21 H. 7. 40. See 8 E. 2. tit. Assise 413. A town had common of Turbary in a marsh, and divers of the inhabitants of the town had made trenches in the said marsh; and some had not a full foot of land in the town, and such persons by their trenches which they had made there, used to carry turffs out of the said marsh by boats, and sell them, unto the value of 20 marks

per annum, to their great private profit, and to the great grievance of the others. For which cause, it was provided by common assent of the freeholders of the lord of the said town, that all the trenches in the said marsh should be stopped, so as from thenceforth no turffs be carried in boats by the trenches. And there it was holden, that if the greater part of the commoners assent, the same shall bind the others who have not assented; for ubi major pars, ibi totum: and then, if such towns may make laws; a fortiori, the City of London. Secondly, this law is good by custom; for they have used to make such Acts and ordinances time out of mind, &c. and these customs are confirmed by Act of Parliament; and also they may appoint a penalty, for to what purpose otherwise should they make an Act, oderunt peccare mali formidine pœnæ. Also this action is maintainable; for an amercement in a court baron, an action of debt lieth. Gawdy Justice, 44 E. 3. 19. every one ought to assent. Wray, There the ordinance made was to charge the inheritance but here it is only to charge their goods; wherefore the assent of the greater part is sufficient. And afterwards, a procedendo was granted.

5 Co. 1 And. 234.

MICH. 33 ELIZ. IN THE KINGS BENCH.

CCCLVI. PENDLETON AND GREEN'S CASE.

Pendleton sued Green in the Spiritual Court for tythes, who pleaded, that Pendleton was not lawful incumbent, but one Taylor; and that plea, those of the Spiritual Court would not allow to the parishioner to plead to the right of the incumbency; and thereupon he prayed a prohibition, for otherwise he should be twice charged for tythes; and therefore a prohibition was granted.

Ante 203. 1 Len. 94.

[266] MICH. 33 ELIZ. IN THE KINGS BENCH.

CCCLVII. KNEVYTT AND COPE'S CASE.

Knevytt brought ejectione firmæ against Cope, and declared, quod, cum John Hopkins by his indenture bearing date the 20 of May, 32 Eliz. had let to him his house and two yard-lands containing 40 acres of land, meadow and pasture, apud Tythingham de Forecomb. in parochia de S. &c. upon not guilty pleaded, the venire facias was de Tythingham de Forecomb. Exception was taken by Cook, that the declaration had not any certainty; for it is not shewed in certain, how much there was of meadow, how much of land, and how much of pasture, there was contained in the said two yard-lands; and the jury may find the defendant guilty as to the land only, but not to the residue. Also, he hath not shewed in the declaration, when the lease was made; but only saith, that by indenture bearing date the 20 of May, &c. but doth not shew any day of delivery of the indenture, for then the lease takes effect.

To which exception, it was said by the Court, that the declaration as to that was good enough, for it shall be intended to have been delivered at the day of the date.

Another exception was taken to the visne, because that the visne ought to be of the parish, and not of Tythingham, &c. See 11 H. 7. 23, 24. Forcible entry in the mannor of B. in B. the visne shall not be [of the mannor of B.] but [of B.]

Gawdy, Justice, You shall never have a visne of the parish; for divers towns may be in one parish: but here the visne is good of Tythingham, &c. for it may be that it is a town.

Cook, It is but a ville conus, from which a visne cannot come.

4 Len. 59. Ante 193.

MICH. 33 ELIZ. IN THE KINGS BENCH.

CCCLVIII. TAYLOR AND FISHER'S CASE.

Taylor brought an action of trespass against Fisher, for entring into his house, and taking and carrying away of his goods. To which the defendant pleaded, that, before the trespass supposed, one A. was possessed of the said goods; and the said goods being in the house of the said plaintiff, the said A. sold them to the defendant; by force whereof he was possessed: and, so possessed, came to the plaintiffs house where, &c. And by assent and licence of the plaintiffs wife, he entred into the said house, and **[267]** carried away the said goods, &c. Upon which, there was a demurrer. It was holden, that the same is no plea; for there is no colour given to the plaintiff; and the licence given by the wife, is not any matter for the justifying of the entry. And as to the goods, the plea was holden good: for, if A. might sell them being in the house of another, and not in his own possession, is scrupulous to the lay-people.

Wray, If the goods of the defendant were in the house of the plaintiff with the knowledge of the defendant, it had perhaps been a good plea; but that is not alledged here.

Cook, 30 E. 3. 23. In trespass for breaking of his pound, the defendant said, that he came to the place where the cattel were impounded, and there found the plaintiff's wife, to whom he offered pledges for the cattel impounded, to make amends according to reason, and prayed to have deliverance of the cattel; and the plaintiff's wife delivered them; without that, that he brake the pound, &c. And it was said, that this want of colour is but matter of form, which he ought to have alledged upon his demurrer; or otherwise he shall not have advantage of it.

Wray Justice, The defendant in his plea doth not meet with the plaintiff; therefore the plea is not good in substance. It was adjourned.

PASCH. 33 ELIZ. IN THE COMMON PLEAS.

CCCLIX. DOWNHALL AND CATESBY'S CASE.

In a formedon by Downhall against Catesby, the parties were at issue; and it was tryed by nisi prius. It was moved in banco, because that some of the jurors did eat and drink before that they gave their verdict, that the Court would not receive the postea.

The Court said, that we cannot do here; for we do not know if your information be false or not; and that matter ought to have been examined by the Justices of Nisi Prius, and they ought to certifie us of it, and then we shall have good cause to stay it.

And it was then said there, that if any of the jurors eat and drink before the verdict at their own costs, that the same doth not make the verdict void: but otherwise, if it be of the costs of the plaintiff, or the defendant.

4 Len. 113.

[268] MICH. 33 ELIZ. IN THE KINGS BENCH.

CCCLX. WITHRINGTON AND DELABAR'S CASE.

In an appeal of murder by Withrington against Delabar, of the death of her husband; the defendant pleaded, never accoupled in lawful matrimony: and pleaded over, not guilty. The plaintiff replyed, lawfully accoupled, but did not reply over to the felony. It way moved, as a discontinuance of the whole.

Wray, If the defendant pleads matter tryable at the common law, and over to the felony, there the plaintiff ought to reply to both; but where the first matter is not tryable by the common law, there the same is not needful. Quod cæteri justiciarii concesserunt.

MICH. 33 ELIZ. IN THE KINGS BENCH.

CCCLXI. LAKE'S CASE.

[See *Shoppee* v. *Nathan & Company*, [1892] 1 Q. B. 251.]

Stephen Lake, commissary of the Bishop of Canterbury, Fr. Alredge, register; and R. Hunt apparitor, were indicted of extortion, that they, colore officiorum suorum, had malitiose, accepted and received 11s. 6d. for the absolution of one B. who was excommunicated; where they ought to have but 2s. 6d.

And exception was taken to this indictment, because that all their offences are put together, scil. colore officiorum suorum; whereas the particular offence of every offender ought to be specially set down, but here they are confounded. Which see, by the statute of 25 E. 3. 9. that Ordinaries shall not be impeached by such general indictments, unless they say, and put in certain, in what thing, and of what, and in what manner the said Ordinaries have committed extortion.

But that exception was not allowed; for of that the party grieved cannot have notice, for they took in gross, and afterwards parted it betwixt them.

Another exception was, because it is not shewed, what is their due fee: and that was conceived to be a good cause of exception: and if no fee be due, the same ought to appear in the indictment. And afterwards the opinion of the Court was, that they should be discharged.

[269] HILL. 33 ELIZ. IN THE COMMON PLEAS.

CCCLXII. DOUGHTY AND PRIDEAUX'S CASE.

Action upon the case by Doughty against Prideaux, for these words, Thou art a wicked and perjured fellow, and art forsworn in the Court of Star-Chamber, as appeareth by an exemplification here under the seal of this Court. The defendant justified because of a bill exhibited in the same Court, by one Brooks, against the now plaintiff, for conspiring with another to endict the said Brooks of certain felonies. And the defendant now plaintiff, in his answer to the said bill, denyed upon oath the said conspiracy: and sentence was given in the said Court against the now plaintiff, ubi revera such a conspiracy was. The plaintiff replicando, said, that the said Brooks was arraigned and convicted upon the said indictment, and prayed his clergy. Whereupon it appeared, because the said Brooks was not legitimo modo acquietatus, that the same could not be any conspiracy in the now plaintiff, to procure the said Brooks to be indicted.

Walmesley and Periam, Justices, This replication is not good; for it may be that Brooks was acquitted, and yet the plaintiff did conspire, upon which a writ of conspiracy perhaps would not lie, but an action upon the case without doubt: for the replication doth not prove, that the plaintiff did not conspire, but that the plaintiff was not punishable for such conspiracy, &c.

4 Len. 101.

CCCLXIII. PASCH. 33 ELIZ. IN THE COMMON PLEAS.

The case was; An abbot leased lands to three men for 80 years; and in the end of the said lease was a clause, that if they died within the said term, that then the lessor might enter. The possessions of the abby came unto the King, who granted the reversion to J. S. who made a new lease thereof to J. D. for 21 years to begin after the expiration, determination, or surrender of the said former lease.

The 3 lessees died within the term; if J. D. might now enter before J. S. hath entred, was the question?

And it was the opinion of all the justices, that he could not; for it is in the

election of J. S. if he will take advantage of the condition, and defeat the lease; but that ought to be by entry: and none can make such entry but the lessor himself, or by his express direction, &c.

[270] PASCH. 33 ELIZ. IN THE KINGS BENCH.

CCCLXIV. BOND AND BAYLE'S CASE.

Bond brought a scire facias against Bayle's administrator of one T. B. upon a recovery against the intestate in an action of debt. The defendant pleaded before the said judgment given, the testator acknowledged a statute-staple to one B. and that the same was not paid in the life-time of the intestate, nor ever after, and that they had not goods of the intestate in their hands above to pay the said statute. Upon which, it was demurred in law.

Crook argued, that the bar was not good; for here no execution upon the statute is pleaded; and then the judgment and the statute being things of as high nature, that of which execution is first sued, shall be first satisfied: and if this action had been brought upon the obligation, the plea had not been good: for although that Brian saith, 21 E. 4. that recognizances shall be paid by executors before obligations; yet that is to be intended, when a scire facias is to be sued upon it: otherwise not. See 12 E. 3. Fitz. tit. Execution 73. In a scire facias upon a judgment in debt given against the testator; enquiry was, what goods the executors had at the day of the garnishment. And he said, it was moved, 20 Eliz. by Anderson, in this Court, in debt upon an obligation against an executor, the defendants pleaded, that the testator was endebted to one A. and that they had not more than to satisfie the same; and it was holden no plea; unless they had pleaded further, that a scire facias was sued forth upon the same.

But Wray said, that was not law: and there is a difference when the judgment is given against the testator himself, and where against the executors: for where judgment is given against the executors, the judgment which was first given, shall be first executed: but if two judgments be given against the testator, he who first sueth execution against the executors, shall be first satisfied, because they are things of an equal nature; and before suit, it is in the election of the executor to pay which of them he pleaseth. See 9 E. 4. 12. As if two men have tallies out of the Exchequer, he who first offers his to the officer, shall be first satisfied; for before that, it is in the election of the officer which of them he will pay. And a judgment is a higher record, than a statute; for the statute is not a record, but debitum recordatum recognitum. And therefore, 19 H. 6. if the release enrolled be lost, the enrollment of it is not of any effect.

And, Pasch. 20 Eliz. our very case was moved in the Court **[271]** of Common Pleas, in a scire facias upon a judgment given against the testator, the executor pleaded, that the testator had acknowledged a statute before, not satisfied, ultra which, &c. and it was holden no plea; for a statute is but a private and poquet-record, as they then called it.

And, 32 Eliz. between Coney and Barkham, the same plea was pleaded, and holden to be no plea. Also, if this plea should be allowed, great mischief would follow; for then no debts should be satisfied by executors; for it might be, that the statute was made for performance of covenants; which covenants peradventure shall never be broken. And afterwards, judgment was given for the plaintiff.

1 Len. 328. 1 Roll. 926.

MICH. 33 & 34 ELIZ. IN THE KINGS BENCH.

CCCLXV. BUTLER AND BAKER'S CASE.

See the principal case reported in Cook, 3 Part, 25. The argument of Egerton, Solicitor-General, in the said case, under his own hand, was as followeth; viz. The disagreement by the wife in pais, is good by the common law. An agreement may be

by word, ergo, a disagreement. If husband and wife lease for years, rendring rent, the husband dieth, the wife accepteth of the rent, that acceptance shall bind her, 15 E. 4. 17. 3 H. 6. 48. 48 E. 3. 13. 16 E. 4. 8. 11 H. 7. 13. 9 H. 6. 44. 10 H. 6. 24.

Tenant in tail makes a lease for years not warranted by the statute, rendring rent, and dieth, and afterwards the issue accepteth the rent, the same shall bind him; 21 H. 7. 38. 21 H. 6. 25. 14 H. 6. 26. 19 H. 6. 43. An enfant leaseth for years, rendring rent, and at his full age accepts the rent, 11 H. 7. 13. 21 H. 6. 24. 14 H. 8. 35. So where the successor accepts of a rent upon a lease made by the predecessor, 37 H. 6. 4. 8 H. 5. 10. 4 E. 4. 14. The same law in exchanges and partitions, if the wife accepteth of dower of the land which her husband hath taken in exchange, she shall be barred of that land which her husband gave in exchange, 6 E. 3. 50. 15 E. 3. tit. Bar. 125. 12 H. 4. 12. &c. And in all these cases where there is an agreement; and therein an agreement implyed, scil. an agreement to the lease, and a disagreement to have the possession, &c. And so agreement to the land received in exchange, and disagreement to the land given in exchange; and all that by word and act in pais.

And so here in these cases, estates are affirmed, and entred, and benefit of the possession waived and refused. So it is also of a right and title of action, 21 H. 6. 25. The lord entitu-**[272]**-led to have a writ of right upon disclaimer, accepts a rent of the tenant; now he is barred of his action. 13 Ass. 3. The disseisee accepts homage of the disseisor, it is a good bar in an assise. 21 Ass. 6. Pendant a cessavit, the tenant aliened, the lord accepted the services of the alienee, his action is gone, 11 E. 3. tit. Dower, 63. A woman entituled to dower, accepteth homage of the ter-tenant, the same is a bar of her dower: and as it hath been said of entries and actions, of which a man may refuse the benefit by word and acceptance in pais: so is the law also in cases of estates vested, if the party doth not enter.

Husband and wife tenants in special tail; the husband levyeth a fine to his own use, and afterwards deviseth the land to his wife for life, the remainder over, rendring rent; the husband dieth: the wife enters and pays the rent; now she hath waived her remitter, 18 Eliz. Dyer, 351. 10 E. 4. 12. The tenant enfeoffed the lord and a stranger, and made livery to the stranger, although the freehold vested in them both, yet if the lord disagreeth to the feoffment in futuro, he cannot enter and occupy the land, and he may distrain for the services, &c. If a disseisin be made to the use of the husband and wife, and the husband agreeth to it, the freehold vests in the husband and wife; but the wife is not a disseisor, and after the death of the husband, she may disagree unto the estate by word, 12 E. 4. 7. And also an agreement shall make her a dissessisor. See to the same intent, 7 E. 4. 7. and Litt. 129. Although that in such and the like cases, the estate vests in some manner, yet it shall never vest to the prejudice of the party without an express and actual agreement. And, that disagreement to an estate in such manner vested, may be in pais and by word, seems by a clause in the statute of 27 H. 8. cap. 1. Where a joynture is made after marriage, there the wife after the death of her husband may at her pleasure refuse her joynture, and have and demand, and take her dower, her writ of dower, or otherwise; scil. by word, and acceptance in pais. And if in a writ of dower, the tenant will bar the demandant, by joynture made during the coverture, he ought to say, quod intrando agreeavit. See Litt. in Dower ad Ostium Ecclesiæ; if the wife entreth and agreeth, the same is a good bar in dower, Littl. 8.

Now in the principal case, when the wife agreeth to the devise of Thoby, and the same is executed by entry; now the same is a full disagreement to Hinton.

It was afterwards objected, that although it be clear, that the wife may waive her joynture in Hinton, by word and act in pais, without matter of record; yet some conceived, that this manner of devise of Thoby is void by the statute of 32 & 34 H. 8. The statute enables to devise two parts, or so much as **[273]** amounts to two parts in value at the time of the death of the devisor, for then the will takes effect; which cannot be here in this case; for at the time of his death the joynture of Hinton was in force, and so continued, until the disagreement afterwards.

Also the words of the statute are, having a sole estate in feesimple; but here the devisor had but a reversion in fee expectant upon an estate tail, &c.

As to the first point, it was answered, that the disagreement doth relate to the death of the husband, and is now, as if no joynture had been made ab initio. And here the heir shall have Hinton by descent, and he shall be tenant to every præcipe; and if it be brought against him the same day that the husband dieth, the writ shall be good by the disagreement after, and the heir shall have his age, &c. And if the father had been a disseisor, and had conveyed the land, ut supra; now by this agreement of the wife, the heir shall be accounted in by descent, and thereby the entry of the disseisee taken away.

And if the heir in such case taketh a wife, and dieth, by this disagreement after, the wife shall have dower of Hinton; and hath such a possession, quod faciet sororem esse hæredem.

And if that the same day that the husband dieth, the heir levyeth a fine, or acknowledge a statute; or maketh by indenture enrolled a bargain and sale of it; by the said agreement, Hinton shall be subject to such acts of the heir. All which cases prove, that the devisor upon this matter at the time of his death, had a sole estate in feesimple in the mannor of Hinton; and that the third part in value descended to the heir: and so the devise of Thoby good.

It hath been objected, that here is not an immediate descent of which the statute of 34 H. 8. speaks; and here the mannor of Hinton doth not descend immediately; for there was a mean time between the death, and the disagreement; and so the will void for Thoby.

To that it was answered, that this word, [immediatè] sumitur dupliciter, re, & tempore, and shall be taken here immediatè re & statu, scil. that a reversion, or a remainder dependant upon a particular estate in possession which is mean, shall not be allowed for the third part descended; for a descent which takes away an entry, ought to be immediate; for a mediate descent doth not take away an entry, Litt. 92. as the descent of a reversion or remainder.

And if this word [immediatè] had not been in the statute, then the statute might have been construed, that it should be sufficient to leave the third part to descend in reversion or remainder; but this word [immediatè] makes it clear. And therefore the third part which descends, ought to descend immediatè in **[274]** re, & statu. Yet a reversion upon a lease for years, or for life, with the ancient rent reserved, is sufficient, and is a good and immediate descent of the third part.

And this word here [immediatè] to be construed ratione temporis, is a frivolous construction; for the wore, descent, implys that; for there cannot be an expectant and future descent; for descent is clearly immediate without mean time. But here in this case, the word, immediate, is to be taken in both senses, et re, et tempore; for by the relation of the waiver, it is, as if no joynture had been made, and the heir is to have the profits of the land from the death of his ancestor; and so the descent of Hinton immediatè, et re, et tempore; and, that the same time hath had such reasonable construction, is now to see: the statute of 18 H. 6. cap. 1. is, that the Chancellor shall make patents to bear date the same day that the warrant was made, and not before.

It hath been taken, that if the patents bear date after the warrant entred, they are good. Which see, 19 Eliz. Plow. Com. 492. in Ludford and Gretton's case.

The Statute of Acton Burnel is, that if the extendors extend the land too high, statim respondeant illi qui fecerunt extent. This word of time (statim) shall not be construed, that the extendors shall pay presently, but that they shall pay without delay; i.e. at the day limited in the statute. See 2 H. 4. 17, 18.

It hath been objected, that it is a great inconvenience, that the King for his third part should attend the pleasure of the wife, the time of her election; and therefore the will shall be void.

But the same is no inconvenience, for the joynture never was actually in the wife, to her prejudice, until she entred into the land, &c. And now by the waiver, the joynture is avoided ab initio to all intents, as if it never had been made: so as the King shall be answered of the entire profits after the time of the death of the husband; and may seize the whole land presently, without staying the election of the wife, or taking notice of her joynture.

And so are the words of the diem clausit extremum; tibi præcipimus quod omnia

terras & tenementa, of which, &c. et ea salvò custodias donec aliud tibi præceperimus; and that may be before any office found: and those who have any interest in the land, or otherwise may shew the same upon the traverse of the office, or in the Court of Wards, and have allowance of it; and so there is not any prejudice to the King: no more, than when tenant in knight-service deviseth all his lands, there division is to be made, and the King hath not any prejudice by it.

[275] In the true construction of this statute, it is very necessary to consider the intention and meaning of both statutes. And it is certain, that the said statutes were made for the benefit of the subjects, to enable them to dispose of their lands for the preferment of their wives, advancement of their children, and payment of their debts, whereof they were restrained by the Statute of 27 H. 8. of Uses.

The savings in the said statute are for the benefit of the King and the lords; so as provision is made not only for the benefit of the subjects, but also for the profit of the King and other lords.

The disability of the subjects to dispose of their lands, to the intents aforesaid, appears in the preface of the statute of 32 H. 8.

And the favour and grace of the said King towards his subjects, to supply the necessity of subjects, appeareth by the prefaces of both statutes.

The later statute, is an explanation of the former in divers points.

The first statute to persons, having mannors, &c. ex vi termini, includes tenants in tail, joynt-tenants, enfants, idiots, feme-coverts; but the same is explained by the later Act, to be of feesimple only, and of sole estates, and to persons of sound memory, not of coverture. And so, if the Kings tenant deviseth all his land, the same is good for two parts of it; so if he devise all which he hath in feesimple, and leadeth the third part to descend in tail.

This statute shall be taken strict against the heir: for the whole scope and intent of the Parliament was, to bind the heirs, and to enable their fathers to dispose, so as the third part be saved to the King and the lords. And that is manifest, for the estates made by collusion are preserved, and by an express clause in the statute kept in force against the heir; but void as to the lords.

As to certain readers cases, which have been put to prove, that these statutes ought to have a strict construction, I conceive, nihil operatur. A man seised of one acre by disseisin, and of two acres by good title, all holden in chief by knight-service, deviseth the two acres which he hath by good title, and dieth, so as the acre which he hath by disseisin descends to the heir being within age: the King seiseth, the third acre is devested by eigne title; the devise of the other two acres is good against the heir; for it is within the express words of the statute, having a sole estate in fee-simple. And yet by another branch of 34 H. 8. the King for his time, shall have recompence out of the other two acres; and he agreed the law to be so: but the same doth not conclude our case.

[276] A man seised of two acres in socage, and of one acre holden by knight-service in chief of equal value, is disseised of the acre holden in chief, and deviseth the other two acres in fee, the same is a good devise; for it is within the first branch expresly, having a sole estate in feesimple, and not having any lands holden by knight-service; for during the disseisin, he hath not the land whereof he was disseised, and therefore the devise is good for the benefit of the devisee, and the lord is not at any mischief: for the disseisee notwithstanding the disseisin, remains tenant of the lord as to the avowry, and the lord shall have the wardship of such heir, and may enter upon the disseisor, and so have a third part. And that case was put out of Gilbert's reading.

A man seised in fee of two mannors of equal value holden by knights-service in capite; and a third mannor of the same value is conveyed to him by deed of bargain and sale acknowledged; and before enrollment, he deviseth the two first mannors to J. S. in fee, and dieth; and afterwards the indenture is enrolled; yet the devise is not good for the said two mannors by any relation of the bargain and sale enrolled. That case may well be agreed to be law; for the estate doth not vest in the vendee before enrollment, and so the estate was not perfectly in the devisor at the time of the will; for although that the enrollment shall relate to prevent all acts and charges made mean by the vendor; yet it shall not relate to vest the estate, from the time of

the delivery of the deed, for the vendee cannot punish a trespass mean; and if the vendee hath a wife, and the vendee dieth before enrollment, and afterwards the deed is enrolled, she shall not be endowed; but here shall be some descent to take away an entry, yet the heir shall have his age. But in our case, it is otherwise; for by the waiver, the joynture was waived ab initio.

And he cited Carrs case, 29 Eliz. in the Court of Wards, the King granted the mannor of C. to George Owen in fee, tenend. in socage, and rendring 94l. per annum; and afterwards granted 54l. parcel of the said rent, to the Earl of Huntington in fee to be holden by knight-service in capite; and afterwards purchased the said rent in fee; and afterwards of the same mannor enfeoffed William Carr, who devised the same for the payment of his debts; and it was holden, that the devise was good against the heir. And the King was not entituled to livery or primer seisin: and therefore the defendant was dismissed. But peradventure the Queen shall have benefit of the Act. See Cook 3 Part, 30, 31. Butler and Baker's case.

The King gives lands unto A. in fee, to hold by knights-service during his life, and afterwards to hold in socage; he may devise the whole: for at the time when the devise took effect, he was tenant in socage.

[277] Lands holden in knight-service, are given to J. S. in tail, scil. to the heirs males of his body, the remainder to the right heirs of J. S. J. S. deviseth these lands, and afterward dieth without issue male, the same is good for two parts; yet during his life, he had not an estate in fee in possession.

The father disseiseth his son and heir apparent of an acre of land holden in chief by knight-service in capite; and afterwards purchaseth a mannor holden in socage, and deviseth the said mannor, and dieth, his heir within age, the devise is good for the whole, and the King shall not have wardship of any part, and that in respect of the remitter, and yet it is within the words, having sole estate in fee of lands holden; and within the saving.

Tenant in tail of an acre of land holden of the King in chief by knight-service, seised of two acres in fee, holden, ut supra, makes a lease for three lives of the acre entailed, reserving the accustomed rent, and afterwards deviseth the other two acres in fee; and afterwards dieth seised of the reversion and rent; the same is a good devise of all the two acres: and here is an immediate descent of the third part, for the same is within the words, in possession, reversion or remainder, or any rent or service incident to any reversion, or any remainder. See the statute of 34 H. 8.

A man seised of three acres of equal value holden by knight-service in capite, assureth one to his wife for her joynture by act executed; and deviseth another to a stranger, and the third to his wife also; the King in this case shall have the third part of every acre: but if the stranger waived the devise, the King shall have the acre to him devised, and the wife shall retain the other two acres, and it shall not go in advantage of the heir. So if he deviseth the said three acres severally to three several persons, to each of them one acre, and the one waives the devise in one acre, the devise of the other two is good; or otherwise, the King shall have the third part of every acre, &c.

Poph. 87. 1 And. 348. 3 Co. 25.

[278] CCCLXVII. Mich. 35 Eliz. In the Common Pleas.

The case was, An enfant was made executor; and administration was committed to another; viz. A. durante minori ætate, who brought an action of debt against the debtor, and recovered, and had him in execution; and now the executor came of full age.

It was moved, what should be done in this case, and how the party should be discharged of the execution; for the authority of the administrator is now determined, and he cannot acknowledge satisfaction, or make an acquittance.

Windham, Although the authority of the administrator be determined; yet the record and the judgment remain in force. But peradventure you may have an audita querela. But he conceived, that an administrator could not have such action; for

that he is rather a bailiff to the enfant, than an administrator: (see Prince's case, 42 Eliz. Cook 5 Part, 29.) which Rhodes concessit.

A. was bounden unto B. in an obligation of 100l. upon condition, to pay a lesser sum: the obligee made an enfant his executor, and died: administration was committed durante minori ætate to C. to whom A. paid the mony; it was doubted, if that payment was rightful: or, if the mony ought to have been paid to both?

Windham, Doth it appear within the record, that the enfant was made executor, and that administration was committed, ut supra? To which it was answered, No.

Then Windham said, You may upon this matter have an audita querela.

In this case, it was said to be the case of one Gore, 33 Eliz. in the Exchequer, in a scire facias, by an assignee of a bond against an enfant executor: he pleaded, that the administration was committed to A. and his wife during her minority. And it was adjudged no plea.

5 Co. 29.

[279] CCCLXVIII. Mich. 35 Eliz. In the Common Pleas.

Note: it was the opinion of all the justices, that if lessee for 20 years, makes a lease for 10 years, that he may grant the reversion without deed: but in such case if there be a rent reserved, there ought to be a deed, and also an attornment, if the rent will be had.

And it was agreed by them all, that if there be lessee for years, and the lessor granteth the land to the lessee and a stranger, that the reversion shall pass without livery or attornment; and that by the acceptance of the deed by him who ought to attorn: but whether he shall take joyntly or in common, or whether in a moyety or in the whole, the justices were of divers opinions. Ideo quære, for it was not resolved.

Jones Rep. 243.

The Fourth Part of the REPORTS of several CASES OF LAW, Argued and Adjudged in the several Courts at Westminster, in the time of the late QUEEN ELIZABETH'S Reign. Collected by a Learned Professor of the Law, WILLIAM LEONARD, Esq., then of the Honourable Society of Grayes-Inn. Published by WILLIAM HUGHES of Grayes-Inn, Esq. 1687.

[1] HIL. 20 ELIZ.

I. LAUNTONS CASE.

Emblements.

A. is bound in an obligation, that B. shall enjoy a lease of black acre immediately after his death: the land being sown, the executors of A. take the corn; it was holden, the obligation was not forfeited, for that by the laws the corn did belong to the executors.

II. PASC. 23 ELIZ.

Devise.

A man possessed of a term devised the same to his son when he came to the age of 18 years, and that his wife should have it in the mean time, and made his wife his executrix, and died before the son came to the age of 18 years, the wife took husband: it was holden that she should have the term as executrix, till the son came of the age of 18 years.

[2] III. MICH. 23 ELIZ.

A man made a feoffment in fee sub conditione, ea intentione, that his wife should have the land for her life, the remainder to his younger son in fee: the feoffee died without making such an estate; the heir of the feoffor entred; it was resolved, that it was not a condition, but an estate, which was executed presently according to the intent.

TRIN. 8 ELIZ.

IV. MANNING AND ANDREWS CASE.

Fine levied a Bar.

Husband and wife donees in special tail, the husband levied a fine of the lands. It was holden if the proclamations pass in his life time, or before the wife by her entry

had avoided the fine, the issue should be barred: otherwise, if the husband had died before the proclamation had passed.

Vide 1 Leon. 256. 1 Leon. 345.

27 Eliz. In the Common Pleas.

V. Buckhursts Case.

Extinguishment.

Lessee for 10 years granted a rent charge to his lessor for the said years, the lessor granted the remainder in fee to the lessee for years: it was the opinion of the justices, that the rent was gone, because the lessor, who had the rent, was party to the destruction of the lease, which is the ground of the rent.

26 Eliz.

VI. Pulmants Case.

Assumpsit.

One who is indebted promiseth to pay it upon request, in an action upon the case upon that promise, the party needs not to express the assumpsit with the request, it being an old debt, but otherwise it is, where there is such a promise, without any duty precedent.

VII. Hill. 26 Eliz. In the Kings Bench.

Assumpsit.

A man in consideration of 20l. paid him, promiseth to assign to J. S. the lease of a stranger: it was adjudged, that an action would lie upon such a promise, because the assumor might purchase the house and then assign it.

[3] Hil. 26 Eliz. In the Kings Bench.

VIII. Rawson and Browns Case.

Assumpsit.

A. being in prison at the suit of B. upon an account, and in custodia marescalli. the marshal suffers him to escape: A. being at liberty promiseth to B. that if he will permit him to be at large and further, if he do such an act, that he will pay to him 10l. which he doth not pay: whereupon B. brings assumpsit against him, it was adjudged that the action would not lie; for that both the considerations ought to be proved, and A. was at large before.

31 Eliz. In the Kings Bench.

IX. Strangborough and Warners Case.

Assumpsit.

Note, that a promise against a promise will maintain an action upon the case, as in consideration that you do give to me 10l. on such a day, I promise to give you 10l. such a day after.

31 ELIZ.

X. ESCRIGS CASE.

Assumpsit.

If an executor promiseth to a creditor, that if he will forbear to sue him until such a time, that then he will satisfie the creditor his debt; in that case the executor is liable to pay the debt of his own goods; adjudged.

30 ELIZ. IN THE KINGS BENCH, ROT. 30.

XI. KIRKMAN AND REIGNOTTS CASE.

Occupant.

A lease was made to two, habendum to them, and to two others for their four lives, and the longer liver of them: it was resolved, that the two named in the habendum should not take any thing, and that if the two first die, there should be no occupancy, for the lives of the two in the habendum, was intended an estate to them, and not a limitation of the estate of the first two.

PASC. 30 ELIZ.

XII. BARKHOUSE CASE.

Forfeiture.

Debt against lessee for years for rent: the defendant claimed fee in the land whereas he had no fee: it was resolved that it was a forfeiture.

[4] XIII. PASC. 31 ELIZ. IN THE COMMON PLEAS.

Avowry.

It was resolved by the justices, that an avowry might be for part of a rent.

MICH. 28 ELIZ. IN THE KINGS BENCH.

XIV. STRANGDEN AND BURNETS CASE.

Pleadings.

In an action of trover and conversion of goods to his proper use in Ipswich: the defendant pleaded that the goods came to hands in Dunwich in the same county, and that the plaintiff gave unto him all goods which came to his hands in Dunwich, absque hoc that he is guilty of any trover or conversion in Ipswich: it was ruled to be a good manner of pleading, by reason of the special justification, vide 27 H. 6. But where a justification is general, the county is not traversable at this day, vide 19 H. 6, 7.

XV. 24 ELIZ. IN THE COMMON PLEAS.

Infant.

An infant made a lease for years rendring rent, and when he came to his full age, he said to his lessee, God give you joy of it: it was holden by Mead Justice, that thereby the lease was affirmed and made good.

PASC. 25 ELIZ.

XVI. FULLERS CASE.

One is bound to pay his rent at a day certain, payment before the day, adjudged, doth not discharge him.

29 ELIZ. IN THE KINGS BENCH.

XVII. CARTER AND MARTENS CASE.

Payment.

Two are bound for a debt, the principal makes the surety his executor who pays the debt generally: quære if it shall be as executor or as obligor.

XVIII. POPHAMS CASE.

Bargain and Sale.

Land was bargained and sold, the bargainee levies a fine of the lands, and afterwards within the six months the [5] deed is enrolled. It shall pass by the fine, and the conusee shall have the land, for the enrollment shall relate to the time of the bargain and sale.

18 ELIZ.

XIX. HENNINGHAMS CASE.

It was adjudged in this case, that he who is special heir by the custom, as of borough English land, shall have the writ of error, and not the heir at the common law.

HIL. 19 ELIZ. ADJUDGE.

XX. PARRY AND HERBERTS CASE.

Condition.

Lessee for years upon condition that he shall not grant over the land by will or otherwise, and he deviseth the same to his executors, who except it only as executors, and not as devisees: it was holden, that the condition was broken: because he had done as much as in him lay to have granted it over.

IN THE EXCHEQUER.

XXI. SIR THOMAS HOBBIES CASE.

Heirs.

A man hath issue two sons, and is attainted, the eldest son purchaseth land, and dyeth without issue, the second son shall inherit the land as heir to him, notwithstanding the attainder of the father, because the blood is not corrupted between the two sons.

MICH. 29 ELIZ. IN THE KINGS BENCH.

XXII. BARTON AND EDMUNDS CASE.

Infant. Assumpsit.

An infant and another were bound for the debt of the infant, the infant at his full age promised to save the other harmless, the infant died: it was adjudged, that upon this assumpsit, an action upon the case did lie against his executors.

XXIII. MICH. 36 ELIZ. IN THE KINGS BENCH, ADJUDGED.

If an executor promise to pay a debt when he hath not assets; it was the opinion of all the justices; **[6]** that no action upon the case lieth against him; but if he hath assets, then it is otherwise: and the heir if he hath nothing by descent, is not subject to an action upon such a promise.

MICH. 28 ELIZ.

XXIV. THE LORD PAGETS CASE.

Indictments.

An indictment was quare vi & armis clausam A. B. apud D. fregit, whereas A. B. then had a lease at will of the land, the matter was for digging of turfs: the indictment was holden to be good.

XXV. 25 ELIZ. IN THE KINGS BENCH.

Indictments.

Indictment de uno equo, where it was a gelding, holden not good: but otherwise it is, where trespass was brought de equo castrato, and the jury found a gelding, and adjudged for the plaintiff.

26 ELIZ.

XXVI. TUCKER AND NORTONS CASE.

Execution.

An infant in execution upon condemnation in debt sued a writ of error, his father and brother bailed him: it was said the recognisance shall be by them two only that the infant shall appear, and if the judgment be affirmed, that they pay the mony, and not that they shall render his body to prison, for when he is once discharged out of execution, he shall never be in execution again.

XXVII. MICH. 29 ELIZ. IN THE COMMON PLEAS.

Nobleman. Recognizance.

It was holden by the justices, that a nobleman shall be bounden with his bail in a recognizance, that he shall render his body, and that upon the statute of 13 E. 1. if he hath not goods or lands, his body shall be taken in execution, for the law in such case excepts only clarks.

XXVIII. Hil. 26 Eliz. In the Exchequer.

Felo de se.

The Queen granted to one catalla utlagatorum & felonum de se within such a precinct, one indebted to the Queen having goods is felo de se, within the precinct: resolved the Queen should have the goods to satisfie her debt.

[7] 26 Eliz. In the Kings Bench.

XXIX. King and Cottons Case.

Disseisin.

Lessee for life, the remainder in tail, the remainder in fee, lessee for life makes a deed of feoffment of the land, and delivers it, and makes a letter of attorney to another to deliver seisin, who enters and makes livery accordingly; adjudged that the attorney is a disseisor.

26 Eliz. In the Kings Bench.

XXX. Gerrards Case.

Prohibition.

The owner of the lands severed his tythes, and a stranger took them and carried them away. The parson libelled in the Spiritual Court against the owner of the land for the tythes; who thereupon prayed a prohibition. It was adjudged no prohibition should issue in this case: for that he might plead the same matter in Bar in the Spiritual Court.

Hil. 31 Eliz.

XXXI. Willet and Wilkinsons Case.

Surrender.

Note, it was adjudged, that if lessee for years take another lease from the guardian in soccage, that the same is a surrender of his first lease: note, the second lease was made in the name of the guardian.

Trin. 26 Eliz.

XXXII. Ould and Conyes Case.

Commoner. Conies.

It was adjudged, that a commoner cannot kill conies which destroy his common, though he hath not any other remedy.

Trin. 29 Eliz. In the Kings Bench.

XXXIII. Mayes Case.

One sent a letter by a carrier to a merchant for certain merchandizes to send them to him, receiving a certain sum of mony, the merchant sent the merchandizes by the carrier, without receiving the mony: it was the opinion of the justices, that the buyer should not be charged for the mony, for it was a conditional bargain, and it was the folly of the merchant to trust the carrier with the wares.

[8] MICH. 30 ELIZ.

XXXIV. HALTONS CASE.

Recognizance. Inrollment. Chancery compel Attornment.

A recognizance was acknowledged before Sir N. Read one of the masters of the Chancery, and the recognizor died before it was enrolled, it was doubted, if it might be enrolled at the petition of his executors; it was agreed by the justices that it might be well enough, for it is like to a conusans of a fine before a Judge, which may be removed out of the hands of the Judge by certiorari, and yet it is not a record till the perfection of it: at the same time it was doubted also if the Chancery would aid a man, when there wanted the words (heirs) in a deed where the land was sold for mony. But it was agreed that after a fine levied the Chancery might compel the tenant to attorn.

HIL. 27 ELIZ.

XXXV. HOLLAND AND HOPKINS CASE.

Entre congeable.

In ejectione firmæ it was agreed by the Court, that if a disseisor be of an 100 acres, and he lets the same to divers for years, that the entry into one acre by the disseisee is an entry against them all; but if they had been tenants for life, quære, for that then he might have his action against them: and it was said, that if one makes a lease for years, rendring for the first two years 10l. and afterwards 30l. every year, with condition, if the rent of 30l. or any part of it be behind, that the lessor enter; the lessor enters for not payment of the 10l. that his entry is lawful, for the 10l. was parcel of the rent, for it was but one rent.

TRIN. 29 ELIZ. IN THE KINGS BENCH.

XXXVI. CLAMP AND CLAMPS CASE.

Copyholder. Surrender.

A copyholder in possession surrendred the reversion of his land post mortem suam to the lord to an use, &c. It was adjudged, that thereby nothing passed.

XXXVII. TRIN. 21 ELIZ. IN THE COMMON PLEAS.

Leases.

A lease was made of a mannor, with all gardens, orchards, yards, &c. and with all the profits of a wood, except to the lessor forty trees to take at his pleasure: it was a question if the lessee should have the wood: it was the opi-[9]-nion of Dyer, that the wood was not comprised within the lease, but the lessee should only have the profits, as pawnage, herbage, &c. And he said it was a case adjudged; a man made a lease of a wood ad faciendum maximum proficuum meliori modo quo poterit, that the lessee thereby could not cut the trees, nor do waste.

MICH. 33 ELIZ. IN THE EXCHEQUER.

XXXVIII. BUTLER AND LIGHTFOOTS CASE.

Copyholder. Surrender.

It was holden by the barons, that if tenant for life be of a copyhold, the remainder ver in fee to another, he in the remainder, may surrender his estate, if there be no

custom to the contrary; for the estate of tenant for life, and he in the remainder, are but one estate, and the admittance of the particular tenant is the admittance of him in the remainder.

3 Leon. 239.

XXXIX. Mich. 33 Eliz. In the Exchequer.

Upon Statute of 5 *Eliz. Apprentices.*

In an information upon the statute of 5 Eliz. cap. 4. against one for exercising the trade of a chandler, not having been an apprentice to the same by the space of 7 years: it was holden by the justices, that for as much as he had been apprentice to a taylor for 7 years, which is one of the trades mentioned in the said statute, that the penalty thereof did not extend to him, but judgment was given against the informer: for it was holden clearly upon the said statute, that if one hath been an apprentice for 7 years at any trade mentioned within the said statute, he may exercise any trade named in the said statute, although he hath not been an apprentice to it.

Mich. 33 Eliz. In the Exchequer.

XL. Sir John Hawkins and Chapmans Case.

Assignment of Bonds to the Queen.

If A. be bounden to B. by obligation with condition for the performance of covenants, although the covenants, or some of them, be for payment of money, yet the assignment of such bonds to the Queen shall not be received, and if it be assigned, it shall be put out of the Court; for no bonds shall be assigned ut supra, but such which are made for payment of money.

XLI. Mich. 33 Eliz. In the Exchequer.

A. lessee for years, the remainder to B. for years; the term of A. came to the Queen, and afterwards the reversion. Clark Baron said, that the lease of B. should begin presently, and ci-[10]-ted the case 1 Eliz. between Wortesly and Adams, where a lease for years is made to A. and afterwards a lease in reversion is made to B. for years. A. obtains an estate for life from him in the reversion; the lease of B. shall begin presently: but Manwood Chief Baron held that the first lease was not extinct.

XLII. Mich. 33 Eliz. In the Exchequer.

Upon Stat. 31 *Eliz. of Inmates.*

Upon the statute 31 Eliz. cap. 7. the case was this: A woman having a great messuage, viz. a brewhouse alloted to her for her dower, let the same to another, reserving to her self two or three rooms of it, and now an information was exhibited against the lessee upon the said statute. Clark Baron, A cottage proprie loquendo, is where a poor man inhabits, and this being a great messuage cannot be said a cottage; inmates are, where there are more families than one. Manwood, Be it a messuage or a cottage, for more families than one makes a messuage a cottage, as to this statute. Gent. The words of the statute are, There shall not be more families than one in any cottage made, or to be made, and I conceive it ought to be a cottage accounted in law, before the inhabitations of the inmates. Clark. If I grant to you all my cottages in D. my messuages shall not pass: if I marry my daughter, and she and her husband inhabit with me in the same house, are these inmates? Manwood, An inmate is such an one who is at his own finding, and therefore if the husband and

wife are entertained there at the charge of the father of the daughter, they are not inmates: and if in our case any inmate be, the same is the woman, for she hath the lesser part of the messuage.

MICH. 33 ELIZ. IN THE EXCHEQUER.

XLIII. CURSONS CASE.

Execution of a Statute binds the King. Assignment to the Queen.

Curson acknowledged a statute to Alderman Starkey of London, and afterwards he acknowledged another statute to one Hampden, who assigned the same to Fitton, who assigned the same to the Queen: Starkey sued forth execution upon his statute, and the lands of Curson are extended, and he hath a liberate of it: it was agreed by all the barons, if Starkey had execution upon his statute before the Queen, the execution shall stand against the Queen, and the Queen should not put him out. A. recovers debt in the Kings Bench, so as he hath title to sue execution by elegit. The defendant sold his lands, and afterwards A. assigned his execution to the Queen: it was holden, that the Queen should not have prerogative against the feoffee, to have execution of the whole land; and it was holden by Manwood Chief Baron, If execution be had upon a **[11]** puisne statute, and that is afterward avoided by an elder statute, and the elder statute is satisfied by the execution, now the younger recognizee shall enter without suing forth a new execution.

3 Leon. 239.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

XLIV. CLARKS CASE.

Leases by Corporations. Misnosm. Leases.

In ejectione firmæ, the case was, the master, brothers, and sisters of the Hospital of the Blessed Mariæ Virginis, by indenture, by the name of the Hospital Beatæ Mariæ, &c. leaving out the word (virginis) leased the land: it was resolved, that notwithstanding the want of the word (virginis) that the lease was good: then it was moved, that the words of the indenture are, Hæc indentura inter magistrum, fratres, & sorores Hospital Beatæ Mariæ, &c. Testatur; that the said master, with the assent of the brothers and sisters aforesaid, had leased to A. in cujus rei testimonium, the said master, with the assent of the brothers and sisters aforesaid had put their common seal: Ayliffe and Clench Justices, held that the lease was void, for here the brothers and sisters, being one entire body with the master, are not parties to the indenture, but give their consent only: and it is not like to the case, where abbot or prior makes a lease for years, with the assent of their covent, for the monks and friers, being dead persons in law, cannot be parties to the lease; but here in the case at Bar, the brothers and sisters are persons able in law: and it is not like to the case of parson, patron, and Ordinary, where the parson with the assent of the patron and Ordinary, grant a rent-charge, for there the parson is the principal grantor, and the others have not any express interest in the land charged: Gawdy Justice contrary, It is more honourable for Judges to maintain leases made by corporations, than for to permit them to avoid the same: and he said for law, If two joyntenants be of lands, and they make the like indenture, viz. testatur, that one of them with the assent of the other deviseth the land, in witness whereof he, with the assent of the other, hath put his seal, it is a good demise by them both: but Clench said, that is not like our case, for the two joyntenants are distinct persons and the one of them may assent to the other; but in our case, the master, brothers, and sisters are but one person in law, and a body cannot be distinct, so as one can consent to the other: which Ayliffe concessit: Wray Chief Justice was absent in the Star-Chamber.

[12] TRIN. 26 ELIZ. IN THE KINGS BENCH.

XLV. HARVEY AND HARVEYS CASE.

Suit for Legacies. Prohibition.

Clare Harvey libelled against Sebastian Harvey, the executor of Sir James Harvey their father, for a legacy bequeathed to him by his father in his will. By which he willed, that after his death his goods should be divided and parted betwixt his children, according to the laudable custom of London, and averred in his libel that the goods and chattels whereof the testator died possessed, amounts to such a sum, and that it belonged unto him, being one of his children, to demand so much, virtute legationis prædict. The defendant came and prayed a prohibition, and Wray Chief Justice conceived he ought to have it, for here is not any legacy, but the testator setteth forth his meaning, that his pleasure is that the custom of London should be observed in the disposition of his goods ; and the said Clare is put to his writ de rationabili parte bonorum. But yet afterwards, a special consultation was granted.

PASC. 27 ELIZ. IN THE COMMON PLEAS.

XLVI. SANDERSONS CASE.

Leet.

Note, it was adjudged by the Court, that pound-breach is not inquirable in a leet, for it is not a common nusans : but Rhodes Serjeant said, that excessive toll is inquirable in a leet. Vide Book of Entries 390.

XLVII. PASC. 37 ELIZ. IN THE COMMON PLEAS.

Abatement of Writ. Amendment.

In a quare impedit by the Queen, exception was taken to the writ, because the words were quod permittat ipsam præsentare ad rectoriam de D. where it ought to be ad ecclesiam : the Court awarded that the writ should be openly amended in Court by a clerk of the Chancery.

XLVIII. PASC. 27 ELIZ. IN THE COMMON PLEAS.

Pleadings.

In a writ of entry for disseisin, the tenant said, that the house in demand is within the City of London, and that the said city is an ancient city, and that King Henry 3. concessit civibus civitatis prædict. quod non implacitentur de terris, & tenementis suis, &c. extra muros civitatis prædict. and said that he himself is a citizen of London, and demanded judgment of the writ ; and to the pleading he further said, Sed illis rectum teneatur infra civitatem prædictam secundum consuetudinem civitatis prædict. **[13]** Exception was taken to the plea, because the tenant did not shew before that by their custom they ought to be impleaded : and by the opinion of the whole Court, the tenant ought to have shewed, that the citizens for their lands there ought to be impleaded in the Hustings, &c. And the general words in the plea Sed illis rectum teneatur infra civitatem prædictam secundum consuetudinem civitatis prædict. do not supply the defect aforesaid : and afterwards it was awarded that the tenant plead ouster.

MICH. 21 ELIZ. IN THE COMMON PLEAS.

XLIX. HUNT AND SONES CASE.

Assumpsit.

An action upon the case by W. Hunt against W. Sone. The plaintiff declared, quod cum idem Hunt was seised in his demesn as of fee, of certain lands, and shewed the same in certain; prædict. Sone in consideration that the said Hunt permit the said Sone occupare terras prædict. ab eodem die. 20 Julij 27 Eliz. usque ad secundum diem Novembris, which should be in anno 1589. assumed and promised, that he the said William Sone ad festum omnium sanctorum proxime sequend. 10l. 2s. 6d. ac ab inde annuatim durante dict. termino. 20l. 5s. ad Festa Annunciationis Beatæ Mariæ, ac omnium sanctorum, per æquales portiones solvend. eidem Hunt bene & fideliter contentare vellet, at licet prædict. W. Hunt permisit præfat. Sone occupare terras prædict. a dict. 28 die Julij 27 Eliz. usque ad secundum diem Novemb. 28 Eliz. licetque etiam post dict. 20 diem Julij 27 Eliz. & ante prædict. diem secund. Novemb. an 28 Eliz. dict. fest. omnium sanctorum an 27. Supradict. ac Fest. Annunciationis Beatæ Mariæ Virginis, ac fest. omnium sanctorum 28 Eliz. præterierunt, prædict. tamen W. Sone dict. 10l. 2s. 6d. ad prædict. fest. omnium sanctorum proxime sequend. post permissionem & assumptionem prædict, ac aliam 10l. 2s. 6d. ad Fest. Annunciationis 28 Eliz. ac alia 10l. 2s. 6d. ad fest. omnium sanctorum an 28. Eliz. superdict. nondum solvit. The defendant pleaded, that the plaintiff entred into parcel of the premises 6 October 28 Eliz. & eadem occupare eundem Sone non permisit; upon which they were at issue, and it was found for the plaintiff; it was moved in stay of judgment, that the plaintiff had no cause of action before that all the term was expired; for it is an entire assumpsit, and cannot be severed by action, and therefore it was said, that if I promise to pay you 10l. viz. at such a feast 5l. and at such a feast other 5l. there before the last day of payment no action lieth, for the sum of 20l. is one sum entire: but if I promise to pay another, at Easter next 10l. and at Midsummer as much, here they are several assumpsits, and upon default of payment of the first sum an action will lie without excepting the latter payment. But at last the Court agreed, that judgment, notwithstanding that exception **[14]** should be given for the plaintiff, and that the declaration was good enough, as well in respect of the exception aforesaid, as also that the word (licet) was effectual enough to set forth the permission.

2 Leon. 107. Owen 42. 3 Cro. 118. 1 Roll. 29 & 30 ibid.

L. HIL. 31 AND 32 ELIZ. IN THE COMMON PLEAS.

A. disseised B. of two acres of land and leased one of them to C. at will, and the other acre to D. at will, and they entred accordingly: B. the disseisee by lease leased both acres to E. for years, and entred into one of the acres in the name of both, and sealed and delivered the lease to E. It was holden by the Court to be a good lease to maintain an ejectione firmæ of both acres.

LI. MICH. 32 ELIZ. IN THE COMMON PLEAS.

A seised of certain lands, and having two sons, devised part of his lands to his eldest son in tail: and the other part of his lands to his younger son in tail, with this clause in the will, that if any of his sons dyed without issue, that then the whole land should remain to a stranger in fee, and dyed, the sons entred into the lands devised to them respectively, and the younger son died without issue, and he to whom the fee was devised entred: it was adjudged, that this entry was not lawful, and that the eldest son should have the land by the implicative devise.

2 Cro. 655, 656 plus. 2 Roll. 416. Johnson versus Smart cont.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

LII. FRICE AND FOSTERS CASE.

Variance. Evidence good to maintain Issue.

In ejectione firmæ, the plaintiff declared upon a lease made 14 Jan. 30 Eliz. to have from the Feast of Christmas then last before, for three years; and upon the evidence the plaintiff shewed a lease, bearing date the 13 day of January the same year, and it was found by witnesses, that the lease was sealed and delivered upon the land the 13 day of January: whereupon Puckering and Cowper Serjeants moved on the part of the defendant, that for that variance between the declaration and the evidence of the plaintiff, that the jury might be discharged: but Anderson Chief Justice said, that the evidence was good enough to maintain the declaration, for if the lease was sealed and delivered the 13 of January, it was then a lease 14 January, quod cæteri justiciarii concesserunt.

[15] LIII. MICH. 32 ELIZ. IN THE COMMON PLEAS.

Quare Impedit by Executors. Collation.

In a quare impedit against the Bishop of Coventry and Lichfield: the case was, that A. seised of an advowson in fee, the church voided, the bishop collated wrongfully, A. dyed, it was holden that his executors might have a quare impedit upon that disturbance, and that by the equity of the statute, which gave an action of trespass to executors of goods carried away in the life of the testator, 4 E. 3. cap. 7. and that the clerk should be removed at the suit of the executors.

MICH. 32 ELIZ. IN THE KINGS BENCH.

LIV. HARVEY AND THOMAS CASE.

Fine by the Husband where avoids a Lease & ê contra.

The case was that the husband seised of land in the right of his wife, made a lease of it for years, and afterwards he and his wife conveyed the land to a stranger by fine, the husband died. Wray Chief Justice was of opinion that the conusee should hold the land discharged of the lease. Gawdy, contrary, In case of a rent granted, or a recognizance acknowledged by the husband, the conusee of the fine shall avoid any of them; but in this case the conusee meddles with the land it self, and an estate in the land is conveyed by the husband, which none but the wife or her heirs shall avoid; and if the wife, after the death of her husband, accept the rent upon such a lease, by that the lease is confirmed.

1 Roll. tit. Charge in Marg. 389. Plow. Quær. 31. 261. ib. plus.

MICH. 33 ELIZ. IN THE KINGS BENCH.

LV. BLABY AND ESTWICKS CASE.

Assumpsit. Attornment.

In assumpsit, it was moved in stay of judgment, that one of the defendants was dead after verdict; but notwithstanding that allegation, judgment was given, for the Court cannot take notice of it judicially, nor any of the parties hath day in Court to plead it, and therefore the Court is not to have regard to such informations.

Wray, It is not honourable for us upon such surmises, which cannot be tryed to delay judgment; and also the party is not without remedy, for he may have a writ of error.

33 ELIZ. IN THE KINGS BENCH.

LVI. HORE AND BRIDDLEWORTHS CASE.

Hore brought trespass against Briddlesworth, quare clausum & domum suam fregit; the defendant pleaded, and put **[16]** the plaintiff to a new assignment, i.e. a house called a stable, a barn; and another house called a carthouse and garnier: and that was assigned for error for that assignment is not warranted by the declaration. Gawdy said it was good enough, for domus in the declaration contains all things contained in the new assignment; but if the declaration had been of a close, and the new assignment of a barn, it had not been good. Wray Chief Justice, Domus est nomen collectivum, and contains many buildings, as barns, stables, &c. And such was the opinion of the Court.

MICH. 33 ELIZ. IN THE KINGS BENCH.

LVII. MANS CASE.

Prohibition. Consultation.

Man was sued before the commissioners in ecclesiastical causes, for an incestuous marriage, viz. for marrying his wives sisters daughter, and although it be not expressly within the Levitical degrees, yet because more farther degrees are prohibited the Archbishop of Canterbury, and other the commissioners gave sentence against him, upon which he sued a prohibition upon the stat. of 32 H. 8. c. 38. The prohibition was general where it ought to be special, that it be not within the Levitical degrees, and therefore a consultation was granted.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

LVIII. DOYLIES CASE.

Appeals.

In an appeal de roberie against Doyly; it was agreed by the justices, that the party robbed shall have an appeal of robbery 20 years after the robbery committed, and shall not be bound to bring it within a year and a day, as in the case of an appeal of murder: vide contr. 22 Ass. 97. vide Stamford 62.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

LIX. RUISHBROOK AND PUSANIES CASE.

Traverse.

The plaintiff brought trespass for pulling down his hurdles in his close: the defendant, justified, by reason that one Beddingfield was lord of the mannor of D. and that the said Beddingfield, and all those whose estate he had in the said mannor, had had a free course for their sheep in the place where &c. And that the tenant of the said close could not there erect hurdles without the leave of the lord of the mannor, and that the said Beddingfield let to the defendant the said mannor, and because the plaintiff erected hurdles without lease, &c. **[17]** in the said close, he cast

them down, as it was lawful for him to do: the plaintiff replyed of his own wrong without cause, &c. It was holden by the justices to be an ill plea, for the plaintiff ought to have traversed the prescription.

19 Eliz. In the Common Pleas.

LX. Par Marquess of Northamptons Case.

Leases, by a Baron contrary to Act of Parliament, void.

Par Marquess of Northampton took to wife the Lady Bourchier, heir of the Earl of Essex: who levied a fine of the lands of the lady sur conusans de droit, &c. with a grant and render to them for life, the remainder to the right heirs of the body of the said lady. And afterwards by Act of Parliament 35 H. 8. it was enacted, that the said lady should retain part of her inheritance, and dispose thereof as a feme sole, and that the said marquess should have the residue, and that he might lease the same by himself without the wife for 21 years, or lesser term, yielding the ancient rent, being land which had been usually demised, &c. The marquess leased the same for 21 years, and afterwards durante termino prædict. he let the same land to another for 21 years, to begin after the determination of the former lease. It was moved that the last lease was void, for three causes; 1. Because the marquess had but for life, and then it cannot be intended, that the statute would enable one, who had an estate so determinable to make such a lease, which peradventure could not begin in his life. 2. The letter of the Act is 21 years or under, and the word (under) strongly expounds the meaning of the Act to be not to extend to such an estate, for hereupon the matter is a lease for 40 years. 3. Because the land leased is the inheritance of the wife; and it was said that in the case of one Heydon, such a private Act of Parliament was strictly construed, it was enacted that all copies for three lives granted by the Lord Admiral, of the lands of his wife which was Queen Katherine should be good: the Admiral granted in reversion for three lives. It was holden that the grant was void, and not warranted by the said private Act of Parliament. Dyer, The words are general, omnes dimissiones, therefore not to be restrained to special leases. Manwood, A feme covert by duress joyns in a lease with her husband, it shall bind her. The case was adjourned.

3 Leon. 71.

LXI. Mich. 19 Eliz. In the Common Pleas.

Debt for Rent.

The Queen leased for years rendring 10l. rent; the lessee granted the land over to A. rendring 20l. rent: A. granted the land over to B. who surrendred to the Queen, **[18]** and took a new lease: and Manwood said, that the first lessee should have an action of debt for the rent of 20l. against him, who was possessed of the land, and not against A. his assignee, for it is a rent issuing out of the land, and he who hath the possession of the land shall pay it, and no other; for if any part of the land be evicted, the rent shall be apportioned; and because it is meerly a rent, and ensues the privity real, viz. the possession of the land, and not the privity personal, the person of him who was party or privy to the contract: and he said, if the first lessee, who reserved the rent, entred upon the land, the rent is suspended. Dyer, The first lessee hath election which of them he will sue, 18 H. 6. 1. in debt, against lessee for years, for the arrearages of rent reserved upon it, he needs not declare that the lessee had entred, for the contract is the ground of the action 44 Eliz. 3. 5. Debt against the lessee, notwithstanding the assignment.

MICH. 26 ELIZ. IN THE COMMON PLEAS.

LXII. BLUETS CASE.

Obligation forfeited.

Bluet granted the next avoidance to Stell and Brooks, and was bound to Brooks in an obligation that he should enjoy the said presentment without any disturbance or claim of the said Bluet: Stell released to Bluet his interest on the said advowson; the church became void, Bluet offer'd to joyn with Brook, in presenting to the avoydance: it was holden in this case, that the obligation was forfeited, although that Bluet had a puisne title to it, after the obligation was entered into.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

LXIII. SHREWSBURY AND THE INHABITANTS OF ASHTONS CASE.

Action upon Statute of Huy and Cry.

An action was brought by Shrewsbury against the inhabitants of the hundred of Ashton in the county of Bucks, upon the Statute of Huy and Cry: it was moved by Fleetwood Serjeant, for the defendants, that if upon such huy and cry the inhabitants do their endeavours as much as in them is, to pursue and take the malefactors, and yet they cannot apprehend them, that in reason they ought not to be charged: but the whole case was very strongly against him: for Anderson Chief Justice said that the inhabitants of the hundred in which the robbery is done are bound to apprehend the felons, or to satisfie the party robbed: and the party robbed is not bound to give notice to the inhabitants, nor to direct them which way the felons took their flight, but the inhabitants are bound to pursue the **[19]** felons without any such instruction. And afterwards the inquest was taken, and gave a verdict in this manner: that where the plaintiff had declared that the robbery was done in the parish of D. in the hundred aforesaid, the jury found, that the place where the robbery was done was a lane within the said hundred, and that the one side of the said lane was within the parish of S. and the other side within the said parish of D. and that the robbery was done on the side of the said lane, which was in the parish of S. and prayed the opinion of the Court upon the matter: and the whole Court was clear of opinion that notwithstanding the exception, the plaintiff should have judgment, for here is the right hundred, which ought to be charged, and the mistaking of the parish was not to the purpose.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

LXIV. JOSSELIN AND JOSSELINS CASE.

Jeofails.

In debt; the plaintiff declared, that he let certain lands for years to the defendant, rendring rent payable at the Feasts of the Annunciation and St. Michael, or within forty days after every of the said feasts, and that the rent was behind at the Feast of St. Michael last past, unde actio accrevit: the defendant pleaded, nihil debet: upon which they were at issue: it was shewed to the Court that here upon the pleading is a jeofail, for the rent is reserved payable at the said feasts, or within forty days after; and he declares that the said rent, upon which the action was brought, was behind at St. Michael, without respect to the forty days after, which cannot be; for before the forty days after each feast, no action did lie; whereupon the Court awarded a repleader.

MICH. 32 ELIZ. IN THE KINGS BENCH.

LXV. THE QUEEN AND THE EARL OF SHREWSBURIES CASE.

Grants of the King. Office of Marshal of the Kings Bench. Recital in Grants of the King.

The Queen granted to George Earl of Shrewsbury, an. 15 Eliz. the office of Earl Marshal of England, and now came the said earl and prayed that J. N. one of his servants, to whom he had granted the office of Marshal of the Kings Bench, might be admitted to it, because that the same is an office incident to his office, and in his power to grant; and that Knowles, to whom the Queen had granted the same office of Marshal of the Kings Bench, which she had by the attainder of Thomas Duke of Norf. might be removed. And a president was shewed M. 14. and 15. Eliz. between Gawdy and Verney, where it is agreed, that **[20]** the said office was a several office from the said great office, and not incident to it; and as to the case of 39 H. 6. 33 & 34. the truth is, that the said Marshal of the Kings Bench was granted expresly to the duke, and so he had it, not as incident to his office of Marshal of England: on the other side were three presidents shewed; in the time of Edward 2. that the office of Marshal of the Kings Bench was appendant to the said office of Marshal of England. And 8 H. 2. when the said great office was in the King, he granted the said office of Marshal of the Kings Bench: but 26 R. 2. both offices were rejoyned by Parliament as they were in ancient time before; and there was also shewed one patent of 4 E. 4. and another of 19 H. 8. by which it appeared that the said inferiour office had ever been part of the grand office; then it was moved, that when the said office is in the Kings hands, and the King grants the said under office, if the same was for ever severed from the grand office. Wray Chief Justice, It is a severance of it; for the chief office is an office of dignity, which remains in the King; but the under office is an office of necessity, and the King himself cannot execute it, wherefore of necessity he ought to grant it. Another matter was moved, if the grant of the King to the Earl of Shrewsbury was good, because in the grant to Verney of the under office, it is not recited according to the statute of 6 H. 8. cap. 9. As 20 Ass. 6. the King seised of the honor of Pickering, to which a forrest was appendant: the bailywick of which forrest he granted in fee rendring rent, and afterwards he granted the honor with the appurtenances, and afterwards the baily committed a forfeiture, and the same was found in eyre, for which the office of bailywick was forfeited; the grantee of the honor seized it; yet it was holden that the King should have the rent: and here in this case, the Earl of Shrewsbury shall have this office in his power to grant it, and so much the rather, for that it was granted but for life.

MICH. 32 ELIZ. IN THE KINGS BENCH.

LXVI. CONIES CASE.

Sale of Goods by the Sheriff upon Execution, where good, where not.

In debt; it was holden, that if the sheriff upon the fieri facias makes sale of the goods of the party, and afterwards doth not return his writ, yet the sale is good: the case went further: that upon the fieri facias, the sheriff returned, that he had seized goods of the party to such a value, sed non invenit emptores, and afterwards before sale of them he is discharged, and afterwards a di-**[21]**-stringas issued to the new sheriff, to cause the ancient sheriff to sell the said goods; who did so: it was holden, that the said sale of them was void, for the new sheriff ought to have sold them: vide 34 H. 6. 36. a distringas to the old sheriff to sell and deliver the goods to the new sheriff.

Roll. Abrig. 894.

LXVII. MICH. 19 ELIZ. IN THE COMMON PLEAS.

Remainder where void.

Note, by Dyer and Manwood, A. leaseth to B. for years, the remainder to the right heirs of the said B. and makes livery. That the remainder is void, because there is not any person in esse, who can take presently by the livery, and every livery ought to have its operation presently: but where a lease is made to B. for life, the remainder to his right heirs, there he hath a fee executed; and it shall not be in abeyance, for there he takes the freehold by the livery.

MICH. 19 ELIZ. IN THE COMMON PLEAS.

LXVIII. HINDES CASE.

Habeas Corpus. Cause of commitment, where must be returned, where not.

Upon an habeas corpus for one Hinde, the warden of the Fleet returned, that Hinde was committed to the said prison by the commandment of the Commissioners in causes ecclesiastical. It was holden, that the warden in his return, ought to certifie the cause for which he was committed; and then upon the return the Court ought to examine the cause if it be sufficient or not. But if one be committed to prison, by the commandment of the Queens Privy Council, there the cause needs not to be shewed in the return, because it may concern the state of the realm, which ought not to be published.

LXIX. HIL. 31 ELIZ. IN THE COMMON PLEAS.

Return of the Sheriff, where void.

In a writ of dower the demandant recovered by default; whereupon a writ issued to enquire, if the husband died seised, and of the damages; and the sheriff took an enquest of office, by which it was found, that the baron did not die seised, prout eis constare poterit, and that inquisition was returned by the sheriff, and filed: it was moved, that the said inquisition and office was not good, for the office ought to find expresly, that the husband died seised, or not; and not doubtfully as it is here, prout eis constare poterit; and for that cause the award of the Court was, that **[22]** the return should be taken off the file, because it was insufficient, and a new writ was awarded.

MICH. 19 ELIZ. IN THE COMMON PLEAS.

LXX. THE LORD ST. JOHN AND SIR JOHN GRAYS CASE.

Grants of Omnia bona, by an Executor, what passeth.

Note, by Dyer and Manwood, upon an evidence unto a jury, in debt, brought against the defendant, as executor of his own wrong: that if an executor gives omnia bona sua, the goods which he hath as executor shall not pass, which vide 10 E. 4. 1. by Danby; but the contrary of that was holden by Wray Chief Justice of the Kings Bench: and Plowden in the case of Bracebridge, 18 Eliz. and they said that the said case of 10 E. 4. was not law; for by such grant made by executors the goods of the testator should pass.

MICH. 18 ELIZ. IN THE COMMON PLEAS.

LXXI. TAYLORS CASE.

Outlawry, how to be avoided.

Taylor was outlawed in debt, where a supersedeas of record was delivered to the sheriff before the awarding of the exigent: it was holden, that the party should avoid the same by plea: then it was moved, if the plea should be pleaded by attorney, or in person, to which it was said by Manwood Justice, that where matter in fact is pleaded in avoiding of an outlawry, it ought to be pleaded in person; but a matter of record might be by attorney. And so it was said by Ford Prothonotary, it was agreed in Sir Tho. Chamberlains case, 7 Eliz. and so it was agreed in the principal case.

18 ELIZ. IN THE KINGS BENCH.

LXXII. BETTUANS CASE.

Fines levied to uses. Feoffment to Uses.

In ejectione firmæ, the case was, A fine was levied to Cook and three others; and by an indenture between the parties to the fine it was declared, that the said fine was levied ea intentione, that the conusees should make an estate of the said land to such a person, which the conusor should name, and in the end of the said indenture was a proviso, that the conusees should not be seized to any other use, but to that which was specified before, and that the conusees should not incumber the said lands. And the opinion of all the Justices of the Kings Bench was, that upon the said indenture, the conusees are seized to their own use until the conusor hath made nomination; and if he dieth without any nomination, then the use should **[23]** vest in his heir: it was further given in evidence, that the conusor named the said Cook one of the conusees, and willed that the other three conusees should release to him. Gawdy Justice held, that that by nomination, the use did vest in Cook, for he said, it had been adjudged, that where before the statute of 27 H. 8. one infeoffed divers persons to his use; and the feoffor willed that his feoffees should make estate to such person as his son and heir should name, and died; the son and heir named one of the feoffees; that the same was a good nomination, &c. Wray and Jefferies to the contrary; for after this release Cook is in the whole by the conusor, and not by his co-feoffees, and by this limitation the conusor ought to name such a person which ought to take the estate: and so cannot one joyntenant from his companion, &c. And also the words are so that they four shall take the estate.

14 ELIZ. IN THE KINGS BENCH.

LXXIII. THE BISHOP OF ROCHESTERS CASE.

Grant of a Reversion by a Bishop. Attornment.

In ejectione firmæ the case upon evidence was, The Bishop of Rochester, 4 E. 6. made a lease for years to B. rendring rent, and afterwards granted the reversion to C. for 99 years, rendring the ancient rent, habend. from the day of the lease without impeachment of waste, which grant was confirmed by the dean and chapter: but B. the lessee did not attorn; and in default of attornment, it was holden by the whole Court, that the lease was void, for it is made by way of grant of the reversion: but by Catlin, If the bishop had granted the reversion and also demised the land for 99 years, it should pass as a lease to begin first after the former lease determined. And as to the attornment, it was given in evidence, that B. after the notice of the grant to

C. had speech with C. to have a new lease from him, because he had then in his lease but 8 years to come, but they could not agree upon the price: and the justices conceived that that was an attornment, because he had admitted the said C. to have power to make a new lease: also the said B. being in company with one R. and seeing the said C. coming towards him, said to the said R. See my landlord, meaning the said C. Bromely solicitor, the same is no attornment being spoken to a stranger. Barham contrary, because he was present: it was holden by the whole Court that it was a good attornment: but if the attornment was not before the bishop was translated to Winchester, the lease should be void; and although the confirmation of the dean and chapter was before the attornment, so as no estate was vested in C. yet it was good enough, for the assent of the dean and chapter is sufficient, be it before or after; by Catlin, Southcoat, and Whiddar Justices, but Wray held the contrary.

[24] PASC. 26 ELIZ. IN THE KINGS BENCH.

LXXIV. RUSSELS CASE.

Execution, where not good upon a Capias without a Scire Facias.

Russel was condemned in an action of debt, and after the year and day, the plaintiff sued a capias ad satisfaciend. against him, and by force thereof he was taken, and committed to the marshal, as in execution: it was the opinion of the justices, that it was a void execution, and not only voidable by error, and therefore the defendant was discharged; for it is not any execution at all; and the plaintiff may have a scire facias when he pleaseth.

PASC. 26 ELIZ. IN THE KINGS BENCH.

LXXV. BLUET AND COOKS CASE.

Action for Words.

In an action upon the case, the plaintiff declared for scandalous words: viz. Lambert is a thief, and Bluet innuendo the plaintiff, is his partaker. It was the opinion of the whole Court that the words were not actionable, because they were too general, for it may be that the plaintiff is his partaker in other matters. But if the words had been, that Bluet, knowing Lambert to be a thief, was his partaker, there the action would have lain. Judgment was given against the plaintiff.

TRIN. 33 ELIZ. IN THE KINGS BENCH.

LXXVI. HUNT AND GONNELS CASE.

Bail. Execution.

Hunt recovered in debt against Gonnel, and procured against him a capias ad satisfaciend. upon which non est inventus is returned, but the writ is not filed. Hunt sued a capias against the mainpernors, who are taken in execution: it was the opinion of the justices, that they should avoid this execution by error, and not by plea or surmise, &c. But if the capias returned against Gonnel had been filed, and after imbezelled. Quære of the error, for the Court conceived that the matter shall be examined, but quære to what intent. Wray said to punish the deceit, but not to maintain the execution against the mainpernors.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

LXXVII. SAER AND BLANDS CASE.

Prohibition. Prescription.

Saer parson of the church of D. libelled in the Spiritual Court against Bland for tythes; Bland came to the Kings Bench **[25]** and shewed, that within the said parish of D. there is a hamlet in which the said Bland inhabited, and the said inhabitants within the said hamlet, time out of mind, had had a chappel of ease within the said hamlet, because the said hamlet was distant from the church of the said parish, and with part of their tythes have found a clark to do Divine service within the said chappel, and also had paid a certain sum of money to Saer, and his predecessors for all manner of tythes; and prayed a prohibition, and had it; and it was holden a good prescription.

LXXVIII. PASC. 29 ELIZ. IN THE COMMON PLEAS.

Attornment.

A copyholder with licence of the lord made a lease for years and afterwards surrendred the reversion with the rent to the use of a stranger, who is admitted accordingly. It was moved if there needed any attornment: it was the opinion of Rhodes and Windham Justices, that the surrender and admittance ut supra, are in the nature of an attornment, and so amount to an attornment, or at least supply the want of it.

MICH. 29 ELIZ. IN THE STAR-CHAMBER.

LXXIX. THE LADY NEWMAN AND SHYRIFFES CASE.

Upon the Statute of 5 Eliz. of Perjury. Note.

The Lady Newman, sister of James Wingfield, lately deceased, exhibited a bill of complaint in the Star Chamber, against one Shyriffe dwelling in Dublin in Ireland, and two others, complaining, that the said Shyriffe had forged a deed, purporting that the said James had by that deed given unto him all his goods, and also that the said James had by that deed assigned to the said Shyriffe a lease for years of lands in Ireland, and also the said Shyriffe had procured the two other defendants to depose upon their oaths before the Town-Clerk of London, that the said deed was sealed and delivered by the said James as his deed. It was moved by the counsel of the defendant, that these matters of forgery were not within the statute of 5 Eliz. nor also the perjury, or the procurement thereof: upon which the Lords of the Council there, referred the consideration of the said statute to both the Chief Justices: who at the next day in Court declared their opinions upon the said matters, i.e. that the said matters did not extend to the forgery of a deed containing a gift of chattels personals, which see clearly by the statute which as to that purpose extends but to obligations, bills obligatorie, acquittances, releases or other discharges, and that also a deed of assignment of a lease of lands in Ireland is not within the said statute; and also they were of opinion, that the said perjury, and the procurement of it was not punishable by **[26]** the said statute, because the oath was taken coram non Judice, for the Town-Clerk of London could not take an oath in such a case, no more than a private person. But because that the bill in the perclose and conclusion of it was, (contrary to the laws and statutes of this realm) the two Chief Justices were of opinion, that the said Court might punish these offences as misdemeanors at the common law, but not according to the statute; and afterwards Shyriffe was fined, and by order of the Court to stand upon the pillory.

3 Leon. 170.

MICH. 29 ELIZ. IN THE EXCHEQUER CHAMBER.

LXXX. THE QUEEN AND LORD VAUXES CASE.

Bills.

In the Exchequer Chamber before the Chancellor, &c. the Lord Vaux brought a writ of error upon a judgment given against him in the Court of Exchequer, and assigned for error that a bill was exhibited against him, that the Lord Vaux had taken certain goods of the Queen at Westminster in the county of Middlesex, and also had intruded into the rectory of Ethelborough in the county of Northampton; whereas the Queen ought to have brought several bills being for several causes, arising within several counties. But it was resolved by the whole Court, that the bill of the Queen was good enough, and here is no mischief; for if the defendant will plead not guilty, two several venire facias shall be awarded, one into Middlesex, the other into the county of Northampton.

MICH. 27 ELIZ. IN THE COMMON PLEAS.

LXXXI. OWEN AND MORGANS CASE.

Common Recovery. Feme not party to the Writ of Covenant not bound by a Recovery.

George Owen brought a scire facias against Morgan to have execution of a fine levied 8 Eliz. by which fine the land was given to the conusee and his heirs; the conusee rendred the same to the husband and wife, and to the heirs of the body of the husband, (note that the husband was the conusor) the remainder in fee to the now demandant; and note that the writ of covenant was between the conusee plaintiff and the husband deforceant, without naming the wife. And afterwards the husband suffered a common recovery without naming of the wife; the husband and wife died without issue, and now Owen, to whom the remainder was limited by the fine, brought a scire facias; in bar of which the recovery was pleaded. It was argued by Shuttleworth Serjeant, that the said recovery had against the husband was a good bar, and should bar the remainder; and the wife ought not to be named in, or party to the recovery, for that nothing accrued to her by the fine, because she was not party to the writ of covenant, and to the conusans, vide 32 H. 8. **[27]** Fines 108. None can take by the fine but those who are named in the writ of covenant, but every stranger may take by way of remainder, vide etiam 7 E. 3. Br. Fines 114. 6 E. 3. Fitz. Fines 117. 7 E. 3. Fitz. Scire Facias 136. It is said by Herle, If such a fine ut supra be taken, it is good as long as it is in force.

LXXXII. SIR RICHARD LEE AND ARNOLDS CASE.

Reservation of Rents upon a joynt Lease. Assigns. Condition destroyed in part good in part. Conditions divided. Grantee of parcel of the Reversion is an Assignee within 32 *H.* 8. *of Conditions. Condition apportioned. Condition suspended. Severance. Conditions by act in Law divided not by Act of the Party. Statute of* 32 *H.* 8. *of Conditions taken by Equity. Difference between a Reservation and a Contract. Condition suspended in part is suspended in all.*

Sir Richard Lee, Kt. seized of three manors, made a lease of them to Sir Nicholas Arnold for certain years, reserving for the one manor 5l. and for the other manor 10l. and for the third manor 10l. upon condition that if the said rents, or any of them, or any part, &c. be behind, a re-entry into all the manors; and afterwards he bargained and sold the reversion of one of the said manors to William Winter in fee: and afterwards by deed indented and inrolled, bargained and sold the two other manors,

and for the rent of one of the said manors, the vendee did re-enter into all the manors. Manwood, Here are several reservations several rents, and several leases; for although that the words are joynt, yet by construction they are become several; as land given to an abbot and a secular man, although here be joynt words, yet they are tenants in common, Litt. 296. And if I sell to you two horses, the one for 5l. and the other for 5l. here are two several contracts; the parties to whom these reversions are assured, ut supra, are assignees within the statute of 32 H. 8. by which it is enacted, that assignees may take advantage of conditions; for such an assignee is not meerly in by act of law, as the lord by escheat, and he is not such an assignee; but is in by conveyance: the lessor enters upon his lessee and makes his feoffment and the lessee re-enters, now the feoffee is an assignee; and this condition is destroyed in part and continued in part: if one hath common in the land of another for 20 beasts, and releases his common for 10 beasts, the common for the residue remains; but if he purchaseth part of the land in which he hath common, the whole common is destroyed; a feoffment to two with warranty, and one of them releases the warranty, all the warranty is gone: as to the condition for as much as it is not collateral, but incident to the reversion, it may be severed and is of the same nature as the rent and reversion. A man possessed of lands for 20 years, and seized of other lands in fee, leaseth all the land for 10 years, reserving rent, with clause of re-entry, and dieth, now the heir hath a reversion for the land in fee, and the executor for the other land, and so the condition is divided according to the reversion; so if lands were given to one in general tail and others in special tail and he thereof makes a lease rendring rent and dieth having several issues inheritable to each tail, now the condition shall go according to the rent: and he conceived, that the grantee of parcel of the reversion is an assignee within the said **[28]** statute, as if a lease for years be made rendring rent, with clause of re-entry. The lessor grants the reversion for life, such a grantee is an assignee within the said statute. Jefferies, The condition is gone: A. leaseth two acres for years, rendring rent with clause of re-entry: the lessor accepts a surrender of one acre, the whole condition is gone, but the rent shall be apportioned. A parson leaseth land, whereof he is seized in his own right, and land whereof he is seized in the right of his church, for years rendring rent, with clause of re-entry, and dieth, the rent shall go according to his respective capacity and the condition divided: so if part of the land so demised be evicted, the rent shall be apportioned, and the condition also: and he said that the bargainee is not an assignee within the statute. Barham, If the reservation doth not make the lease several, yet it shall make the reversion several, &c. Mead, 6 Eliz. The Court was moved in this case: A. leased for years rendring rent, with clause of re-entry, and afterwards became bound to another by recognizance, the recognizee extended the moiety of the rent and reversion in execution; and the clear opinion of the Court was, that the condition was suspended: if A. let lands for years rendring rent, with clause of re-entry to a man and to a feme sole, and afterwards the lessor intermarries with the feme, the condition is suspended. Mounson, Justice, The demise is joynt, although that the reservation be several. Cestuy que use is seized of an acre in possession, and of another in reversion, and makes a lease for years of both rendring rent, here are several rents. 13 E. 3. A. seized of two acres of lands before the Statute of Westminster 3. made a feoffment thereof to hold the one acre by knight service and the other in socage; the tenancy in such case is several, 9 Ass. 24. a lease is made of a mill, and of a wood, rendring for the mill 10s. and for the wood 20s. these are several rents: and so here they are several rents and several conditions: two tenants in common make a lease for years rendring rent upon clause of re-entry, the condition is several according to the reversion, for joynt words in the letter have sometimes, as the matter requires constructions in the severalty. As A. and B. covenant by indenture, and are reciprocally bound the one to the other to perform all covenants contained in the said indenture, the same is to be construed such covenants, which on the part of A. are to be performed, and so of the other part B. And he conceived that by the distracting of the reversion the condition was gone: a condition by an act in law may be divided but not by the act of the party. As a man makes a lease for years rendring rent, with clause of re-entry, takes a wife and dyeth; the wife recovers the third part of the land devised for her dower, now that third part is discharged of the

condition during the estate in dower, but the residue is subject to the condition; and vide F. N. B. 21. the heir at common law [29] shall have a writ of error for his part; and the heir in borough English for his part: two joyntenants make a lease for life upon condition, and one releaseth the condition, the same barred the condition. And he conceived that the bargainee is an assignee: for the statute of 32 H. 8. shall be taken by equity, &c. As if a man leaseth lands for years to begin at Michaelmas next, and before Michaelmas he makes a feoffment, and at Mich. the lessee enters, the feoffee is an assignee within the statute: two joyntenants make a lease for years rendring rent with clause of re-entry, and the one releaseth to his companion, he is an assignee within the statute. Manwood, He is an assignee and in by the bargainor; the words of the statute of 32 H. 8 are, Grantees or assignees to or by any person or persons, and here the bargainee is an assignee to the bargainor as to the use; and for the possession he is an assignee by him: he who is in by a common recovery is not an assignee, although the recovery was to his use, for the writ disaffirms his possession: if tenant for life be disseised and he in the reversion confirms the estate of the disseisor, and the tenant for life re-enters, the disseisor is now an assignee, but otherwise it is if he in the reversion doth release to the disseisor: and he conceived, that the lessor should recover part of the land in an action of waste, or enter in part of the land for a forfeiture, for an alienation in fee that the condition remains. Harper, Several reservations do not make several leases, for the reservation is not of the essence of the lease, for it is good without any reservation: and whereas it hath been said, that a lease is a contract, I say, that there is a great diversity between a reservation and a contract: for if I sell to you a horse for 40s. and afterwards I take this horse out of your possession; yet I shall have an action of debt for the 40s. But if I lease land to you reserving rent, and afterwards enter into parcel of the land demised, I shall not have the rent: and if I lease two acres for years with several reservations, I shall have but one action of waste, but several avowries according to the several reservations. And here if any part of any of the said rents be behind, the party may re-enter into the whole, therefore the lease is but una & eadem. And I conceive, that the assignee of the assignee is by the statute to take advantage of the condition even to the twentieth degree, as a warranty to one of his heirs and assigns, extendeth to the twentieth assignee. But here in our case, he is not such an assignee that shall take advantage, &c. for he is in by the statute, scil. in the post, but not in the per, and here the bargainee hath but an use by the act of the party, and the possession of the statute of 27 H. 8. But admitting that he is an assignee, yet he is an assignee but of part, and therefore shall not have advantage, &c. When a condition is suspended in part, it is suspended in all. A. leaseth lands for years upon condition, and afterwards the lessor [30] confirms his estate in part for life, the condition is gone. Dyer, The lease is one and entire, although there be several reservations, for here are not several capacities, nor several interests. 42 Ass. Two joyntenants lease for life, rendring rent to one of them, yet the rent and reversion shall be to both of them; but if it be by deed indented, the rent shall go to one only, according to the literal reservation, vide Litt. 80. 346. But if the lease had been made by several limitations as habendum one manor for 20s. and the other manor for 10s. then the lease and the reversion had been several; but here the rent shall not rule the reversion, but the reversion the rent, and the rent shall be of the same nature as the reversion. Tenant for life makes a feoffment in fee upon condition, and re-enters for the condition broken, now by that re-entry the freehold is reduced to the lessee for life, and the fee unto the lessor; but the forfeiture remains. Two joyntenants, one of them makes a feoffment in fee of his moiety upon condition, and for the breach of the condition re-enters, the joynt estate is revived: and he conceived that the grantee of part of the estate, or part of the land should not take advantage of the condition; and he said that the bargainor is an assignee within the statute: if tenant in tail makes a lease for years, and afterwards bargains and sells the reversion, the vendee hath a fee simple determinable, and may enter for the condition broken: if a reversion be granted to two and to the heirs of one of them, they are assignees within the statute, and if he, who hath but an estate for life, surviveth, he also is an assignee, for the entire reversion passeth out of the grantor, and that is my rule. Judgment was given against the re-entry.

Post. 93.

LXXXIII. PASC. 30 ELIZ. IN THE KINGS BENCH.

Surrender.

Lessee for 21 years took a lease of the same lands for 40 years to begin immediately after the death of J. S. It was holden in this case, that the same was not any present surrender of the first term; but if J. S. dye within the term, then it is a surrender, for it may be that J. S. shall survive the first term.

PASC. 30 ELIZ. IN THE KINGS BENCH.

LXXXIV. ANDERSON AND HEYWOODS CASE.

Copyholder.

A copyholder of an inheritance of a manor which is in the hands of the King is ousted of his copyhold. It was holden that he hath not gained any estate, so as he may make a lease for years, upon which the lessee may maintain ejectione firmæ; but he hath but a possession against all strangers: and **[31]** it was holden in this case, that if a copyholder dyeth, his heir within age, he is not bound to come to any Court during his nonage, to pray admittance, or to tender his fine; also if the death of his ancestor be not presented, nor proclamations made, he is not at any mischief, although he be of full age.

1 Leon. 100. Rumny and Eves.

PASC. 30 ELIZ. IN THE KINGS BENCH.

LXXXV. COOK AND SONGATES CASE.

Assumpsit.

In assumpsit, the plaintiff declared whereas lis & controversia had been moved between the plaintiff lord of the manor, &c. and the defendant, claiming certain lands parcel of the said manor, to hold the same by copy, &c. And both the said parties submitted themselves to the judgment and arbitrement of Mr. Godfrey, a man learned in the law, concerning the said land, and the title of the defendant to the same: the defendant in consideration that the plaintiff promised to the defendant, that if the said Mr. Godfrey should adjudge the said copy to be good and sufficient for the title of the defendant, that then he would suffer the said defendant to enjoy the said land accordingly without molestation, the defendant reciprocally promised to the plaintiff, that if the said Mr. Godfrey should adjudge the said copy not to be sufficient to maintain the title of the defendant, that then he would deliver and surrender the possession of the land to the plaintiff without any suit. And shewed further that the said Mr. Godfrey did award the said copy utterly to be insufficient, &c. Yet the defendant continued the possession of the said land: it was moved that the same was not a good and sufficient consideration to ground an assumpsit. But Gawdy Justice, said it was a good and sufficient consideration, because it was to avoid controversies and suits: and afterwards judgment was given for the plaintiff.

TRIN. 26 ELIZ. IN THE KINGS BENCH.

LXXXVI. TAYLORS CASE.

Assumpsit.

In assumpsit, the case was: that the defendant promised to carry certain apples for the plaintiff by boat from Greenwich, in the county of Kent, to London; and the

apples being in the boat, the boat in which they were, by a great and violent tempest was sunk in the river of Thames, so as the said apples perished, &c. It was holden to be no plea in discharge of the assumpsit, by which the plaintiff had subjected himself to all adventures.

[32] LXXXVII. TRIN. 26 ELIZ. IN THE KINGS BENCH.

Devise.

A. seized of lands in fee, and having issue two sons, Richard and Gilbert, by his will willed, that if his son Richard dye before issue, so that the land descend to my son Gilbert, then I will that my overseers shall have the government of my lands and of my son Gilbert. Richard took a wife and dyed, she being young with child with a daughter, the devisor died, the daughter was born. It was adjudged in this case, that by this devise the daughter was excluded from the inheritance, and that Gilbert should have the land.

TRIN. 32 ELIZ. IN THE KINGS BENCH.

LXXXVIII. LUKES CASE.

Luke Esq; of Tedcaster, was indicted upon the statute of 13 Eliz. cap. 8. for being a broker in a usurious contract; for which he encurred a præmunire. Who pleaded not guilty, upon which they were at issue, and at the day of the return of the distringas, the jurors appeared, and the same day that the jury was to be taken, Popham Attorney General sent for the distringas, and for certain causes for the Queen, would not proceed. Note that the attorney was informed, that the jury was partial. It was moved by Cook that the attorney could not stay the proceedings, the writ being returned, and the jury appearing, he could not stay the tryal, for no president is thereof. Popham, The entry shall be in this case, Vicecomes non misit breve. Cook, That is false, and the sheriff is sworn to make a true return; but by consent of the parties, such a thing may be done, for consensus tollit errorem, quære.

33 ELIZ. IN THE EXCHEQUER.

LXXXIX. THE QUEEN AND PAINTERS CASE.

Accompt of the King against a Stranger.

Sir William Pelham was Surveyor of the Ordnance, and delivered the money of the King to Painter, Clerk of the Ordnance. It was holden in this case, that for the said money the Queen might have accompt against Painter, although he wanted a privity, which cannot be so in case of a common person; for if any receiver make one his deputy, I shall not have an accompt against him. Popham Attorney General, If one of the Exchequer lend unto another 500l. of the Queens money, and takes a bond for it in his own name, yet the Queen shall have an accompt against the borrower.

[33] MICH. 29 ELIZ. IN THE EXCHEQUER.

XC. PELHAMS CASE.

Grant of Office of Sheriff.

In the Exchequer Chamber, before the Chancellor, Treasurer and Barons there, in the case of Pelham, the case was, that the Queen had granted by her letters patents, that Pelham should not be bailiff, constable, nor other officer or minister, licet

eligatur; yet it was holden that the Queen might make him sheriff, for that grant doth not extend to officers royal, as grants of amercements do not extend to amercements royal; and also the office of sheriff doth not lye in election; but if the words had been, Licet eligatur per nos, then it should have been otherwise: and such was the opinion of Bromley then Lord Chancellor.

Savile Rep. 43.

Trin. 19 Eliz. In the Kings Bench.

XCI. Godbolts Case.

Sales.

In the case of one Godbolt, it was agreed, that the sale of a bailywick of a hundred, was not within the statute of 5 E. 6. cap. 16. for such an office doth not concern the administration of justice; nor is it an office of trust.

XCII. In Temps Eliz.

Difference between an Interest and a Limitation.

A. granted to B. a rent-charge out of his lands, to begin when J. S. died without issue of his body, J. S. dyes, having issue, which issue dyes without issue. Dyer held that the grant shall not take effect, for J. S. at the time of his death had issue, and therefore from thence the grant shall not begin, and if not then, then not at all. And Manwood said, that if the words had been, to begin when J. S. is dead without issue of his body, then such a grant shall take effect when the issue of J. S. dies without issue, &c. If donee in tail hath issue which dies without issue, the formedon in the reverter shall suppose that the donee himself died without issue, for there is an interest, and there is a diversity between an interest and a limitation; for if I give land between A. and B. for term of their lives, if any of them dye, the survivor shall hold the whole; but if I give lands to A. for the lives of B. and C. now if B. and C. dye, the whole estate is determined, because it is but a limitation, and B. and C. have not any interest. Vide to this purpose 34 Eliz. Brudnels case in Cook 5. p. 9.

[34] XCIII. Temps Roign Eliz. In the Common Pleas.

A. seized of a manor, leased the same for years, rendring rent, with clause of re-entry; and afterwards levied a fine sur conusans de droit, &c. to the use of himself and his heirs, the rent being demanded is behind. Dyer, A. cannot re-enter, for although the rent in right passeth without attornment, yet he is without remedy for the same without attornment, and it would be hard without attornment to re-enter; it was here moved further, if the conusor be an assignee within the statute of 32 H. 8. Manwood, The reversion of a termor is granted by fine, there wants privity for an action of debt, waste, and re-entries: but if the conusee dieth without heir, although that in right it was in the conusee, yet the lord by escheat shall make avowry, and yet the conusee by whom he claims could not: and in the case at Bar, the conusee himself could not; but the conusor being cestuy que use, who is in by act of law, shall avow, and re-enter without attornment, for the conusor is in by the statute of 20 H. 8. Harper, The heir of the conusee shall avow and re-enter before attornment. Dyer, 13 H. 4. The father leaseth for years rendring rent, with clause of re-entry, the father demands the rent which is not paid, the father dyeth, the son cannot re-enter, for the rent doth not belong unto him; and therefore in the case at Bar, the conusor cannot avow for the rent before attornment, therefore not re-enter: and in case of bargain and sale, the bargainee is assignee within the statute, but not the conusor in this case.

TEMPS ROIGN ELIZ.

XCIV. 15 ELIZ. SIR FRANCIS LEAK AND SIR WALTER HOLLIS.

Upon Attainder of Treason, who shall seize the Goods for the Queen.

At the assizes, the opinion of Dyer and Stamford was demanded upon this matter: one seized of lands and tenements, and possessed of goods within the duchy of Lancaster, was attainted of high treason, and a great question arose between Sir Francis Lake kt. bailiff of the duchy, and Sir Walter Hollis sheriff, which of them ought to seize for the Queen; and their opinion then was, that the same did appertain to the office of the sheriff, if in the patent of the sheriff there were not special words to the contrary.

[35] XCV. 15 ELIZ. IN THE COMMON PLEAS.

Lease by Tenant at Will if a Disseisin.

Tenant at will made a lease from year to year, Dyer conceived that it was not a disseisin, but the lease was void; and he said, that the book of 12 E. 4. 12. was not law. For he who disseiseth a man ought to claim inheritance in the land, whereof the disseisin is done. Harper conceived that the said book of 12 E. 4. 12. was good law, for a lease at will is a lease at the will of both parties, and therefore when the lessee makes a lease for years, his will is determined, and he will not hold at will. Manwood agreed with Dyer; for if tenant at will lease for years, rendring rent, before that the lessee for years, entreth the tenant at will shall not have any rent for it was not a perfect contract; otherwise it is where a man seized of lands leaseth the same, ut supra. If one entreth into my land, and occupieth the same of his own head, claiming to hold the same at my will, and afterwards I demand of him a certain rent for the occupation of my land, he is now my tenant at will; which all the justices granted.

MICH. 30 ELIZ. IN THE KINGS BENCH.

XCVI. CUTTER AND DIXWELS CASE.

Action upon the case, for that the defendant exhibited a bill to the justices of peace against the plaintiff, containing and complaining, that the plaintiff is an enemy to all quietness, seeking by all means to disquiet his neighbours, and hath used himself as a lawless person, and having process to serve upon one in the parish, (scil. J. S.) did keep the process, and would not serve it but on the Sunday in the time of Divine service, not having regard to her majesties laws or the quiet of his neighbors. Upon which bill the justices to whom it was exhibited awarded process against the plaintiff to find sureties for his good behaviour, by virtue of which he was taken and imprisoned. It was the opinion of all the justices in this case, that upon this matter, an action upon the case would not lie.

MICH. 27 ELIZ. IN THE KINGS BENCH.

XCVII. BASPOLES CASE.

Devise to his Son and Heir.

The father seized of lands is bound in an obligation, and devised his land to his wife until his son shall come to the age of 21 years, the remainder to the son in fee; and no other land descends to the son from his father. It was moved, that

the heir in this case at his election might wave the [36] devise, and take by descent, or è contra, vide 9 E. 4. 18. per Needham. It was the opinion of Gawdy and Fenner Justices, that the son should be adjudged in by descent: Clench held the contrary.

3 Leon. 118. 2 Leon. 101. Stiles 148.

MICH. 27 ELIZ. IN THE KINGS BENCH.

XCVIII. ONIONS CASE.

Costs.

In an action upon the statute of 5 Eliz. for hunting in his park, the statute gives treble damages: it was the opinion of the justices, that notwithstanding that the statute gives treble damages, that the plaintiff should have costs also.

XCIX. MICH. 27 ELIZ. IN THE KINGS BENCH.

Bail.

In debt the plaintiff had judgment to recover, and a scire facias issued against the bail before any capias issued against the principal, and the bail was taken; and now they came and shewed this matter to the Court, and prayed to be discharged. Wray Justice said, They shall be put to their writ of error, for being but error in process, we may reverse our own judgment.

C. MICH. 14 ELIZ. IN THE COMMON PLEAS.

A man seized of a pasture, within which are two great groves and wood, known by the name of a wood, leased the same by indenture for years, and also in the same pasture were certain hedgrows and trees there growing sparsim, & by the same indenture bargained and sold to the lessee all woods and underwoods in and upon the premisses; and further, that it shall and may be lawful to the lessee to cut down and carry away the same at all times during the term. Harper said the hedgrows did not pass by these words, for they are not known by the name of woods, 14 H. 8. 2. Manwood held the contrary. Mounson contrary to Manwood, for the words of the grant may be supplied by other in it, viz. woods. Dyer held that these hedgrows should pass, for the grant is general. It was further moved, if by these words the lessee might again cut them, &c. or but once. Harper, Manwood and Mounson, three of the justices, held, that he might cut them but once. But Dyer held the contrary & said so it should be, if the words had been (growing upon the premisses) and this word (growing) although it sounds in the present tense, yet it shall be taken also in the future tense: if not that the word tunc be laid, for that is a word of restraint. The case which was argued in the Chancery, 27 H. 8. where I was present, was this, The prior of St. Johns let a commandry; provided [37] that if the said prior, or any of his brethren there being commanders, will dwell thereupon, then the said lease to be void. And it was doubted if that proviso did extend to the successor; for this word (being) in the present tense, and yet it was holden by Fitzherbert, that it should be taken in the future tense, and so to extend to the successor, but otherwise if the words had been (nunc) being.

15 ELIZ. IN THE COMMON PLEAS.

CI. CONIES CASE.

Devises. Tail. Devisee, who shall first take.

A man seized of lands in fee devised, that this wife should take the profits of his lands, until Mary his daughter and heir should come to the age of sixteen years; and if the said Mary died, that J. S. should be his heir. Manwood said, that the daughter, after she had attained the age of sixteen years, should have the lands in tail, for devises shall be construed, according to the interest of the devisor; if they have any certainty or reason; but no intent shall be taken against reason and certainty. It is certain the daughter shall not have fee-simple, for that should have descended to her without any devise; and these words (if she dye) cannot be intended a condition, for it is certain that she shall dye; but if the words had been, if she dye before the age of sixteen years, J. S. should be his heir, that had been a condition; and if the words had been, that after the death of Mary, J. S. should be his heir: so as the estate tail remains in the daughter. Mounson and Harper contrary. And that she shall have but for life; Mounson said, that if Mary had been a stranger to the devisor, she had taken nothing: and this case was put by Barham Serjeant, A man devised 100l. to his youngest daughter, and 100l. to his middle daughter, and 100l. to his eldest daughter, and that all these sums should be levied of the profits of his lands, it was holden by the better opinion, that the youngest daughter should be first paid, and then the middle, and then the eldest daughter, &c. and that he said was Conies case.

CII. 6 ELIZ. IN THE COMMON PLEAS.

Estate executed. Extinguishment. Tenants in Common.

A man made a lease for life, and afterwards made a lease to another for years to begin after the death of the tenant for life: the lessee for years died intestate, the Ordinary committed letters of administration to A. the tenant for life and A. joyned in the purchase of the fee-simple of the land demised; it was holden by the justices in this case, that the fee was executed for one moiety, for the remainder for years, was not any impediment to the execution of it. Manwood con-[38]-ceived that the term was not extinct, for the same is not properly a term, but only an interest of a term, which cannot be surrendred. Mounson, He hath the term in auter droit as administrator, and therefore it cannot be extinct. Dyer, If an executor hath a term, and purchaseth the fee-simple, the term is determined. A woman termor for years takes husband, who purchaseth the fee, the term is extinct by Manwood, for the husband hath done an act, which destroys the term, scil. the purchase. But if a woman being a termor, marrieth with him in the remainder, the term continueth; for here it is not the act of the husband, but the act of law. It was the opinion of Dyer, that in this case the tenant for life and the administrators should be tenants in common of the fee.

CIII. MICH. 17 ELIZ. IN THE COMMON PLEAS.

Possessio Fratris.

The husband is seized in right of his wife of certain customary lands in fee, and he and his wife, by licence of the lord make a lease for years by indenture, rendring rent, have issue two daughters, and the husband dyeth; the wife takes another husband, and they have issue a son and a daughter, the husband and wife dye, the son is admitted to the reversion, and dyeth without issue; and by Manwood, that reversion shall descend to all the daughters, notwithstanding the half blood, for the estate for years which is made by indenture by license of the lord is a demise, and a

lease according to the order of the common law, and according to the nature of the demise the possession shall be adjudged, which possession cannot be said possession of the copyholder, for his possession is customary, and the other is meer contrary, therefore the possession of the one shall not be the possession of the other, therefore there shall be no possessio fratris in this case: but if one had been the guardian by custom, or the lease had been made by surrender, there the sister of the half blood should not inherit. And Mead said the case of the guardian had been adjudged. Mounson agreed: and it was said, that if a copyhold doth descend to the son, he is not a copyholder before admittance, but he may take the profits, and punish a trespass before admittance.

CIV. PASC. 19 ELIZ. IN THE COMMON PLEAS.

Forfeiture. Quære.

A parson let his rectory for three years, and covenanted, that the lessee shall have and enjoy it during the said term, without expulsion, or any thing done or to be done by the lessor, and is also bound in an obligation to the lessee to perform the said covenant. Afterwards for not reading of the articles he was deprived ipso facto, by the statute of 13 Eliz. The patron **[39]** presented another, who being inducted ousted the lessee; wherefore an action was brought upon the obligation. It was the opinion of all the justices, that this matter is not any cause of action; for the lessee was not ousted by any act done by the lessor, but rather for non feasans; and so out of the compass of the covenant aforesaid; as if a man be bound that he shall not do any waste, permissive waste is not within the danger of it.

PASCH. 26 ELIZ. IN THE COMMON PLEAS.

CV. KING AND COTTONS CASE.

Entre Congeable.

In ejectione firmæ, the case was: Lessee for years, the remainder for life, the remainder in tail to lessee for years, lessee for years made a feoffment in fee with warranty, and dyed, he in the remainder for life dyed, the issue in tail entred, and made a lease to the plaintiff. It was clearly resolved by the Court in this case, that the entry of the issue in tail was lawful, notwithstanding that the disseisin was done to another estate than that which was to be bound by the warranty, scil. to the estate for life, vide 50 E. 3. 12. & 13, 46 E. 3. 6. Fitz. Garr. 28.

PASCH. 26 ELIZ. IN THE COMMON PLEAS.

CVI. SCOT AND SCOTS CASE.

Accompt. Abatement of Writ.

Bartholomew Scot brought a writ of accompt against Thomas Scot: Thomas Scot sum' fuit ad respondend. Barth. Scot quod reddat ei rationabilem computum suum de tempore quo fuit receptor denariorum, &c. And declared quod cum the said Thomas Scot fuit receptor denariorum, &c. & recepisset, so much by the hands of such a one, &c. Cumque idem Thomas habuisset & recepisset diversa bona, and shewed what, ad merchandizand, &c. Exception was taken to the declaration, because the writ and declaration is general against the defendant as receiver, whereas for such goods as the defendant had received ad merchandizand. he ought to have been charged as bayliff, quod Curia concessit, vide Book Entries 19. 46 E. 3. 9. And afterwards the defendant traversed severally both the charges, whereupon several issues were joyned, and both found for the plaintiff: and as to the monies, with the receipt of which he was

charged as receiver, the plaintiff had judgment; and as to the others, which he received ad merchandizandum, the writ abated. And it was said by the Court, that the writ should have abated in the whole, unless the several issues had helped the matter, because the plaintiff might have had an action for part in other manner. Vide 9 H. 7. 4. by Brian.

[40] 17 ELIZ. IN THE STAR-CHAMBER.

CVII. MORGAN AND COXES CASE.

Brief de Fama & gestu.

Morgan exhibited a bill of perjury in the Star-Chamber, against one Cox, setting forth, that whereas he was bound to his good behaviour by recognizance acknowledged in the Kings Bench, and he in discharge of the said recognizance had obtained a writ de fama & gestu, to enquire of his conversation, and therefore at the sessions in the county of Devon, where the said Morgan was dwelling, the grand jury charged with the said matter, the said Cox gave evidence to the said grand jury in maintenance and continuance of the said recognizance, and upon the evidence given by Cox the said bill was conceived. It was moved by the counsel of the defendant, that that bill upon the matter did not lye, for that the evidence in the bill for the perjury was given for the Queen in maintenance of the recognizance, and that to the grand jury which was charged for the Queen: but as to that it was said, by the Lord Chancellor and both the Chief Justices, that the writ de fama & gestu, is an especiall writ at the suit of the party, and not of the Queen, and the Court cannot deny it to him who asketh it; and the grand jury, as to that matter, shall be accounted a special jury, &c.

MICH. 16 ELIZ. IN THE COMMON PLEAS.

CVIII. JACKSON AND DARCYS CASE.

Tail barred by a Fine.

In a writ of partition betwixt Jackson and Darcy, the case was, tenant in tail, the remainder to the King, levied a fine, had issue and dyed, it was adjudged that the issue was barred, and yet the remainder to the Queen was not discontinued; for by the fine an estate in fee-simple determinable upon the estate in tail, passed to the conusee.

3 Leon. 57.

TRIN. 17 ELIZ. IN THE COMMON PLEAS.

CIX. STROAD'S CASE.

Tenures.

In a replevin, the case was, lands holden of a subject came to the possession of the King by the Statute of 1 E. 6. of Chauntries. The King granted the lands over unto another; it was holden in this case that the patentee should hold of the King according to his patent, and not of the ancient lord; but the patentee should pay the rent, by which the said land was before holden, as a rent-seck distrainable of com-[41]-mon right to the lord and his heirs, of whom the land was before holden.

CX. MICH. 19 ELIZ. IN THE COMMON PLEAS.

Estate. Devises.

A. seized of lands in fee devised them to his wife for life, and after her decease she to give the same to whom she will: he had issue two daughters, and died; the wife granted the reversion to a stranger and committed waste, and the two daughters brought an action of waste. In this case it was holden, that by that devise the wife had but an estate for life, but she had also an authority of giving the reversion by her will to whom she pleased; and such a grantee shall be in by A. and his will; for A. hath given expresly to his wife for life, and therefore by implication she shall not have any further estate: but if an express estate had not been appointed to the wife; by the other words an estate in fee should have passed.

Leon. 121.

MICH. 19 ELIZ. IN THE COMMON PLEAS.

CXI. SIR THOMAS KEMP AND WINDSORS CASE.

Sir Thomas Kemp was outlawed at the suit of one Windsor, who had against him four capias utlagat' and none of them were served, and afterwards he sued out a fifth capias: it was moved by Mead, that the said Sir Thomas keepeth open house, and yet the sheriff had not served the capias. Dyer, The sheriff may justifie to break the house to take his body, and seize his goods for the Queen, for this process is in law at the suit of the Queen; but contrary where the process is sued at the suit of a subject; and the justices commanded Ford Prothonotary to make a special capias for body and goods; and a pain in the writ of 100l. upon the sheriff to execute the writ accordingly.

CXII. MICH. 19 ELIZ. IN THE COMMON PLEAS.

Improvement of Common.

This case was moved by Anderson Serjeant at law, if in case of common appurtenant by prescription without number, the lord of the waste might improve, for it is not admeasurable, therefore not improveable, for the common being without number, the sufficiency cannot be proved. Dyer and Manwood Justices, Although it be without number, yet it may be reduced to a certainty being by prescription; as the number of the cattel, and the best and most substantial tenant of the said tenement at any time within time of memory had kept upon the said waste, and then the plaintiff the lord might improve leaving sufficient, according to such rate.

[42] MICH. 19 ELIZ. IN THE COMMON PLEAS.

CXIII. THE EARL OF DERBYS CASE.

Debt not against the Husband upon a Contract by the Wife.

Debt by a merchant of London against the Earl of Derby and his wife, and declared upon a contract for silks, and it appeared upon the evidence, that the countess during the coverture had bought of the plaintiff certain silks for her own wearing; and for the mony, which the countess agreed to pay for the same the action was brought. It was the opinion of Dyer, Manwood, and Mounson, that the contract by the wife, during the coverture, should not bind the husband; but admit that the husband should be bound, yet this action is not well brought against the wife, for she ought not to be mentioned in the writ.

CXIV. Mich. 19 Eliz. In the Kings Bench

Indictments.

One was indicted in the country, because he commanded J. S. to take up a bridge, being in regia via, leading from such a town to such a town; and also the said J. S. was indicted for executing the command of the other: exception was taken to the first indictment, because no place of the commandment is alledged in the indictment, and for that cause the indictment was taken insufficient, although Mr. Plowden strongly insisted upon the contrary, as in trespass the defendant justifies by the commandment of J. S. the same is good, without any place of the commandment, for in the first case the commandment is traversable, but contrary put by Mr. Plowden, vide 3 H. 7. 11. Markenfield's case. Another exception was taken to the indictment, because it is not there alledged, that the bridge was a common bridge, but because there was other words in the indictment which supplyed the same, scil. in via regia, the indictment was holden good enough.

CXV. 19 Eliz. In the Common Pleas.

In a writ of partition between tenants in common upon the statute, of 20 acres of land; the defendant as to part, scil. 10 acres, pleaded non tenet pro indiviso, and as to the residue confessed the partition; and by Manwood, and Ford Chief Prothonotary, the confession ought to be in the beginning of the plea, and non tenet pro indiviso, in the second place last, so as that part of the plea which agrees with the demand, ought to preceed the part which denies demand: and the truth of the case was, that the defendant had but 10 acres in all, and of them was **[43]** sole seized. Manwood, If your case be such you may safely plead to the whole non tenet pro indiviso.

20 Eliz. In the Common Pleas.

CXVI. Duffams Case.

Estoppel. Recital.

A man made a lease by deed indented for 20 years to begin after the expiration of a former lease thereof made to one Duffam, in an action brought by the second lessee against the lessor; the lessor said there was no such Duffam in rerum natura at the time of the supposed lease made to Duffam. It was said that such a plea did not lye for the lessor, for he is estopped to say against the indenture, that no such Duffam was, &c. And also, if no such person was, then the first lease was void, and the second lease should begin presently, which Mounson and Manwood concesserunt. And Manwood said that the defendant should be estopped by the recital of the first lease, to say that no such Duffam was; and although that the common ground is, that a recital is not any estoppel, yet where the recital is not material, as it is here, for the second lease is to be begun upon the expiration of the lease recited, there is an estoppel.

Trin. 29 Eliz. In the Common Pleas.

CXVII. Brown and Fulsbyes Case.

Stat. 5 Eliz. of Usury.

Upon the statute of 5 Eliz. of Usury, the case was this, A. borrowed of B. 80l. and was bound in an obligation to pay to him 90l. at the end of the year: it was the

opinion of the justices, that although the 90l. was tendred, and B. the lender did tell the same, yet if he take and accept but of 80l. it is not usury within the statute to make a treble forfeiture; but yet in that case the obligation it self is void.

CXVIII. Trin. 29 Eliz. In the Exchequer.

Note in the case of the tenants of Owning and Northmaston, it was holden by Manwood Chief Baron, that he who hath vesturam terræ cannot dig the land. And Gent Baron said, Where many have lot-meadow to be divided every year by lot, who shall have the grass of such an acre, and who of such an acre, &c. and so change every year according to lots, they have not any freehold therein, but only vesturam terræ.

[44] Trin. 32 Eliz. In the Exchequer.

CXIX. Sir Walter Wallers Case.

Execution. Discontinuance of Suit.

In the case of Sir Walter Waller, it was moved, if one hath judgment in debt, and thereupon within the year and day sueth a capias ad satisfaciend. although he doth not prosecute the same in two or three years, yet when he pleaseth he may proceed upon it, and shall not be put to a scire facias, and of that opinion was Philips. Manwood Chief Baron, I agree that if one hath sued a writ of execution, and the same be continued two or three years by vicecomes non misit breve, yet the plaintiff may proceed upon it, and shall not be put to a scire facias. But if such writ be sued forth, but not continued, but discontinued for a year and a day, he shall be put to a scire facias, for it is the negligence of the plaintiff not to continue it, which within the year and day he might do without order of the Court; but not after the year by any order of the Court.

3 Leon. 259. 2 Leon. 77.

32 Eliz. In the Exchequer Chamber.

CXX. Russel and Prats Case.

Russel as executor of Russel brought an action upon the case against Prat and his wife, of trover and conversion of goods and 700l. in money, and declared that the testator was possessed of these goods, 6 Feb. 1 Eliz. at which day they came to the hands of the defendant dum ipsa sola fuit, and converted them, &c. and licet the wife dum sola fuit was required, and the said Prat and she after their marriage, to deliver them, yet they not only refused so to do, but knowing the said goods and money de jure to belong to the testator in his life, and to his executors after his death machinantes ipsum inde callide decipere & defraudare, the said wife dum ipsa sola fuit converted them to her use the said 6 day of February. And error was assigned in the declaration, because it is not alledged there, whether the said conversion was in the life of the testator, or after his death, for that ought to be shewed certainly: for if it was in the life of the testator, then it was not punishable by the common law or statute law, and the conversion is the principal point of the action. This action is personal & moritur cum persona; for it is grounded upon a personal wrong, and ariseth upon a disceit and wrong, and if there was no conversion, then an action of detinue should lye 7 E. 3. Replevin by executors of goods taken in the time of the testator. Fitz. Exec. 106. And it was said that this action here doth not lye upon the statute of 4 E. 3. which gives to executors an [45] action of trespass de bonis asportatis in vita testatoris, for the said statute gives remedy in cases, where there

was no remedy before, but here the plaintiff might have detinue. And in our case it appeareth not whether the conversion was in the life of the testator, or after his death, therefore for the incertainty it is not good. Also here is a repugnance in the declaration, scil. scientes the said goods de jure pertinere to the testator, in his life, and after his death to his executors, & machinantes ipsum inde decipere & defraudare, the said wife dum ipsa sola fuit, converted them to her use, which cannot be, &c. Popham Attorney General contrary. And he agreed, that the executor should not have an accompt against one who was accomptable to the testator, because the privity was gone. But it hath been granted on the other side, that here upon the matter detinue lieth, and if, &c. then also this action lieth, for this is the nature of it. If the testator lends a horse to a special purpose, scil. to ride to such a place, and the party rideth further, and the testator dyeth, the executor may have detinue, or this action, be the conversion in the life, or after the death of the testator; and yet the damages recovered, for the goods converted shall be assets. Two joyntenants possessed of goods, lose them, and they come to A. by trover, who converts them to his use, be it in life, or after the death of one of them, is all one. Anderson, The conversion may be well intended after the death; and as to the exception for the repugnancy, it was said by the justices, that the words scientes &c. are but surplusage, and not traversable. Cook, If I deliver goods to a carrier, being in a chest, and he breaks it and takes them out, in that case trespass lieth vi & armis, notwithstanding the delivery. Anderson, prædicta tamen; i.e. non obstante, that the testator was dead, did not redeliver them &c. which proves that the testator was dead: Periam, prædicta tamen, refers to the non deliberavit, not to the conversion. Cook, I find your goods and use them, the same is a conversion: and in the case of Knight against Winchcomb, it was holden that a conversion is traversable, therefore it ought to be certainly alledged: and in our case the executor might have detinue or trespass for the personal wrong; where the thing it self certain is to be recovered, there the executor is sure to have an action, as detinue, replevin, &c. but where damages only, or things uncertain, there the executors shall not have action; and that difference was in a manner agreed by all. Anderson, Where it is said, that upon the assumpsit of the testator, the executor shall have an action upon the case, the reason is, because the duty upon the assumpsit is certain: and the statute of 4 E. 3. shall not be taken by equity; for by the said statute, the executor of an executor shall not **[46]** have an action before the statute of 25 E. 3. Also there is not any wrong, for then moritur cum persona: if one finds my goods, and denies the having of them, the same is not trespass. Periam, This case is not within the statute of 4 E. 3. for the statute is to be intended, where goods are taken vi. & armis, and if it be at all within the statute, it must be within the equity of it. Manwood, Where one takes my horse and dies, I shall not charge his executor, and that is our case. At another day some held, that the action did not lye against executors, therefore not for executors: and executors of executors shall not be charged with a devastavit made by the first executors. Manwood, The executor of the gaoler shall not be charged in an escape. Anderson, It is not within the equity of the statute of 4 E. 3. Cook, A smith pricks my horse, my executors shall not have an action for it. Anderson, If one takes my goods, I shall have detinue for it, therefore this action. Cook, If one take my goods he is a trespasser, and I shall have detinue, for that affirms a property. Manwood, If my goods be taken from me, I cannot give them to a stranger, but if my goods come to another by trover, I may give them over to another.

CXXI. Trin. 32 Eliz. In the Exchequer.

Attaint.

It was holden by all the barons, that where the Queen is sole party against the subject, and the jury find for the Queen, no attaint lyeth; contrary where the suit is tam pro Domina Regina, quam pro seipso.

CXXII. Trin. 32 Eliz. In the Exchequer.

Debt.

If rent-corn be reserved upon a lease for years, and it is behind for two or three years, the lessor may have debt for the corn, and shall declare of so much corn, and it shall be in the detinet, but yet he shall not have judgment to have corn, but so much mony as the corn was worth, every several year being accompted. Clark Baron doubted if he shall recover the price of the corn, as it was at the time when it was payable, or it was at the time of the action brought. Manwood, The law is clear, that the lessee shall pay according to the price it was at the time of the payment and delivery limited by the lease. Clark said, A. is bound to pay and deliver to the obligee 10 bushels of wheat, and no place is appointed where the payment shall be made, the obligor is not bound to seek the obligee in what place soever as it is in case of payment of mony, for that the importableness therefore shall excuse him, which Manwood granted.

[47] CXXIII. Trin. 27 Eliz. In the Exchequer.

Fine for Alienation without Licence.

Note, it was holden by the barons, that for fines for alienation without licence, not only the land aliened, but the other lands of the alienor shall be chargeable.

Mich. 30 Eliz. In the Exchequer.

CXXIV. Prowses Case.

Tythes. Unity no discharge of Tythes.

It was holden in the case of one Prowse by Egerton Solicitor, upon the statute of 31 H. 8. where an abbot had a rectory impropriate, and also land within the same parish, &c. and so paid no tythes, because he could not pay them to himself, and for no other cause was discharged; and after the dissolution the rectory is granted to one, and the land to another, that in such case the King nor his patentees should not be discharged of tythes, for the lands were not discharged in right; but if the lands in the hands of the abbot were discharged in right, as by composition or lawful means, there the King and his patentee should be discharged from payment of tythes. And it was said by Burliegh Lord Treasurer, that if the composition or custom was that the abbot and his successors should be discharged without extending to farmors or lessees, if the abbot made a lease, and the lessee paid tythes, as he ought; and after the reversion cometh to the King, the lessee should pay tythes during his lease, but after the lease determined, the King and his patentee should not pay, but should be discharged by the said statute; and said, the like matter was in the Chancery, Trin. 30 Eliz. The Abbot of Tewkesbury having the rectory impropriate of Tewkesbury, 11 H. 7. purchased lands within the said parish to him and his successors, after the dissolution the King granted to G. the rectory, and to W. the lands; and if W. should pay tythes, was referred to Manwood and Periam, who gave their resolution, that tythes were payable.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CXXV. ROPERS CASE.

Restitution. Fresh Suit.

Roper was robbed by Smith, and within a week after the robbery, he preferred an indictment against him, and within a month after the robbery, he sued an appeal against Smith, and prosecuted it until he was out-lawed, and thereupon Cook moved to have restitution, and they of the Crown **[48]** Office, said that the fresh-suit was not enquired, for upon an appeal one shall not have restitution without fresh-suit. Cook, The books are, if the defendant in the appeal of robbery be attainted by verdict, the fresh-suit shall be enquired of: but here he was attainted by outlary, and not by verdict, and so the fresh-suit could not be enquired of; and here the indictment is within a week, and the appeal within a month after the robbery, is a fresh-suit. Wray, Chief Justice, In our law he is to pursue the felon from town to town; but the suing of the appeal is no fresh-suit, vide 21 E. 4. 16. Restitution grounded upon outlawry, and appeal of robbery without fresh-suit enquired of 1 H. 4. 5. if he confess the felony, and so is 2 R. 3. 13.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CXXVI. PIERS AND LEVERSUCHES CASE.

In ejectione firmæ by Piers against Leversuch. It was found by verdict that one Robert Leversuch, grandfather of the defendant, was tenant in tail of the land whereof, &c. and made lease for years to Purn, who assigned it over to Piers the plaintiffs father. Robert Leversuch died, W. his son entred upon Piers, who re-entred; W. demised the lands without other words to P. for life, the remainder to Joan his wife for life, the remainder to the son of P. for life, with warranty, and made a letter of attorney to re-enter and deliver seisin accordingly. P. died before that the livery was executed, and afterwards the attorney made livery to Joan, W. died, Edward his son and heir entred upon his wife, she re-entred and let the land to the plaintiff, who upon an oustor brought the action. Heal Serjeant, When P. entred upon W. Leversuch, the issue in tail, he was a disseisor, and by his death the land descending to his heir, the entry was taken away of W. Leversuch. Cook contrary, P. by his entry was not a disseisor, but at the election of W. for when P. accepted such a deed of W. it appeared that his intent was not to enter as a disseisor; and it is not found that the said P. had any son and heir at the time of his death, and if not, then no descent, and there is not any disseisor found that P. expulit Leversuch out of the land, and judgment was given against the plaintiff. And Cook cited a case which was adjudged in the Common Pleas; it was Skipwiths case. Grandfather tenant in tail, father, and son, the grandfather died, the father entred and paid the rent to the lessor, and died in possession, and it was adjudged the same was not any descent, for the paying of the rent explained by what title he entred, and so shall not be a disseisor, but at the election of another.

[49] TRIN. 33 ELIZ. IN THE KINGS BENCH.

CXXVII. PENHALLS CASE.

Penhall was indicted upon the statute of 5 E. 6. for drawing his dagger in the church against J. S. without saying, that he drew it with intent to strike the party, and for that cause the indictment was holden void, as to the statute. It was moved, if it should not bee a good indictment for the assault, so as he should be fined for the same: by Sands Clerk of the Crown, and the whole Court, the indictment is void in

all; for the conclusion of the indictment is contra formam statuti, and then the jury cannot enquire at the common law.

TRIN. 33 ELIZ. IN THE KINGS BENCH.

CXXVIII. WESHBOURNS CASE.

Weshbourn and Brown were indicted upon the statute of 8 H. 6. and exception was taken to it, because in the margent was written Middlesex, and in the indictment they both were named of London; and afterwards in the proceedings the words are, that Weshbourn and Brown entred in such manner in com. prædict. and that is incertain what county is intended, Middlesex or London; but the exception was not allowed, for London before is not expressed to be accounted, but only implyed. Another exception was, because they had not any addition; but it was not allowed, for it appeared to the Court. And after it was moved upon the statute of 31 Eliz. cap. 11. that no restitution upon such indictment should be granted, if the party indeed had had the occupation, or had been in quiet possession for three years next before the day of the indictment, and in the case at Bar the master hath been in possession by three years, but the parties indicted being his servants, had been with him but for one year; it was thereby holden by the Court, that upon the matter restitution should not be granted, for the possession of the master in this case, takes away all restitution, and that by the statute.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CXXIX. CANONS AND OSBORNS CASE.

Attornment.

A. seized of a rent in fee, granted the same by fine to B. to the use of C. It was moved to whom the ter-tenant should attorn, and by Walmesly, Periam, and Windham, **[50]** there needs not any attornment to the conusee, because all the right of the rent is out of the conusor, and transferred to cestuy que use instantly: and Walmesly cited this case to have been lately adjudged. A reversion in fee upon a lease for years was granted by fine to A. to the use of B. B. without attornment brought an action of waste, and it was adjudged that the action did well lye.

CXXX. MICH. 32 ELIZ. IN THE COMMON PLEAS.

[See *Bastin* v. *Bidwell*, 1881, 18 Ch. D. 244.]

A lease for years is made by deed indented rendring rent, and the lessor covenants that the lessee paying his rent shall enjoy the land demised for the whole term, the lessee did not pay the rent, and afterwards is ejected by a title peramount: by Walmesly and Windham Justices, that the covenant is conditional, and that the lessee should not have advantage of it, if he did not perform the condition, which is created by this word (paying). Periam Justice, was strongly to the contrary, viz. that the word (paying) did not create a condition.

MICH. 32 ELIZ. IN THE COMMON PLEAS.

CXXXI. THETFORD AND THETFORDS CASE.

Leases. Baron and Feme. Agreement. Disagreement.

The case was an action of debt for rent reserved upon a lease for years; the plaintiff declared that land was given to A. and B. his wife, and the heirs of their bodies, and that he and his wife leased for years to the defendant, and that the donees were dead, and that the plaintiff as heir, &c. for rent behind, &c. And upon non dimiserunt, the jury found, that the husband and wife dimiserunt by indenture, and that after the husband died, and the wife entred and within the term died: now upon this matter, Anderson Justice, conceived clearly that the jury have found for the defendant, scil. non dimiserunt, for it is now no lease ab initio, because the plaintiff hath not declared upon a deed, and also the wife by her disagreement to it, and occupation of the land after the death of her husband, had made it to be the lease of her husband only.

[51] TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CXXXII. ACTON AND PITCHERS CASE.

Leases within 32 *H.* 8.

In a writ of second deliverance by Acton against Pitcher, it was moved if a lease made by a prebendary were within the statute of 32 H. 8. cap. 28. because the said statute speaks of men seized in the right of their churches, and a prebendary is seized in right of his prebend, and not in right of the church: but it is the opinion of the whole Court that he was within the equity of the statute.

TRIN. 32 ELIZ. IN THE COMMON PLEAS.

CXXXIII. CURTISES CASE.

Amendment.

In a writ of error it was holden in the Common Pleas, that if a writ of error be brought and delivered to the Chief Justice de Communi Banco, and allowed by him under his hand; that afterwards the record cannot be amended by prothonotary, attorney, or Clerk of the Court, although that no record be entred upon the roll, upon which the writ of error is brought.

MICH. 31 ELIZ. IN THE COMMON PLEAS.

CXXXIV. SCOTS CASE.

Resceit.

Scot brought a formedon against A. who made default after default, and now came B. and surmised to the Court that C. was seized of the land in demand, and gave the same to A. in tail, the remainder to the said B. in fee, and prayed to be received; and afterwards the Court, upon advice, ousted him of the resceit.

Anders. 133.

28 ELIZ. IN THE COMMON PLEAS.

CXXXV. TERRETS AND THE HUNDRED OF &C. CASE.

Action upon Statute of Huy and Cry. Oaths.

In an action upon the Statute of Huy and Cry against the hundred of, &c. the defendants pleaded not guilty: and in evidence, the plaintiff to prove that he was robbed, offered to the jury his oath in verifying his declaration, which Anderson and Periam utterly refused to accept of; but Windham Justice affirmed, that such an oath had been accepted of in the case of one Harrington, where the plaintiff could not have other evidence to prove the cause in respect of secresie, for those who have occasion to travel about their occasions, would not acquaint **[52]** another, what monies or other things, which they have in their journey: and we see that the law doth admit of the oath of the party in his own cause where the oath shall make an end of the cause, as in debt, where the defendant wageth his law. Periam, That's an ancient law; but we will not make new presidents, for if such an oath be accepted of us in this case, by the same reason in all causes where is secrecy and no external proof, whereupon would follow great inconvenience; and although such an oath hath been accepted of, and allowed here, yet the same doth not move us, and we do not see any reason to multiply such presidents. The declaration is, that the plaintiff was robbed of 10l. de denariis ipsius querentis, and upon the evidence it appeareth that the plaintiff was receivor of the lady Rich, and had received the said mony for the use of the said lady: and exception was taken to the same by Shuttleworth, but it was not allowed of, for the plaintiff is accomptable to the Lady Rich for the said mony. And it was agreed, that if he which was robbed after he had made huy and cry, doth not further pursue the felons, yet his action lyeth.

MICH. 26 ELIZ. IN THE KINGS BENCH.

CXXXVI. TOWNSEND AND PASTORS CASE.

Feoffment by Coparceners cestuy que uses.

Note, It was holden in the Common Pleas by all the justices in the case between Townsend and Pastor, two coparceners are in the use of a manor after the statute of 1 R. 3. the one of them enters and makes a feoffment in fee of the whole manor, that this feoffment is not only of the moiety of the manor, whereof she might lawfully, and by the said statute make a feoffment, but also of another moiety by disseisin.

MICH. 26 ELIZ. IN THE KINGS BENCH.

CXXXVII. BULWER AND SMITHS CASE.

Bulwer brought an action upon the case against Smith, and declared, how that H. H. had recovered against the plaintiff in the Common Pleas 20l. and before execution died, and that the defendant knowing that, at D. in the county of Norfolk, malitiose & deceptive machinans, to outlaw the plaintiff upon the said judgment, in the name of the said H. H. &c. in performance of his said purpose, at W. in the county of Middlesex, took out a capias ad satisfaciend. in the name of the said H. H. against the now plaintiff upon the said judgment directed to the Sheriff of London, and non est inventus being returned upon that, took out an exigent, in the name of the said H. H. which writ by the procurement of the defendant was retorned, and **[53]** then the plaintiff was outlawed, and afterwards the defendant in the name of the said H. H. took out a capias utlagatum against the plaintiff directed to the Sheriff of Norfolk; by

force of which the plaintiff was arrested and imprisoned for two months, until he had gotten his charter of pardon, by reason of which outlawries the plaintiff had forfeited all his goods and chattels: and upon the said declaration, the defendant did demur in law, and the principal cause of the demurrer was because that the action might have been laid in Middlesex, where the wrong began, scil. the capias ad satisfaciend. the outlawry for this imagination at D. in the county of Norfolk, set forth in the declaration, cannot give to the plaintiff this action: but if divers conspire in one county for to indite one, and they put the same in execution in another county, the party aggrieved may lay his action in which of the said two counties he pleaseth 22 E. 4. 14. for a conspiracy is more notorious, than an imagination, imaginatio est unius, conspiratio plurimorum: and in this case the deliverance of the capias at D. in Norfolk is but accessary, and the suing of the process aforesaid at Westminster is the principal: upon the part of the plaintiff it was said, that such an action might be laid in the county, where the plaintiff was wronged, and the plaintiff is not tied to lay his action in the county where the original matter, which was but conveyance to the said wrong, was done. A. imprisoned upon a capias ad satisfaciend. in Middlesex escapes into Surrey, the action upon the escape shall be laid in Surrey. Reteiner of a servant in one county, who departs in another county, the master shall lay his action in which of the said counties he will, 15 E. 4. 18, 19. 41 E. 3. 1. A writ of disceit was brought in the county of York, and the case was, that in a præcipe quod reddat of land, the tenant shewed forth a protection at Westminster, the which was allowed for a year, and within the year the tenant stayed in the county of York upon his own occasions, the said writ of disceit was holden to be well laid, for there the wrong began, notwithstanding that the original: i.e. the casting of the protection was in Middlesex; for the disceit is, that the tenant contrary to the pretence of the protection continued at York, for the protection was quia moraturus. And always where the cause of the action consists of two things, whereof the one is matter of record, and the other is matter of fact: there the action shall be laid in such county, where the matter in fact may be more properly tried, vide 11 R. 2. Fitz. action sur le case 36 Br. lieu. 84. in the principal case at Bar, the Court was of opinion, that the action was well brought in the county of Norfolk. Another exception was taken to the declaration, because the plaintiff hath there set forth whereas his true name is John Bulwer, by which name he now sues, he was sued and outlawed by the name of John Buller, and then **[54]** the now plaintiff upon that matter was never sued, nor outlawed, and then is not grieved by the defendant, but John Buller; for here in his declaration there is not any averment that John Bulwer and John Buller are one and the same, and not divers persons: but the exception was disallowed, for the whole Court held, that for as much as the plaintiff hath declared that he, by the name of John Buller, was sued and outlawed, the same is an averment in law, &c. and amounts to so much. Another matter was objected, because it appeareth in the declaration that H. H. was dead before this process was sued, and then the outlawry was erronious, and so the plaintiff is not at any mischief, but that he may reverse the outlawry by error; as in conspiracy, the defendant pleads, that the indictment upon which the plaintiff is arraigned is vitious and erroneous, and so his life was never in jeopardy. But as to that, it was said by the Court, that the erronious proceedings of the defendant shall not give advantage to himself, but because the plaintiff was vexed by colour and reason of the outlawry, and put to his writ of error, which cannot recompence the loss and damage by him sustained by reason of the outlawry aforesaid, it is reason that the plaintiff have his action; wherefore Wray Chief Justice, ex assensu sociorum, gave judgment for the plaintiff.

CXXXVIII. Mich. 27 Eliz. In the Kings Bench.

Upon the Statute of 23 Eliz. of Recusancy.

Certain persons were indicted upon the Statute of 23 Eliz. for refusing to come to the church, and upon the same were outlawed, and now they came to the Kings

Bench ready to make their submission, and to conform themselves according to the said statute; and thereupon they prayed to be discharged. But the Court would not receive such submission, but advised them to purchase their pardon for the outlawry, and then to tender their submission, which they did accordingly, and at another day came again, and shewed to the Court their pardon; whereupon the clerk of the Court asked them if they would conform themselves according to the said statute; who said they would, wherefore they were discharged.

MICH. 27 ELIZ. IN THE KINGS BENCH.

CXXXIX. CHRISTIAN AND ADAMS CASE.

Action for words.

An action upon the case was brought for speaking these scandalous words of the plaintiff, scil. the plaintiff did conspire the death of the defendant; it was found for the plaintiff, and moved in arrest of judgment, that upon the matter the action did not lye; for the bare conspiring of the death [55] of a man is not punishable by the law of the land, no more than if many conspire to indict one, but do not put it in execution it is not punishable; but if A. saith that B. lyeth in wait to kill him, or rob him, there an action lyeth, for insidiatores viarum are punishable. But the opinion of the whole Court was, that because these words sound in great discredit of the plaintiff, it is reason he have his action, and so judgment was given for the plaintiff.

MICH. 27 ELIZ. IN THE KINGS BENCH.

CXL. THE LORD STAFFORD AND SIR ROWLAND HEYWOODS CASE.

Abatement of Writ.

The Lord Stafford brought an action upon the case against Sir Rowland Heywood kt. Exception was taken to the original writ, viz. ad respondend. &c. Quare colloquium, quoddam habebatur, inter Dominum Stafford & Row. Heywood de assurando castrum, to the said Lord Stafford by the said Sir Rowland, &c. Dictus Rowlandus castrum illud non assuravit, &c. where the said writ said cum colloquium quoddam habebatur: for the cause of the action is not colloquium habitum, but the not assurance of the castle according to the promise made super colloquium prædictum; and for that cause the writ was abated.

CXLI. MICH. 27 ELIZ. IN THE KINGS BENCH.

Note, by the Court, If one who is not a common informer, be barred in any information or action upon a penal statute, he shall pay costs, notwithstanding the preamble of the statute of 18 Eliz. cap. 5. be, for the redressing of divers disorders in common informers; but if pars gravata be barred, in such case he shall not pay costs.

TRIN. 32 ELIZ. IN THE EXCHEQUER.

CXLII. ROBINSONS CASE.

Jurors, where bound by confession of the parties, where not.

George Robinson lessee for years of the manor of Drayton Basset, the reversion to the King, devised his term to his wife, as long as she should keep her self a widow,

with the remainder over, if she married or died, and made his wife and his son William his executors, the said William being within age, and therefore the administration was committed to the wife alone, and she only proved the will, and afterwards the wife granted all her interest to the said William and dyed; and by Cook nothing passed by this grant, for William had the same before, for every executor hath the whole interest. Popham contrary; for at the time of the grant the son was within age, and **[56]** had not administred nor proved the will, therefore in effect the wife was sole executrix; and by Egerton Solicitor, if during the said executorship by the wife, one doth trespass upon the lands, the wife only shall have the action of trespass without naming her co-executor, which Cook denied; and he cited the case 10 H. 7. 4 where two executors are, and the one only is possessed of goods of the testator and a stranger takes them out of his possession, to whom the other executor releaseth, and after the executor, out of whose possession the goods were taken, brings an action of trespass against the trespasser, who pleads the release of the other executor, and it was holden a good plea, for the possession of the plaintiff was also the possession of his companion: the case was further, that Thomas Robinson in pleading, shewing that G. Robinson was possessed, and the same devised to his wife, who granted to William Robinson, who devised it to the defendant: and the other side shewed, that the said Thomas granted the said term to Paramour, and upon that grant they were at issue; if now against his own pleading Thomas might give in evidence, that Thomas could not grant, for that he had not any thing to grant; for if the gift made by the wife to William was void, and he had the term as executor, then he could not devise it, but his devise to Thomas was void, and then Thomas could not grant it, and so ne grant pas. It was also shewed, that the said Thomas granted the same to Paramour by indenture; if now against that indenture he might give in evidence such special matter, ut supra; and if the party shall be concluded, if the jury shall be concluded to give the verdict secundum veritatem facti, for they are sworn to say the truth, and by Popham and Egerton, as well the jurors, as the parties, are bound and concluded by the confession of the parties on the record; and here all confess that William devised to him, virtute cujus he was possessed. The Queens Attorney to that said, that true it is that Thomas Robinson was possessed; but further said, that the said Thomas granted it to Paramour, and so the interest of Thomas is confessed on both sides. Therefore the jury shall not be received to say the contrary. And by Manwood Chief Baron, if the parties admit a thing by not gainsaying it, the jury is not bound by it; but where upon the pleading a special matter is confessed, the jury shall be bound thereby. And afterwards the issue was found against Robinson the defendant.

33 Eliz. In the Kings Bench.

CXLIII. Applethwait and Nertleys Case.

In an action upon the case, the plaintiff declared, that the defendant promised in consideration that the plaintiff at **[57]** the request of the defendant would marry his daughter, to give to the plaintiff 40l. and said he had married his daughter, and yet the defendant licet sæpius requisitus would not pay it. It was moved by Cook in stay of judgment, that the declaration is vitious because there is not set forth the place and time, when the request was made, for the assumpsit being general, it is by law to be paid upon request. Fenner, If the promise was expresly to be paid upon request, the declaration was not good. And afterwards judgment was given for the plaintiff.

Hil. 30 Eliz. In the Common Pleas.

CXLIV. Wats and Kings Case.

Samuel Wats plaintiff in ejectione firmæ against W. King, upon a special verdict it was found that W. Wallshot was seized in fee, and he with one Oliver Shuttleworth

Octab. Mich. 3 & 4 Phil. & Mary, levied a fine sur conusans de droit, &c. to John Hooper, who granted and rendred by the same fine to Oliver for a month, the remainder to the said W. Wallshot, and to one Anne Cook, and the heirs of their bodies, &c. the remainder to the right heirs of the said W. Wallshot in fee, and that with proclamation. William and Anne intermarry, have issue John now alive: W. Wallshot 4 & 5 Phil. & Mary, levy a fine with proclamation to Edward Popham Esq; to the use of the said Edward and his heirs: W. Wallshot 18 Eliz. died, Anne took to husband Richard Stephens, and they in the right of the said Anne entred, and by indenture demised the said land to Richard Hoose the father, Richard the son, and Mary his wife, for the term of their lives, rendring to the said Richard Stephens and Anne his wife, and to the heirs of the body of the said Anne, and of the right heirs of the same W. Wallshot. Anne died; and if this lease should bind the conusee was the question, for it was agreed by all that the issue in tail was bound by the fine, quære; the case was only put, but not resolved.

CXLV. Trin. 30 Eliz. In the Common Pleas.

Amercement of the Sheriff.

Upon a recovery in a writ of entry sur disseisin of two acres of lands, an habere facias seisinam was awarded; the sheriff as to one acre returned habere feci, and as to the other tarde. And that return was shewed to the Court, and all the justices but Periam held, that the sheriff should be amerced for that return, being contrary & repugnant in it self; but Periam said, it may be that the acre of which no seisin is had was so distant from the other acre whereof the seisin was had, that the sheriff in time could not make execution of both being so remote the one from the other. To which it was answered that if the truth of the case **[58]** was such, then might the sheriff make execution in one acre in the name of both acres. And if upon a capias ad satisfaciend. against two, the sheriff retorn as to one a cepi, and as to the other tarde, he shall be amerced, for his several retorns cannot stand together.

Mich. 29 Eliz. In the Common Pleas.

CXLVI. Lees and Lord Staffords Case.

Compton made conusans as bayliff to Edward Lord Stafford, and shewed that Henry Lord Stafford, father of the said Edward, and Ursula his wife, were seized of the place where, and let the same for years to Edward Lees the plaintiff, Robert Lees, and Elizabeth Atwood, upon condition they, nor any of them, should alien the said term, nor any part of the same without the leave of the lord or his heirs. Henry Lord Stafford and Ursula died, and that the reversion thereof descended to Edward Lord Stafford; and shewed further, that the said Edward Lees the plaintiff had aliened: to which the plaintiff in bar of the conusans said, that the said Edward now Lord Stafford gave license, that the said Edward Lees, Robert, or Elizabeth might alien, and that was without deed. It was conceived by some, that this licence was not of any force to dispense with the condition, because it is uncertain and doubtful in the disjunctive; and it was resembled to the case of 11 H. 7. 13. where a man gives a thing to J. S. or A. B. it is void for the incertainty: but all the Court was to the contrary. For here the thing which is given is but a liberty, and is not to be resembled to a gift or interest; and the intent of the Lord Stafford was, that one of them might alien, but not all of them, and afterward judgment was given for the plaintiff.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CXLVII. LIMVER AND EVORIES CASE.

Limver as administrator of one A. brought debt against Evory, and the case was, F. made G. his executor, and G. made H. an infant his executor, and died, and during the minority, administration was granted to the plaintiff, who as administrator of G. brought an action of debt upon a bond made to the first testator, and that was assigned for error, for the plaintiff ought to bring his action as administrator of the first testator, vide 10 E. 4. 1. 26 H. 8. 7. and for that cause the judgment was reversed.

[59] MICH. 33 ELIZ. IN THE KINGS BENCH.

CXLVIII. KNEVIT AND COPES CASE.

Knevit brought ejectione firmæ against Cope, and declared, whereas John Hopkins by his deed bearing date the 20 of May, 32 Eliz. had let to him a house and two yard lands, containing forty acres of land, meadow, and pasture, at Tithingham de Forecomb. in the parish of Steep, &c. and upon not guilty, the visne was of Tithingham de Forecomb: exception was taken by Cook, that the declaration had not certainty; for it is not shewed certain, how much meadow land, and how much pasture is contained in the said two yard lands, and the jury may find the defendant guilty, as to so much land, but not to the residue; also he hath not shewed in the declaration when the lease was made, but only saith, that by indenture bearing date 20 May, &c. but doth not shew any day of delivery of the indenture, for then is the demise. To which exception it was said by the justices, that the declaration as to that was good enough, for it shall be intended to be delivered at the day of the date. Another exception was taken to the visne, because that the visne ought to have been from the parish, and not from Tithingham, 11 H. 7. 23, 24. Forcible entry in the manor of B. in B. the visne shall not be from the manor of B. but of B. Gawdy, You shall never have a visne of the parish, for divers towns may be in one parish; but here the visne is well of Tithingham, for it may be that it is a town. Cook, It is but a vill conus, from which a visne cannot come.

3 Leon. 266.

CXLIX. TRIN. 28 ELIZ. IN THE COMMON PLEAS. ROT. 1027.

Milbourn brought an action upon the Statute of Winchester, against the inhabitants within the hundred of Dunmow in the county of Essex, it was found by special verdict that the plaintiff was robbed 23 Aprilis, inter horam secundam & matutinam tempore nocturno, & ante lucem ejusdem diei: and the opinion of the Court was clear, that the plaintiff should be barred, for the said statute provided for ordinary travel: as in the case of Archpool, who came to his inn post sunset, & ante noctem in tempore diurno, which is an usual time for travelling to come to his inn; but the law doth not receive any in protection of this stat. who travel in extraordinary hours, for it is the folly of the traveller to take his journy so out of season, and the inhabitants are not bound to leave their houses, and to attend the ways tempore nocturno: and another reason was alledged [60] by the justices, because the said statute appoints watch to be kept in the time of night, à Festo Ascensionis usque ad Festum Sancti Michaelis, and this robbery was done the 23 of April, so as it was out of that time; and afterwards judgment was given against the plaintiff.

MICH. 26 ELIZ. IN THE COMMON PLEAS.

CL. BARKERS CASE.

Estrepement in Partition.

A writ of partition by Barker heir of Gertrude, Marquess of Exceter, who devised all her lands to Blunt; by which the third part was descended to the plaintiff, and he prayed a writ of estrepement; and it was the opinion of the Court, that the writ ought not to be granted, for that the plaintiff might have a more proper remedy upon the statute cum duo & tres, &c. and in a writ of partition, no land is demanded.

TRIN. 29 ELIZ. IN THE KINGS BENCH.

CLI. MEGOT AND DAVIES CASE.

Assumpsit. If the Court may reverse their own Judgment.

Megot brought an action upon the case against Broughton and Davy upon assumpsit; and it was found by nisi prius for the plaintiff, and afterwards before the day in bank Broughton dyed; and after judgment given, Davy the other defendant brought a writ of error in the said Court, scil. in the Kings Bench, where judgment was given, and assigned an error in fact, scil. the death of Broughton depending, the writ, vide 2 R. 3. 21. and this case is not like to trespass; for trespass done by many are several trespasses, but every assumpsit is joynt: and if the Court upon this matter might reverse their own judgment, was the question; the case was not resolved, but adjourned.

CLII. TRIN. 31 ELIZ. IN THE COMMON PLEAS.

Office trove. Conveyance by the Heir; upon Entrusion.

It was found by office, that J. S. held by the Queen, and dyed without heir, whereas in truth he had an heir, scil. A. S. who leased the lands for an hundred years, and afterwards traversed the office, and had an ouster le mayne le Roy. Now the matter was moved in the Common Pleas by Fenner, in behalf of the Sheriffs of London, before whom the matter depended, to whom it was said by Anderson Chief Justice, that where the King is entituled by an office to a chattel, as to a wardship, &c. there if the heir without any intrusion bargain and sell, levy a fine, or lease for years during the **[61]** possession of the King, it is void against the King, but shall bind the heir: but where the King is intituled to the fee-simple, as in this case, such a conveyance is meerly void.

HIL. 31 ELIZ. IN THE KINGS BENCH.

CLIII. SAMUEL STARKEYS CASE.

Homine replegiando by Samuel Starkey to the Sheriffs of London. Who returned, that the said Starkey was indicted to be de mala fama & deceptione Domini Regis, with divers other general words, and namely, that he had deceived J. S. a clothier, and that he was a common cozener; and thereof being found guilty, judgment was given by the mayor and recorder, that he should be disfranchized of his freedom, and should be fined and imprisoned for a year; and further said, that he had not paid his fine, nor the year expired. Cook, Such return hath not been seen, and it is directly against the Statute of Magna Charta. Wray Chief Justice gave a rule that the sheriffs should make their return at their perils before such a day.

HIL. 31 ELIZ. IN THE KINGS BENCH.

CLIV. BUSHY AND MILFEILDS CASE.

Error.

In error brought by Bushby and Milfeild, it was assigned for error, that where in the first action the jury gave four pence costs, and the Court gave de incremento three and twenty shillings, that in the judgment the four pence was omitted. It was the opinion of the Court, that for that cause the judgment should be reversed, although it be for the advantage of the party, so where the judgment is quod sit in misericordia, where it ought to be capiatur.

HIL. 29 ELIZ. IN THE COMMON PLEAS.

CLV. BINGHAM AND SQUIRE'S CASE.

Obligation.

Bingham brought debt upon an obligation against Squire. The condition was, if Squire did procure a grant of the next avoidance of the Archdeaconry of Stafford to be made to the said Bingham, so as the said Bingham, at the said next avoidance may present, that then &c. The case was, that afterwards by the means and endeavour of Squire, the grant of the next avoidance was made to Bingham; but before the next avoidance, the present archdeacon was created a bishop, so as the presentment of that avoidance belonged to **[62]** the Queen: it was adjudged in this case, that the condition was not performed, and that by reason of these words, scil. so that Bingham may present. And afterwards judgment was given that the plaintiff should recover.

3 Leon. 151.

HIL. 26 ELIZ. IN THE COMMON PLEAS.

CLVI. MANSOR'S CASE.

A man bound himself in an obligation to make an assurance of lands the first day of Jan. and the last day of December, he to whom the assurance was to be made, scil. the obligee, the said last day before sun-setting, came to the obligor with a deed ready to be sealed, and prayed him to seal it; who said to him that he was a man unlearned, and said he would shew the same to his counsel, and then he would seal it. And if the obligation was forfeited or not, because he did not seal it presently, was the question: and Fenner argued that it was not; for when a thing is to be done upon request, then he who makes the request, ought to give sufficient and convenient time to perform the condition. I agree, that where the condition is absolute, there if the condition be not performed, he shall not be excused by the default of another. As if a man be bounden to marry A. S. and she will not marry him; or to enfeoff J. S. and he refuseth, as 3 H. 6. is, the obligation is forfeited; yet in these cases if the obligee himself be the cause that J. S. will not take the feoffment, or he will not marry A. S. the obligation is not forfeited: so in our case, for by his late request it is impossible for me to perform the condition; for before my counsel shall have perused it, the time will be past. If a man be bound to enfeoff one of lands in Barwick, request ought to be made so long time before, that after that he may go to Barwick. So if one be bounden to pay 1000l. to J. S. he ought to make his tender so long time before the last instant of the last day, that the mony may conveniently be told. This case was in question, A man made a feoffment of the manor of D. with the appurtenances, to which an advowson was appendant, and covenanted that the manor upon

request should be discharged of all manner of incumbrances, and before that the feoffor had granted the next avoidance to J. S. the incumbent died, the clark of the grantee was instituted and inducted, the feoffee requested the feoffor to discharge the incumbrance. The opinion of many sages of the law was, that he had not made his request within convenient time. So if a man be bounden to infeoff the obligee to have and to hold to him and his heirs as long as J. S. shall have issue of his body; if the obligee demand assurance after the death of J. S. without issue, yet **[63]** the obligation is not forfeited. In 22 E. 4. if lessee for the life of another continues possession for two or three weeks after the death of cestuy que use, where he could not have more speedy notice of his death, he shall not be a trespassor. In 15 Eliz. it was holden in Wottons case. that where he was bound to make a feoffment to J. B. and J. B. came to him in Westminster Hall, and tendred to him a writing, and prayed him to seal it. And Wotton said that he would not, that the obligation was forfeited; contrary if he had not denied to seal it, but had shewed the same to his counsel, as in our case. But the opinion of the justices was, that the obligation was forfeited. For when he knew the last instant of the time, he ought to have had his counsel there ready with him. Vide the case of arbitrement 18 E. 4. 21. At another day the case was argued again by Andrews, and he said that the obligation was not forfeited; for he said it is a rule in law, sic utere tuo, ut alienum non lædas, and in E. 4. a man was bound upon request to relinquish and renounce administration; and there it was holden, that after the request he ought to have convenient time to go to the Ordinary, before it shall be said that he had forfeited his obligation. In 33 E. 3. it is said that if J. S. be bound, that if A. B. infeoff C. that then he shall pay to the obligee 10l. Now if the feoffment be made after sun-setting as it well may be, yet it is sufficient to save his obligation, if he pay the mony the next day: and 19 H. 6. an annuity was granted to an infant until he was promoted to a benefice, if a benefice be offered unto him before he be of sufficient age, and he refuseth it, the obligation is not forfeited. If a man be bound to enfeoff and make livery and seisin of the manor of D. to one upon request, and afterwards the party is made King, in which case he cannot take livery, now if upon request the party refuseth, yet it is no forfeiture: and it hath been holden here by you all, that if a man unlearned seals a deed which is written contrary to the intent of the parties, the same not being read unto him, by that he shall not be bound for ever. But the opinion of the Court was as before. That the obligation was forfeited.

[64] CLVII. Pasch. 26 Eliz. In the Common Pleas.

Note that Mead and Windham (the other justices being absent) were of opinion, that a copyholder in fee, who by custom may surrender in fee, may make a surrender in tail, without any special custom to warrant it; and he who may prescribe to make a feoffment in fee, may make a lease for life, and it shall be good, because omne majus continet in se minus.

Trin. 27 Eliz. In the Kings Bench.

CLVIII. Trecarram and Friendships Case.

Trecarram made a demise by these words: This indenture between Trecarram, &c. of the one part, and Friendship his wife, and their children lawfully begotten, at the assignment of the said Friendship of the other part. The question was, if L. the daughter, which the husband and wife had at the time of the lease made, was party to the said indenture, and so took by it. Or if another son of Friendship, which after he made his executor, should have the term. Hamon, 30 E. 3. If a gift be made to infants of such a man, it is a good name of purchase, and if he hath but one infant it is good to him: and so in our case, where Friendship had issue a daughter, at the time of the lease, that she should take only;

otherwise where he had many. And the words, viz. at the assignment of Friendship, are mere surplusage, as 20 Ass. where a man gave twenty loads of wood in such a wood (whereof fourteen he hath of the gift of such a one,) these words (whereof he hath of the gift of such a one,) are surplusage. Cook conceived that the daughter, who was in esse at the time of the demise, should have the term: for if a man make a grant to two, as the one of them is not capax, he who is capable shall have the whole. As a feoffment to J. S. and the right heirs of J. D. J. D. being alive, J. S. shall have the whole. So Ass. a gift to a man, and to such a wife which he shall have, he shall have the whole, and the wife nothing: the words At the assignment, &c., are void, for there is not a person able to take at the time of the grant, therefore he shall not take afterwards; and because the daughter is able, she shall. Wray Justice, conceived that these words, At the assignment of Friendship, were not void, but that he had reserved to him liberty to make his son party, or not; and because he had not assigned him, that he took nothing. Ayliffe, If lands be leased to me, my wife, and William my son, whereas his name is John, it is void as to the son for the misnomer, but if he had said son, without more, it had been good to the **[65]** son: and so here if he had not mentioned any assignment, then the daughter should have had it; but contrary by the words of the assignment. Clench, The intent of the parties is to be considered: as if I grant to you common within my manor of D. it shall be construed to be within my lands commonable, and not in my orchard: and here it shall be intended those children which he shall name when the sealing was; and if he name others after, it shall be void; as a lease to you, and to her who you shall take to wife, is void, for there ought to be such a person at the time of the commencement of the deed, which might take. And the opinion of the whole Court was, that the defendant, who claimed by the executor, should have the term, and not the plaintiff who claimed by the daughter, and therefore judgment was entred, that the plaintiff nihil capiat per billam.

1 Leon. 287.

Pasc. 24 Eliz.

CLIX. The Countess of Sussex and Worths Case.

Leases by spiritual persons, as Bishops, &c. Leases.

In 4 and 5 Phil. and Mary, a private statute was made by which the manor of Barnham was assured to the Countess of Sussex for her joynture. Proviso that it should be lawful for the Earl of Sussex to make a lease, or leases for 21 years. The earl made a lease for 21 years, and afterwards he made another lease for 21 years, within a year before the first lease ended, and the second lease was to begin at the end of the first lease, and if the second lease was good, and within the intent of the Act, was the question. Popham Attorney, that it was not: 1. Because it is to begin at a day to come. 2. Because it is made during the first lease. But it may be objected, that it is said (lease or leases): it is not in the sense of the Act, for by it he might only make leases in possession, and not in futuro, and so he might make a lease for 21 years, to begin after his death, which should be a great prejudice to the countess, and against the intent of the Act, which was made for her advantage. The Lord Treasurer and W. Mildmay had a commission to make leases for 21 years of the lands of the Queen, because the Queen should not be troubled with it: they could not make leases but in possession only by virtue of their commission; but all others which exceed 21 years, and in reversion passed by the hands of the attorney of the Queen, and not by them only by their commission. 2. Because he cannot make a lease upon a lease, for by the same reason that he might make one future lease, he might also make 20 leases in futuro, and so make void the Act: it was Marshals case upon the statute of 1 Eliz. of leases to be made by bishops. The Bishop of Canterbury made a lease for one and twenty years, and afterwards he **[66]** made another lease for 21 years to begin at the end of the first lease. It was holden that the second lease was not good. But in the great case upon that point in the Exchequer Chamber,

there the second lease was in possession, and to begin presently, and ran with the other; and therefore it was adjudged a good lease, because the land was not charged with more than with 21 years in the whole; and if it had been so done here, it had been good. Wray said that if the second lease had been made two or three years before the expiration of the first lease, then clearly it had been void, but because, but one, two, or three days, or a month before, he doubted if it should be void, or not. The statute of 32 H. 8. leases made for one and twenty years to be good from the day of the date thereof, and one makes a lease to begin at a day to come, and by two of the justices of the Common Pleas it is good; but the two other justices held the contrary. Clench Justice, There is no difference, if it be by one deed or several deeds; and therefore he held, that if the earl had made a lease for one and twenty years, and within a year another, it is a void lease, whether it be by one deed or two deeds, for he exceeds his authority: and so in the principal case; if there had been no proviso, he could not have made any lease, therefore the proviso which gave him authority ought precisely to be performed. At another day it was argued by Daniel for the lessee in reversion to begin at a day to come, and by him words only are not to be taken or considered in a statute, but the meaning of them, and they are not to be severed: also statute law is to be expounded by the common law, and by the common law if one give authority to another to make leases of his lands, he may make leases in reversion, because an authority shall be taken most beneficially for them for whom it was given. So if one grant an authority to make estates of his lands, by that general word, he may make leases for years or life, or gifts in tail, feoffments, or other estates whatsoever. If one gives a commission to another to make leases for one and twenty years of his lands, he may make a lease in reversion: and that case was in the duchy between Alcock and Hicks. 2. It is good by statute law: for the statute of Richard 2. which gives authority to cestuy que use, to make leases, he may thereby make leases in reversion. The statute of 27 H. 8. which gives authority to the chief officer of the court of surveyors to make leases, if it had stayed there he might have made leases in reversion, but the said statute goes further, and says, proviso that he shall not make a lease in reversion, vide 19 H. 8. Dyer 357. The statute of 32 H. 8. of leases to be made by husbands of the lands of their wives by the general words of the said statute, they might **[67]** make leases in reversion. But the statute goes further proviso, that there shall not be any former lease in being above 21 years before the making of the said leases. In all cases of statutes which are with provisoes, the law upon them shall be taken generally, if not in such particulars which are restrained by the proviso, as here, the proviso goes to the ancient rent to be reserved, that the countess shall have remedy against the lessees for the said rent, &c. therefore it is at large in all other points but in these: as if the wife be within age, and she and her husband joyn in a lease, yet this lease is good by the statute of 32 H. 8. because the law is general, and doth not restrain these imperfections expresly: so a feoffment in fee with warranty, proviso that he shall not vouch; yet that is a restraint as to the voucher only, and he is at large to rebutt or have warrantia chartæ: a lease for life, proviso he shall not do voluntary waste, he is at large to do other waste, but otherwise it were if there were no proviso. Therefore a proviso makes the words precedent to be expounded more liberally. The words of the Statute of 33 H. 8. cap. 39. of Surveyors, which gives authority to the chief officer to devise, set, or let for 21 years, he might have made a lease for 21 years in reversion, if the proviso had not been. But the words of the Act in our case are demise; demises therefore shall be taken most liberally. 3. As to the intent of the Act, this lease is within it, for the intent is to be collected out of the words, and shall not be drawn to any private intent against the words which should be done here; for by such exposition the earl, his heirs, executors, &c. should be prejudiced, and the countess only should be benefited; also remedy is given to the countess by this Act against such lessees, that she should have the rent by debt or distress, as if she had been party or privy, therefore it is reason via versa, that they have remedy against her for their leases: also he said that the same remedy should be for them as against the earl himself if he had lived, therefore they shall have remedy against her, who might have had it against the earl in his life. Also the statute is to be expounded according to the words, where such exposition is not rigorous nor mischievous. Also

private laws are to be expounded by the letter and strictly, as the deed of the party, as 14 E. 4. 1. Br. Parliament 16. a particular Act was made that the Chancellor, calling to him one of the justices, might award a subpœna between A. and B. and end the matter between them; there, by all the justices but Littleton, he shall not award a subpœna general but a subpœna making mention of the Act, for he shall pursue the particular Act strictly, and a common Act for the common profit shall be construed largely. Also a [68] statute shall not be construed largely by equity to the overthrow of an estate; as the statute which gives, that if a woman consent to a ravisher, that the next heir shall enter, if the daughter entreth, and afterward a son is born, he shall not put out the daughter, because the statute shall not be drawn to a private intent to the overthrow of an estate vested before lawfully in the daughter: therefore neither in our case the Act shall not be drawn to a private sense for the benefit of the countess to overthrow the lease for years; and it is not like to the case which hath been put: if he make a lease for twenty years, and for other twenty years, the same is not good by the Act, which case I agree, for that is a lease for forty years. Egerton Solicitor contrary: 1. As to the word demise from dismission, the same is nothing else but a letting of the land. So lease is from (laiser) a French word, and such a demise at a day to come is an interest of a lease, and not a lease it self, for he hath not let the land: as if I say, I let you my land for 21 years: when shall you have my land? Shall you have my land at a day to come, or presently? If I sell you land, and covenant that it is discharged of all other incumbrances than leases for 21 years, and there is a lease to begin afterwards for 21 years, I have broken my covenant. If I am bound to make you a lease for 21 years, and I say to you, I make a lease to you to begin 200 years after, I have forfeited my obligation. If the custom of a manor be that dominus pro tempore may make leases for 21 years, may he make a lease to begin 20 years after? Truly not, if there be not a special custom to make it good. If I give authority to my steward to make leases of my lands for 21 years, he cannot make a lease to begin at 100 years hereafter. As to the case of the duchy, there the condition is that he shall make leases according to his discretion, therefore there he may make such leases as he pleaseth. As to the statute of Richard 2. which enables cestuy que use, it is not like to our Act or statute, for that is, that feoffments, estates, &c. therefore he may make such leases without doubt. If I devise that my executor shall make leases of my lands for 21 years, he cannot make a lease for to commence 100 years after; and if they do not make them within convenient time, the heir shall avoid their authority: so the statute law hath such exposition that the precise time ought to be observed, as the statute of 14 E. 3. cap. 18. 1. Receit to Voucher, 8. If the tenant vouch to warranty a dead man, and the demandant will aver that the vouchee is dead, or that there is none such, there the averment shall be received without more delay. Upon that statute the case in 21 E. 3. where one vouched to warranty, and a summoneas ad warrantizan-[69]-dum issued, and then came the demandant, and would have averred that the vouchee is dead, the tenant said he ought to aver the same upon the voucher to warranty, and that now he had surceased his time to take advantage of the time; and the demandant said, that the statute did not bind him to that, nor prescribed any time, but left the same generally, yet by the Court it was awarded that he should have the averment the time of the voucher, or not at all. So the statute of 11 H. 7. cap. 20. if a woman who hath a joynture for life or in tail, and suffers a common recovery according to the statute of 11 H. 7. cap. 20. and afterwards the issue in tail, releaseth all his right by fine and dieth, his issue may enter, for the assent ought to be by voucher in the same action, and the like, for if there be a mean instance between the recovery and the assent, then any assent after is nothing to the purpose; for the recovery being once void by the statute, it cannot be made good by assent afterwards, vide Dr. & Student 54. and yet the statute saith, provided that the Act shall not extend to any such recovery, discontinuance, &c. if the next heir be assenting to the same recovery, &c. so as the same assent or agreement is of record or enrolled; and doth not say, if the assent ought to be at one time, or at another. But to come to leases upon statutes. Before the statute of 2 E. 6. cap. 8. if leases were not found by offices, they should be ousted and put to their traverse. But put case that after that statute a lease to begin at a day to come is not found by office, shall it be aided by that statute: No truly, and so it is holden

in the Court of Wards at this day. And the Lord Chief Justice of England so held in his reading at Lincolns Inn: The Statute of 1 Eliz. of Leases to be made by bishops is, that leases other than for 21 years from the time that they begin, that is, when they take effect as a deed, and when they take effect not to be executed; for so they might make infinite leases: quære the further part of Egertons argument in this case; and vide in Cooks 1 part of his Reports, where this case is reported to be adjudged; that the lease made in reversion by the earl was a void lease.

1 Leon. 35. 3 Leon. 132. Co. 6 Rep. 33. Fitzwilliam's case.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

Debt brought upon an escape in L. the defendant said, that he suffered him to escape in C. by the commandment of the plaintiff, without that; that he escaped in L. It was holden to be no plea. But in an action upon a false imprisonment in L. he may justifie, that he was Sheriff of C. and took him by force of a writ, without that, that he imprisoned him in L. Rhodes Justice, One brings an action upon an escape in L. and in truth he never was in L. after the escape, in an action he shall **[70]** recover. Periam and Rhodes, Where the matter of justification is tied to a place, there the place is traversable. And Rhodes said, there was a case adjudged, in an action, by Davage, against the Mayor of Lynn, where the defendant justified as a special justice within the town, and traversed the place alledged by the plaintiff.

MICH. 29 & 30 ELIZ. IN THE KINGS BENCH.

CLXI. SCOT AND SCOTS CASE.

Common Recovery. Conditions. Proviso Condition.

George Scot the elder sued a replevin against George Scot the younger: the case was this, One Georgo Scot 20 H. 8. being tenant in tail of certain lands, suffered a recovery to the use of his last will, and 25 H. 8. by his will declared, that he willed that the recoverers make a good and favourable lease to Hugh Scot his younger brother, and 25 H. 8. they make a lease to Hugh Scot for ninety nine years, reserving 11l. 5s. 8d. rent payable at the Annunciation and Michaelmas by equal portions, and that to the recoverers, their heirs and assigns. And further it was covenanted, that after the death of the recoverers, the rent should be paid to cestuy que use, and his heirs and assigns, any thing in the indenture to the contrary notwithstanding, proviso that if the lessee make his heir-male his assignee of the term, that then he pay the rent to the recoverers, their heirs and assigns, and he did not pay the rent to the heirs of cestuy que use, and thereupon was a distress and a replevin. Drew argued for the plaintiff; and first he spake to the performance of the condition, and when a condition is created, the law says it shall be taken favourable for him who is to perform it, as 3 H. 7. One is to make appropriation of such a church, and he grants a rent out of it, and then makes the appropriation, it was holden that he had performed the condition. So 27 H. 8. a lease upon condition to scowre the ditches; if he once doth it, it is sufficient, and he cited another case out of 37 H. 6. As to the creating of a condition, there are some words which are conditional of themselves, as in Litt. Ita quod, sub conditione, ad effectum, 38 H. 6. 34. in case of the King: in some case (pro) makes a condition, in some cases not. Proviso also sometimes makes a condition, sometimes it is taken for the enlargement of an estate, 45 E. 3. 8. One had the ward of land, and of the body, and granted the same to W. P. his servant, pro bono servitio, and he departed from his service, the other may enter in the wardship and land therefore, (pro) makes a condition. 41 Eliz. One granted an annuity to another pro concilio impendendo, if he doth not give counsel, the annuity is forfeited, for he hath no means to compel him to give counsel, and therefore it is a condition: but in some cases **[71]**

(pro) doth not make a condition, as if before the Statute of Quia Emptores Terrarum, one makes a feoffment of lands pro homagio suo, there if the homage be not done, he may distrain for it. 9 E. 4. 21. Where tythes are exchanged for annuity, or annuity for tythes, there it is not a condition. (Si) in the case of Colthirst is a condition, in some other cases no condition. (Proviso) in our case doth not make a condition. 7. H. 6. 44. A man made a feoffment with warranty, proviso semper, that he should not vouch him nor his heirs. So a grant of a rent, proviso that he shall not charge his person: these are not conditions but foreprises. 9 H. 6. A lease was made without impeachment, proviso that he should not do voluntary waste; this proviso went to a covenant, and not to the overthrowing of the estate. So if one granted a manor, proviso that his grant shall not extend to a wood upon the manor, the same is not a condition but a foreprise or exception. 35 H. 8. Br. Conditions 195. Note for law, that proviso semper put on the part of the lessee, upon the words of the habendum, makes a condition, but contrary of a proviso on the part of the lessor; as it is covenanted after the habendum and after the reddendum, that the lessee shall scowre the ditches, proviso that the lessee carry the dung to such a place or field, the same is not a condition to forfeit the lease for not doing of it. Contrary if the proviso be put immediately upon the habendum, which makes the estate, or after the reddendum. The case 27 H. 8. of Martin Dockery is left at large. In 5 Eliz. there was a case of one Etherel, where the Bishop of York made a lease for years reserving rent to him and his successors, proviso that during the time of every vacation, the rent should be paid to the Dean and Chapter of York, and it was not paid to them after the death of the bishop, during the vacation: it was holden to be no condition, but a limitation. Also if the proviso here shall be a condition, then it is a favourable lease according to the will, for a conditional lease is not a favourable lease. 2. Point. If it be a condition; yet the plaintiff ought to recover the rent for which the demand shall be, where the entry is only the moiety of an annual rent, and he demands the whole, therefore his demand is not good; for if a feoffment be pleaded made by one, and the deed is shewed, by which it appeareth that it was made by many, although he was one of them, yet it is not good, nor warranted by it. Also the conclusion which they make doth destroy the whole, for it is, et quia prædict. redditus was not payed, &c. Which was that? the rent of the whole year, scil. 11l. 6s. 8d. and that is false; for if the moiety was paid, he had no cause to enter; but by their conclusion, if all was paid but a penny, yet they might enter, and therefore the rejoynder is not good. Cook contrary, for the avowant: he said, It is a condition, and he put this as a gene-[72]-ral rule, that where a proviso is parcel of the sentence which contains covenant, or abridgeth parcel of the covenant, that it doth not make a condition, but an exception. As Litt. a rent granted, proviso that he shall not charge his person, the same is not a condition, because it abridgeth parcel of the grant, and controuls the sentence precedent. So 9 H. 6. proviso that he shall not do voluntary waste, for it abridgeth the first impeachment of waste. So a feoffment with warranty, proviso that he shall not vouch, abridgeth parcel of the force of the warranty; for by warranty he may rebut, vouch, or have warrantia chartæ: therefore there where it is parcel of the sentence which contains covenant, it is not a condition: and that difference was holden and agreed in the Lord Mountjoyes case. But in our case there is not a qualification of the sentence, or covenant contained in the sentence, nor participant at all with the sentence, but it stands substantivè, for there was a full sentence before, and therefore it is not parcel of it. Also it varies from the sentence precedent in the person who shall pay the rent, and to whom it shall be paid, and therefore it is a new sentence, and strange to the first: and it is not like to the case of 9 H. 6 before, Br. warranty, he shall not vouch, for there it controuls the precedent sentence: but if I make a feoffment in fee with warranty, that he shall not vouch J. S. who is a stranger, there it is a condition: but if it is that he shall not vouch the feoffor, there it is not a condition. And the case of the Bishop of York, was Pasc. 4 Eliz. Rot. 460. Com. banc. he conceived, that during the vacation, the rent should go to the King, and therefore perhaps he especially limited it to be paid to the Dean and Chapter of York, and there the proviso did not make a condition: for although it was limited to be paid to the dean and chapter in the time of the vacation, with a proviso, or by way of promise, yet there it is a condition, for all is one corporation; for the dean and chapter are part of the corporation to whom it was

reserved before, for it was reserved before to the bishop and his successors. But 15 and 16 Eliz. Andrews and Cromwells case, where John Blunt sold a manor to Andrews, and his heirs, and Blunt covenanted to suffer a common recovery for the better assurance thereof, and afterwards there was a proviso, provided always, that Andrews re-grant the advowson which was appendant to the manor to Blunt for his life; and because there it stands substantivè by it self, therefore it was holden to be a condition; and yet truly it was not the meaning, that for not granting of a pelting advowson, that the whole former estate of the manor being of great value, should be defeated; yet notwithstanding, it was holden to be a condition: and there also the opinion of Br. 35 H. 8. is controuled, that where **[73]** also the opinion of Br. 35 H. 8 is controuled; that where a proviso is jumbled amongst covenants, that it doth not make a condition: proviso never makes a covenant, therefore either the sentence shall be void, or it shall be a condition. As if a lease for years be made, proviso that the lessee for years do not commit waste, it is no covenant. He said as to the second point, that the same was adjudged between Andrews and Cromwel, where a rent was payable every half year, and there, as here, the whole rent was demanded, and it was good, for he is not to pay the one moiety; and he is at his peril to pay the one moiety; and he who denies the whole, denies every part; et quicquid dicitur de toto, dicitur de partibus. It was adjourned.

2 Leon. 128. 3 Leon. 225. 1 Cro. 73.

Hil. 29 Eliz. In the Common Pleas.

CLXII. The Lord Mountjoyes and Barkers Case.

In an ejectione firmæ upon a special verdict, the case was this, King Ed. 6. granted the manor and hundred of Tremington in fee, rendring rent, to hold of the manor of East Greenwich in socage, reddendo annuatim 136l. Queen Mary reciting the first grant; in the first year of her reign, granted the rent and fealty and the manors of Cauford, D. S. et etiam manerium nostrum, & hundredum de Tremington (although she had not the manor) to the Marquess of Exceter; after which the marchioness being seized of the manor of Cauford holden in capite, and of other lands 4 and 5 Philip and Mary, devised the manors of Cauford, D. S. and whereas she had nothing in the manor of Tremington, but the rent and fealty out of it; she devised the same with the others to the Lord Mountjoy: and also she devised divers legacies and annuities to her servants and others. And devised by the same will, that they should be levied of the manor of Tremington, and of the manors of D. S. whereas D. S. were not manors but farms. And one Barker was found heir to the devisor, who claimed to have the third part: the rst question was, if the rent and fealty here holden in capite, passed by the name of the manor, or not; and if they passed, what quantity passed. Walmsley, They do not pass by that name; for this rent, nec in rei veritate, nec in reputatione, was ever taken for a manor. Also she hath named it in her will, between those which are very manors, by which it appeareth, that her intent was not to pass it, unless it was a manor, as the other, which sense is also fortified, that they shall be levied, parcelled, and taken; by which I conceive her meaning was, that there should be some place to which the devisees might resort to levy it. Further, it is taken for law in wills; that a thing implyed shall not destroy a thing expressed: but if by implication, **[74]** the rent should pass, then the manor of Cauford should not pass, which was her express will to pass. As 16 Eliz. Dyer 330. where a man deviseth his lands to one and his heirs males, and if he dye without heir of his body, &c. Here he shall not have tail general to the heirs of his body, but to the heirs males of his body, for that was the express limitation, and the other after but implication. So 16 Eliz. Dyer 333. in Chapmans case: but our case is better, for that there are not words sufficient to warrant any implication, for nec in veritate, nor in common speech was it ever taken for a manor. 27 H. 6. 2. 22 H. 6. 39. Green Acre may pass by the name of a manor, although it be but an acre of land, because it is known by such name. In 27 H. 8. a man having suffered a common recovery to his use, willed that his feoffees should sell, &c. So in Chapmans case; a man in his

will limited a remainder to his family, there it is taken, the same is a remainder to those which are his next of blood. So 41 E. 3. a man deviseth land to A. his daughter, in truth she being a bastard, she shall have it because she is known by the name of daughter. So if there be grandfather, father, and son, the father dyeth and the son gives lands to his father and his heirs, the grandfather shall have it, for that the son so called him. 19 H. 8. Lands are devised to the right heirs of J. S. who is attainted, having issue a son, the son shall not have the land, for the word (heir) intends one who may inherit, but he cannot, because a man attainted cannot have an heir; and that is a stronger case than our case, in which there is not any affinity with a manor, for it is but a sum in gross, but if it had been an acre of land, peradventure it should have passed, but being rent, common estrovers, or other profits, they cannot pass, for they have not any resemblance to the mannor; but peradventure a man having a manor parcel in demesn, and parcel in services if he alieneth his demesns, and afterwards deviseth his manor, the services will pass. Gawdy, All the difficulty of the case is this, if by the devise, the rent out of Tremington shall pass, for if not, then the third part thereof cometh to Barker. And I conceive clearly, that the rent shall pass; for wills shall have a favourable construction according to the intent of the devisor, and no part thereof shall be void, if by any means it may be made good; for intent then appeareth that something should pass out of the manor of Tremington, for otherwise a clause in her will would be frivolous. For it is precisely found by the jury, that neither at the time of the will, nor at the time of her death, she had nothing of the said manor of Tremington, but the said rent of one hundred thirty and six pounds. Also it may be taken, that she who devised was ignorant of the law, and conceived that it was a manor when she had rents and services out thereof, notwithstanding that, those who are learned in the law know, that a ma-[75]-nor could not pass without there was two suitors at the least, 21 R. 2. Devise 27. Lands are devised to one for life, the remainder Ecclesiæ Sancti Andreæ in Holborn, there it is holden in an ex gravi querela, that the parson should recover, for otherwise the devise should be void, if the parson should not have the lands; and in wills, shall subserve and give place to the intent of the party; and therefore if a man deviseth, that his lands shall be sold for the payment of his debts, his executors shall sell them, and to that intent the naming of them executors is sufficient. Plow. Com. 523. in Weldens case it is vouched to be adjudged: that if one after the statute of 27 H. 8 deviseth that his feoffees shall be seized to the use of A. in fee, that it was a good devise of the lands to A. and yet then he had not, nor could have any feoffees, &c. But the party was ignorant of the statute, and his intent to pass the land was apparent, in that case the words were as much impertinent to the matter, as in our case, for there he had not any feoffees, as here she hath not any manor. Br. recites, that in 38 H. 8. it was holden by Baldwin, Shelly, and Morgan, that if a man who had feoffees to his use would, after the statute of 27 H. 8. that his feoffees should make an estate to J. S. that the land should pass to J. S. 26 H. 8. Feoffments & Faits 12. Land cannot pass by the deed of an house, for it cannot be parcel of an house; but an acre of land may be given by the name of a carve, and a carve of land by the name of a manor; and yet a carve can be no more a manor, than this rent: yea, rents and services more resemble a manor, than a carve of land. It cannot be intended that her will was here to pass the manor it self, which was not in her, but in another. Also she by four years before had the rent, and therefore it shall be intended, that it was her meaning to pass the same, which she her self received, and no other thing: and although in the devise the rent be specially named, and the manor also; yet the same shall not alter the case; for if a man grant the reversion upon an estate for life, and by the said deed grants the land, and the tenant attorns, and the grantee deviseth all his land, the reversion shall pass without all question. If a man grant the advowson of D. and in the same deed, the church and rectory of D. and the grantee deviseth the rectory of D. the advowson shall pass. In Adams case, Plow. Com. 195. a man leaseth his capital messuage rendring rent, there the question is, if the reversion or rent shall pass: it was adjudged, that all which he had passed. As to that, that it cannot be levied out of the rent, for that no place is therein of distress; I say, that she did not know whether a lesser rent might be paid out of a greater rent, and 1 H. 4. mul-[76]-ture was granted reserving rent, and the grant was good. The

words of the will are, All which manors, lands, and tenements, &c. she devised to the Lord Mountjoy, and these words expound her meaning, for although the word (rent) be not within the word (manor) yet the words (lands and tenements) do comprehend it, and words subsequent in wills may express the premisses. As 16 Eliz. Dyer 333. Chapman seized in fee of two houses, having three brothers, devised the house in which A. inhabited to his three brethren, and A. to dwell there, and they not to raise the rent, and devised the house in which B. his brother dwelt to him, and that he pay to C. his brother 3l. for to find him at school, and otherwise to remain to the house; proviso that the houses shall not be sold, but shall go to the next of the name and blood which are male, and dyed. B. his brother dyed without issue, the eldest of the two middle brothers entred, and had issue a son and dyed. It was a question, if the son or the middle brother should have the house: and it was holden that the son of the eldest should have it in tail, which exposition was by reason of the words in the proviso, that it should not be sold, and that it should go to the heirs males. Shuttleworth, The rent shall not pass by the devise, for the construction of a will ought to be according to the words, or according to the intent collected out of the words, and not by a thing out of the will: for then a stranger shall be the maker of the will of another: and 19 H. 8. if a will be doubtful it ought to be expounded for the heir at the common law. And if the rent ought to pass, it ought to have apt words, and not the name of a manor. And thereupon he put the case, that where one deviseth certain lands to one, and afterwards his goods, leases, and other things to another: all his goods and terms shall pass, but not his lands, for that there wanteth apt words to pass them, for the word (other things) shall not pass them; and this set order ought to be observed, for the avoiding of confusion: and the rent and services shall not pass for the two parts, admitting the words sufficient, for they cannot be divided: but Periam said, that the rent might be divided. Anderson said, that it should be but a rent-seck: Periam said it was a rent distrainable of common right, but Anderson doubted of it; but they all agreed that it might be divided, but there should not be two tenures. Fenner, The rent should pass by the devise of the manor, for there is no difference betwixt a manor and a seigniory in gross amongst lay-men; and then their intent shall be taken, although it was not written by apt words; for in grants a reversion shall be taken for a remainder, and à fortiori a devise. And 7 E. 3. a manor shall pass by the name of a knights fee; and 19 H. 8. a wood shall pass by the name **[77]** of land, and 38 E. 3. by grant of totam terram which A. held in dower, the reversion shall pass. Afterwards in Mich. term the plaintiff discontinued his ation. And Periam told me, I being at his house, that the opinion of the Court was against the plaintiff, and if it had not been discontinued, they would have given judgment accordingly: now this was the intent of the Lord Mountjoy. The marchioness had devised all her lands, and had not left any thing to her heir, for which case the heir of the marchioness entred into the third part of the manor of Cauford (of which the lease upon which the ejectione firmæ was brought, was made by the Lord Mountjoy to Insley) and into the third part of the residue of the whole land; now his meaning was, that if the rent was not well passed by the name of the manor, then the same descended to the heir, which was sufficient for him: for the special verdict found also, that the rent was the third part of the value of the whole land of the marquess: so that thereupon it may be collected, that if a man hath three manors, some of them holden in capite, and of equal value, and he deviseth two of them, and suffereth the third to descend, that the devise is good for every part of the two manors, and the heir shall not have the third part of each manor.

Pasc. 28 Eliz. In the Common Pleas.

CLXIII. Spring and Lawsons Case.

One recovered in an ejectione firmæ, and afterwards the defendant made a new lease for years, and he who recovered ousted him, and he brought an ejectione firmæ: and the other pleaded the former recovery. It was holden a good bar by all the

justices, but Windham and Periam, and by them the same is no estoppel, for the conclusion shall be judgment if action, and not judgment if he shall be answered; and although that it be an action personal, and in the nature of a trespass, yet the judgment is quod habeat possessionem termini sui, during which term the judgment is in force, it is not reason that he should be ousted by him against whom he recovered, for so suits should be infinite; and by Rhodes an entry pendent the writ shall abate it.

CLXIV. Hil. 29 Eliz. In the Kings Bench.

An action of covenant was brought against one who had been his apprentice; the defendant pleaded that he was within age: the plaintiff maintained his action by the custom of London, where one by covenant may bind himself within age: exception was taken to it, that that was a departure: for 18 R. 2. an infant brought an action against his **[78]** guardian in socage, who pleaded that the plaintiff was within age. The plaintiff did maintain his declaration, that by the custom of such a place an infant of 18 years might bring accompt against his guardian in soccage, and it was there holden to be no departure. Wray Chief Justice was of opinion, that it was no departure; for he said, it should be frivolous, to shew the whole matter in his declaration; viz. that he was an infant, and that by the custom he might make a covenant which should bind him. But quære of the matter, and of his opinion, for that many learned lawyers doubted much of it. And vide the case in 19 R. 2. of the guardian in soccage.

Mich. 29 & 30 Eliz. In the Kings Bench.

CLXV. Savage and Knights Case.

Error was brought upon a judgment given in Leicester in debt; Tanfeild assigned error, because in that suit there was not any plaint, for in all inferior Courts the plaint is as the original at the common law, and without it no process can issue forth, and here upon this record nothing is entred; but only that the defendant summonitus fuit, &c. and because the first entry ought to be A. B. queritur versus C. Clench, a plaint ought to be before any process issueth; and the summons which is entred here is not a plaint, and for that cause the judgment was reversed: it was said, that after the defendant appeared, a plaint was entred: but it was answered, that that did not help the matter, for there ought to be a plaint out of which process shall issue, as in the Soveraign Courts out of the original writs.

28 Eliz. In the Common Pleas.

CLXVI. Grindal Bishop of Yorks Case.

Grindal Archbishop of York made a lease for one and twenty years, another lease for years of the same land being in being, not expired by four years, and dyed; and in time of vacation, the dean and chapter confirmed it. Clench, It is a good confirmation: a bishop makes a lease for years reserving the ancient rent, but where it was payable at four feasts of the year, it is now reserved payable once in the year, the same is within the letter of the statute, but not within the intent; the same law, if the rent before was usually reserved to be paid upon the land, now it is reserved to be paid at any far remote place. And he said, that although his lease was in possession, yet not to take effect before the four years of the former lease are expired, **[79]** cannot be said an estate within the statute of 1 Eliz. whereby any estate may pass before the commencement of it; for he to whom it was made, had but a right to have the land; and he could not surrender. And he held that the second lessee should pay

the rent as well by the contract as by the estoppel. Periam, At the common law a bishop, with the confirmation of the dean and chapter, might have made a feoffment gift in tail, and a lease for any term of years; and he spake much. What shall be said the possessions of a bishop: and therefore, if a bishop disseiseth another of certain lands, and makes a lease thereof under the seal of his bishoprick, it shall be now his seal, and it shall be his election in what capacity he will take, and then this land is to be reputed parcel of the possession of his bishoprick.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CLXVII. HOO AND HOES CASE.

John Hoo brought a writ of intrusion against Richard Hoo, depending which writ, the demandant prayed estrepement, and had it, and declared upon it, scil. that the tenant after the prohibition fecit vastum, estrepementum, in prosternendo, &c. To which the tenant pleaded, not guilty: but the plea was not allowed by the Court, for there is no issue in this case: but he ought to plead quod non fecit vastum, &c. after the prohibition.

29 ELIZ. IN THE COMMON PLEAS.

CLXVIII. CLINTON AND BRIDGES CASE.

Debt; the condition was for performance of an award, which was to pay 10l. to the plaintiff, and to do divers other things: the defendant pleaded quod perimplevit arbitrium, and shewed how the plaintiff assigned for a breach, that the defendant had not paid the 10l. The defendant rejoyned that he tendred it to the plaintiff, and he refused it. It was the opinion of Dyer, that the same is a departure, for in the Bar, the defendant pleads that he hath performed the award, and shews how; and now in the rejoynder a tender and refusal which is not a performance of the award, although it is not any breach of it.

[80] 29 ELIZ. IN THE EXCHEQUER.

CLXIX. THE BISHOP OF L'S CASE.

Tenures.

The case of the Bishop of L. the King Lord, mesne and tenant, the mesnalty is holden in chief, and the tenancy by knights service; the manor escheats by attainder: if the tenancy should be holden in chief was the question. Manwood, It hath been holden, that no tenure in capite may be, if not by the creation of the King: and he said, that if before the statute of Westminster 3. the Kings tenant in capite had made a feoffment to hold of him, so as now there is lord mesne and tenant; and afterwards the mesnalty came to the Crown by attainder, &c. If by the coming of the mesnalty to the Crown the seignory paramount be extinct, then the tenancy is not holden in capite; but they have taken a difference where the mesnalty comes to the seignory, and where the seignory comes to the mesnalty. But he said it was a good case.

29 ELIZ. IN THE EXCHEQUER.

CLXX. PIGOTTS CASE.

Assignment of Debts to the King.

Pigott Collector of the Subsidy granted by Parliament holden 28 Eliz. and by reason thereof endebted to the Queen (one B. being indebted to him) assigned the said debt to the Queen for parcel of her debt: upon which progress issued out against B. and now, at the return of the process, Cooper Serjeant, moved in the behalf of B. that the assignment was not good. 1. There was no such Parliament holden 28 Eliz. 2. No assignment of debt to the Queen is effectual, where the goods and lands of the Queens debtor are sufficient, but here constat de claro, that Pigott is sufficient: as to the matter of the Parliament, the truth is, that the Parliament was begun in October 28. But no session was then holden, but it was adjourned to Newbury 29 Eliz. But if a session had been holden, one ought to say it was prorogued. Fenner, There is not any authority in our law for such assignments of debt to the Queen. Manwood, The Parliament is October 28 Eliz. and so is the roll, and the record of the Parliament: the writs of Parliament were returned in October 28 Eliz. but then the Queen adjourned, the Parliament; for there was no session: and although it was adjourned, yet the first day of the Parliament was in October: and such was the opinion of all the justices.

[81] 29 ELIZ. IN THE EXCHEQUER.

CLXXI. THE QUEEN AND PAYNES CASE.

Priviledge.

An information was exhibited against Payne Treasurer of the Records in the Kings Bench, upon the statute made against the buying of cattle, and he came and demanded priviledge. Manwood, It hath never been seen, that such priviledge hath been granted against the Queen, vide 21 H. 6. 22. in a decies tantum, by the better opinion the party shall have the priviledge. Some said that this is not like to the case where the Queen only is party, for in such case attaint doth not lye against the jury which have found for the Queen; contrary where the suit is tam pro Domina Regina quam, &c. Manwood, The law is not so, for an attaint lyeth where the Queen alone is party. Tanfield, who was of counsel with Payne, shewed to the Court a president 29 Eliz. where one tam pro Domina Regina quam, &c. prosecuted a suit in the City of Oxford, upon a penal statute, and the defendant claimed the priviledge of the Common Pleas, being an officer there, and by the award of the Court, the priviledge was allowed him. Manwood, The suit upon the penal statute was in an inferiour Court. But shew to us a president where the Courts are equal.

CLXXII. MICH. 30 ELIZ. IN THE COMMON PLEAS.

A poor man was ready at the Bar to wage his law; and upon examination it was found, that the defendant was indebted to the plaintiff ten pounds, to be paid at the Feast of Christmas; and that upon communication between them it was agreed, that the defendant should pay to the plaintiff at the said feast 5l. in satisfaction of all the debt due to the plaintiff; and as to the other 5l. that he should be acquitted of it: upon this matter the justices were clear of opinion, that the defendant ought not to be admitted to wage his law, for notwithstanding that bare communication, the whole debt remained due not extinguished by the communication; for 5l. cannot be a satisfaction for 10l. but contrary of a collateral thing in recompence of it, &c. and

satisfaction and agreement to pay 5l. before the said Feast of Christmas in satisfaction of the whole 10l. Upon such matter shewed, the Court was of opinion, that the defendant might be admitted to wage his law.

CLXXIII. Mich. 30 Eliz. In the Common Pleas.

Withernam. Fine for Contempt.

In a replevin, the defendant avowed for damage feasant: upon which issue was joyned and found for the advowant: and damages assessed, and a retorno **[82]** habendo issued, upon which the sheriff returned elongata: upon which a withernam was awarded. And now the plaintiff came into Court, and tendred in Court the damages assessed by the jury, and prayed a stay of the withernam, and cast the mony into Court. But the whole Court was clear of opinion for the stay of the withernam upon that matter only: because in this case the plaintiff ought to be fined, because he had esloigned his cattel, which is a contempt, wherefore the Court assessed a fine upon him of 3s. 4d. and then the plaintiff had his prayer and request.

Mich. 37 Eliz. In the Common Pleas.

CLXXIV. Germies Case.

Assets.

In debt upon an obligation against A. as executor, the case was, that the testator of A. by his will appointed certain lands, and named which should be sold by his executors, and that the mony thereof arising should be distributed amongst his daughters, when they had accomplished the age of one and twenty years; the lands are sold accordingly, and if the monies thereof coming being in the hands of the executor, should be assets to pay the debts of the testator, was the question. It was the clear opinion of the whole Court, that it was not assets, for that that mony is limited to a special use.

2 Leon. 119. 1 Leon. 87.

CLXXV. Mich. 29 Eliz. In the Common Pleas.

Alien Purchaser.

This case was moved to the Court; An alien purchased lands in fee, the Queen confirmed them to the alien, &c. Office is found, if the confirmation should bind the Queen was the question. Some conceived it should; for by Anderson Chief Justice, when an alien is enfeoffed, he takes by the livery the fee-simple, of which he shall be seized until office found, and a præcipe quod reddat lyeth against him. Fenner, An alien and denizen joyntenants are disseized, they shall both joyn in an assize, vide 11 H. 4. 26. And he said that the wife of the King takes a husband being an inheretrix, they have issue, office is found, the husband shall be tenant by the courtesie, which see 33 E. 3. Fitz. Traverse 36. It was argued on the other side, that the estate of the alien is so weak, that a confirmation cannot enure upon it, for an alien cannot take, but to the use of the King, and cannot be infeoffed to anothers use, and if he be, such use is void. For there is not a sufficient seisin in an alien to carry an use. And it hath been adjudged on Forsets case: where an alien and the said Forset were joynt-purchasers, and the alien dyed, that **[83]** Forset should not have the whole by survivour, but that upon office found the Queen should have the moiety, vide 11 Eliz. Dyer 283.

MICH. 30 ELIZ. IN THE COMMON PLEAS.

CLXXVI. JERMINE AND ARSCOTS CASE.

The case between Jermine and Arscot was this: A. seized of lands in fee, had issue six sons and one daughter, and devised the manor of, &c. parcel of his said lands to J. S. for ninety years, if the said J. S. and G. his wife, or any of them should so long live, the remainder to P. his eldest son, and the heirs males of his body, the remainder to his other sons in tail, the remainder to his daughter. Provided, that if the said P. his son, or any of the sons of the devisor, or any of the heirs males of their bodies, should endeavour by any act or thing to alien, bargain, or discontinue, &c. that then after such attempt or endeavour, and before such bargain and sale, &c. were executed, that the estate of such person attempting, should cease, as if he were naturally dead, and that then the premises should remain and come to such person to whom the same ought to come, remain, or be by the intent and meaning of his will, and died: P. levied a fine of the manor, he in the next remainder entred, and claimed the land by force of the devise. This case was this term argued by Walmesly Serjeant, that an estate tail cannot cease, for it is an estate of inheritance; and here is not any limitation, for the estate tail by the meaning of the devisor shall remain revivable upon the death of the offender, but a limitation determines the estate utterly, which is not here: but here it appeareth as well by the meaning of the devisor, as by the words of the devise, that the estate tail upon such act should be suspended, and it cannot be resembled to the case cited on the other side 22 E. 3. A rent granted to one in fee, and that it shall cease during the nonage of every heir; the rent is but suspended between the parties and privies to the gift; as in the case of Littleton of re-entry and retainer quousque; but that a stranger should re-enter and retain quousque, that cannot be: and in the case of Scholastica reported by Plowden, the estate tail by such offence is determined by the limitation; but in our case by the meaning of the devisor only suspended, so our case is not like to that case. Shuttleworth to the contrary; the purpose of the devisor appeareth to be, the continuance of the land in the name and family of the Caries; and as to the difference of ceasing and suspending of an estate tail, the same is not to the purpose, for the tenant in tail himself may suspend his estate tail, therefore à fortiori the donor upon the creation of the estate tail: **[84]** as by Littleton: Tenant in tail grants totum statum suum, the estate tail is thereby suspended: and by Anderson, If in such a case, after such a grant, tenant in tail levy a fine in our case, if tenant in tail offend: and the party to whom the next interest is limited enters, and after the offender levies a fine to a stranger, there, although his estate was determined by the offence, yet the estate tail is bound by the fine. Ad quod cæteri justiciarii murmurabant. Tenant in tail hath issue two sons, the eldest in the life of his father levieth a fine, and after the father dieth, the estate tail is bound; contrary if the father had survived his eldest son: and afterwards in the end of this term judgment was given against the plaintiff, for by the will here is a good limitation, and an estate to cease upon an act, and upon another contingent to be revived, is good enough, vide 30 E. 3. 7. A lease for life rendring rent, and if the rent be behind, that the lessor shall return quousque agreement be made; so as a freehold may cease and rise again according as the same is limited: and all this was agreed by Rhodes, Periam, and Windham; and afterwards Walmsley for the plaintiff, took an exception to the bar, for that the defendant pleaded quod Petrus Cary tempore levationis finis prædict. non habet exitum, and doth not say, that tempore quo ipse Henricus clamabat reversionem prædict. the said Peter had not issue; for he said if Peter had issue, when Henry claimed the reversion, nothing had vested on him by the said claim: but all the Court besides Anderson, said, that needed not be, but if the matter had been such, the same should come on the part of the plaintiff. Also, they said, that the estate was vested in Henry without claim, and although after the offence committed, and before claim Peter have issue, yet Henry should retain the land during the life of the offender against such issue born after the fine levied: for by the fine levied the reversion vested in Henry without any claim by force of the said limitation.

CLXXVII. MICH. 30 ELIZ. IN THE COMMON PLEAS.

Alien suffers a common Recovery.

Land was given to an alien in tail, the remainder over to another in fee, the alien suffered a common recovery, and died without issue: all this matter was found by office. It was moved, that this office should have return, so as upon the matter, the alien was not tenant of the land at the time of the recovery suffered: but the whole Court held the contrary, and that the recovery was good, and should bind him in the remainder.

9 Co. 141.

[85] MICH. 30 ELIZ. IN THE COMMON PLEAS.

CLXXVIII. SEIXTBARK AND PERCIES CASE.

Ejectione firmæ of lands in Knolton and Woodland; the parties were at issue, and the venire facias was of Knolton only, and it was found for the plaintiff. It was shewed in stay of judgment, that the venire facias was not well awarded, for it ought to have been De vicineto de Knolton & Woodland, which was granted by the Court: and that that defect was not relieved by any statute, for it is a mis-trial, and for that cause judgment was stayed, and a venire facias de novo granted.

30 ELIZ. IN THE COMMON PLEAS.

CLXXIX. THE PROVOST OF QUEENS COLLEDGE IN OXFORDS CASE.

The provost, fellows, and scholars of Queens Colledge in Oxford, are guardians of the hospital, and Meason de Dieu in Southampton, and they make a lease of lands parcel of the possession of the said hospital to one Hagel for term of years by the name of Præpositus Socii & Scholares Collegii Reginalis in Oxonia Gardianus Hospitalis, &c. And in an ejectione firmæ upon that lease, it was found for the plaintiff. It was objected in arrest of judgment, that this word (gardianus) ought to be in the plural number (gardiani) for the colledge doth consist of many persons, and every one of them capable; and not like to abbot and covent: the Court was all of opinion that the exception is not to be allowed, but that as well the lease as the declaration were both good, for the colledge is a body, and as one person, and so it is as well gardianus.

30 ELIZ. IN THE COMMON PLEAS.

CLXXX. GREENS CASE.

Upon Statute of Hue and Cry.

An action upon the Statute of Huy and Cry was brought by Green: the case was, that the plaintiff delivered to his servant certain monies to carry the same from Bristol to London, in which journey the servant was robbed: upon which matter the master brought his action. It was moved, that the plaintiff by the statute of 27 Eliz. c. 13. is not a person able to bring this action, because he was not examined twenty days before the action was brought, but the exception was disallowed, for the Court was clear of opinion, that the master should not be examined, but the servant.

[86] CLXXXI. 30 ELIZ. IN THE COMMON PLEAS.

This case was moved upon the statute of 1 and 2 Phil. and Mary, cap 12. The town of Coventry was within the hundred of Offley in the county of Stafford; and Queen Mary by her letters patents made the said town a county. And now a distress was taken in the residue of the said hundred, and brought into the town of Coventry, and if that be within the statute was the question. It was holden by the Court clearly, that now the town of Coventry is exempted out of the hundred aforesaid, and is a thing by it self, and it is a good challenge for the hundred of Offley, that the juror challenged dwells in the town of Coventry, for now it is not parcel of Offley as to the King: but as to the lord of the hundred, the said town remains parcel of it, notwithstanding the Queens grant. And the citizens of Coventry shall do suit at the Court of the hundred; but in an action upon the Statute of Hue and Cry of a robbery committed in the residue of the hundred, the citizens shall not be charged.

25 ELIZ. IN THE COMMON PLEAS.

CLXXXII. DOLMANS CASE.

A. seized of a mannor to which two parts of the advowson was appendant, presented, and afterwards alienedthe manor cum pertinentiis, the alienee presented and purchased the third part of the advowson, and presented again one J. S. chaplain to the Earl of Rutland, who had a dispensation, and took another benefice, and was inducted 1 Eliz. and died 11 Eliz. The Queen presented for lapse, and her clerk was instituted and inducted, the alienee lord of the manor died seized inter alia; this manor was allotted to the wife of Dolman for her part; and he brought a quare impedit. It was moved, if Dolman should not joyn in this quare impedit with her who had the third part; and by Walmsley, he need not, vide 22 E. 4. 8. By Brian, If an advowson descend to four coparceners, and they make partition to present by turns, and the third presents when the second ought, for that time his presentment is gone, but when it comes to his turn again, he shall present; which proves that they are several tenants.

[87] CLXXXIII. MICH. 26 ELIZ. IN THE COMMON PLEAS.

Posse Manerii & Comitatus differ.

One recovered certain copyhold lands in the court of the lord of the manor by plaint, in the nature of writ of right: it was moved in the Common Bench, if a precept may be made and awarded out of the said Court for the execution of the said recovery, and to put him who recovered in possession with the posse manerii, as in such case at the Common Law with posse comitatus; it was resolved clearly that force in such cases is not justifiable, but by mandate out of the Kings Courts.

HIL. 29 ELIZ. IN THE COMMON PLEAS.

CLXXXIV. ANNE BEDINGFIELDS CASE.

Dower was brought by Anne Bedingfield against Thomas Bedingfield; the tenant brought out of Chancery a writ de circumspecte agatis containing this matter, that it was found by office in the county of Norfolk, that the husband of the demandant was seized of the manor of D. in the county of Norfolk, and held the same of the

Queen in chief by knight service, and thereof died seized, the tenant being his son and heir apparent, and of full age, by reason of which the Queen seized as well the said manor as other manors, and because the Queen was to restore the tenements tam integre as they came to her hands, it was commanded them to surcease Domina Regina inconsulta: it was resolved, that although the Queen be intituled to have primer seisin of all the lands whereof the husband died seized, yet this writ cannot extend to any manors not found in the office, for by the law the Queen cannot seize more lands than those which are found in the office, and therefore as to the land found in the office, the Court gave day to the tenant to plead in chief. And it was argued by Gawdy Serjeant for the tenant, that the demandant ought to sue in the Chancery because the Queen is seized to have her primer seisin. And cited the case 11 H. 4. 193. And after many motions, the Court clearly agreed, that the tenant ought to answer over, for the Statute of Bigamis, cap. 3. pretends that in such case the justices shall proceed notwithstanding such seisin of the King, and where the King grants the custody of the land it self 1 H. 7, 18, 19. 4 H. 7. 1. à multo fortiori against the heir himself, where he is of full age, notwithstanding the possession of the King for his primer seisin, by the Statute of Bigamis, where the heir was of full age, there the wife could not be endowed in the Chancery: but now per Prerogativa Regis, cap. 4. such women may be there endowed, si viduæ illæ voluerint. And after many mo-[88]-tions the Court awarded that the tenant should plead in chief at his peril, for the demandant might sue at the common law if she pleased, vide Cook 9. Part Acc.

CLXXXV. Savages Case.

One Savage was presented to a benefice, and afterwards took another, and then purchased a dispensation (which was too late) and then was qualified, and afterwards accepted of the archdeaconry of Gloucester; and Underhil, who had the archdeaconry libelled against the said Savage in the Spiritual Court. Vide the case reported in the first part of Leonards Reports Sect. 442. ideo quære there.

CLXXXVI. Pasc. 26 Eliz. In the Kings Bench.

Husband and wife copyholders for life, the husband surrendred to the lord, who granted the land over by copy to a stranger, the husband dyed, the wife recovered and entred, and surrendred to the lord, and by Wray, the stranger to whom the lord granted it, after the surrender by the husband, should have the land, and not the lord himself against his own grant.

Pasc. 28 Eliz. In the Common Pleas.

CLXXXVII. Chomley and Conges Case.

Chomley brought trespass of assault and battery made to his wife against Cony, and upon the general issue it was found for the plaintiff: it was moved in arrest of judgment, that the action was not well brought, for the same being an action of trespass done to the person of the wife, the writ ought to be brought and prosecuted in both their names; for now, if judgment be given for the husband, and he dye before execution, the wife to whom the wrong was done should not have execution, but the executors of the husband; and afterwards upon advice the plaintiff had judgment to recover, vide Cont. 9 E. 4. 51. 38 H. 6. 25.

PASC. 28 ELIZ. IN THE COMMON PLEAS.

CLXXXVIII. BLITHE AND COLEGATES CASE.

Vide this Case reported by Cook 2 Part of his Reports.

Replevin by Blithe and Colegate, who made conusans as bayliff to Roger Beckwith son and heir of Elizabeth Beckwith for damage feasant, and upon a special verdict the case was, that the said Eliz. was seized, and took to husband Chri-**[89]**-stopher Kenne, and by an indenture made by the said Eliz. without the assent of her said husband, by the name of Elizabeth Beckwith, bearing date 14 March, 14 Eliz. declareth the uses of a fine to be levied &c. 1. To the use of the said Elizabeth for life, without impeachment of waste, and after to the use of the conusees for their lives, and after to the use of the said Elizabeth and her heirs; and that afterwards the said Christopher Kenne, before any fine levied in Feb. 20 Eliz. by indenture between himself and the said Elizabeth, his wife of the one part, and R. W. of the other part, without the consent of the said Elizabeth declared that the uses of the said fine so to be levied, should be to the use of the said Christopher and Elizabeth for life, &c. And afterwards the said fine was levied by the husband and wife; and the only question upon the matter was, if the uses declared by the wife, or the uses declared by the husband should stand. It was argued by Shuttleworth Serjeant, that the uses declared by the husband should stand, and that the declaration by the wife should be rejected, for a feme covert is not sui juris, but is sub potestate viri. And therefore 17 Ass. 17. a feme covert without her husband acknowledgeth a fine, the husband shall avoid it; and as to the declaration of the uses, it is no other thing but the shewing of the meaning of the parties to the fine, how and in what manner the land of which the fine is levied, shall be disposed of by the fine, but such a power cannot be in a feme covert: for if an infant levy a fine, and declare the uses by indenture, the declaration is void, and the fine shall be to his own use, and that was adjudged in the Court of Wards: the same law in case of a man of non sanæ memoriæ: and if an ideot levy a fine, and declare uses upon it, the declaration is void, and the fine shall be to his own use, and that case also hath been adjudged in the Court of Wards: and by intendment of the law, every wife is at the disposition of her husband, as in a præcipe quod reddat against the husband and wife, the wife makes default, it shall be accounted the default of the husband, for the law intends that the wife is ameanable by the husband. 21 Ass. the husband seized in the right of the wife, made a feoffment in fee, and in making of livery his wife interrupts him, it was not any interruption or impediment quo minus the livery operetur, for cui ipsa in vita contradicere non potuit, &c. So in a præcipe quod reddat against the husband and wife, the husband pleads one plea, and the wife another, the plea of the husband shall be admitted, 33 H. 6. 43. 89 Ass. 1. And the husband may in some case prejudice his wife in point of inheritance, as by cession, vide E. 4. 2. Fitz. Cui in Vita 22. And he argued much upon the ground, where it shall be said the folly of the wife to take such a husband: if the husband be seized in the right of his wife, they sell the said land, and for assurance levy a fine to the vendee, now **[90]** the husband alone shall have an action of debt for the mony upon the sale which proves that it is the sale of the husband alone, which see 48 E. 3. 18. Fenner Serjeant contrary: and first he confessed that the declaration by the wife is utterly void and also the declaration by the husband; and therefore when the husband and wife levy a fine the conusee in judgment of law is in by the wife, and not by the husband, so as the husband as to the right is a stranger to the land, and to the estate which passeth by the fine, although he be party to the fine, for that is not for any interest which he hath in the land, but for the conformity of law, which disables a wife to levy a fine without her husband, and therefore it is not any reason that the husband alone shall be received to declare the uses, for he is no proprietor of the land in right especially, forasmuch as in account of the law, the whole passeth from the wife: and the law in divers cases frames its judgment according to the possession of the wife, and that in acts done by the husband 14 H. 8. 6. where A. seized of a rent-charge in fee issuing out of the land of the wife, A. releases the rent to the husband and his heirs, the same shall enure to

the wife, vide 38 E. 3. 10. from such cases the law respects the nature of the seisin and the manner of the possession. And as to the case vouched out of Dyer 12 Eliz. where the husband and wife were seized of a messuage to them, and to the heirs of the husband, they suffer a common recovery, and the husband alone declareth the uses, the same is good, for in that case the fee was in the husband, and always he who hath the fee ought and may declare the use, if all who have interest will not joyn, and therefore if lands be given to two, and to the heirs of one of them, if they both joyn in a fine he which hath the fee may by himself declare the uses: but if there be two joyntenants in fee, they both ought to joyn in the declaration of the uses, or otherwise make several declarations of their several moieties. So if cestuy que use and his feoffees joyn in a fine, and make several declarations, the declaration of the feoffees shall stand, for that the land passeth from them. So if cestuy que use and his feoffees make a feoffment in fee 21 H. 7. And to that purpose he put the case reported by Plowden 15 Eliz. 464. Husband and wife seized in right of the wife, they levy a fine sur conusans de droit come ceo, &c. and the conusee renders the land to the husband and wife, and to the heirs of the husband, the husband dieth, the wife discontinues the land, the same is not within the penalty of the statute of 11 H. 7. For notwithstanding the wife be now in by the purchase of her husband, yet that purchase is not within the meaning of that statute, because the law respects the original seisin which was in the wife, and so it was adjudged. Vide Term. Mich. 30 Eliz.

[91] PASC. 25 ELIZ. IN THE KINGS BENCH.

CLXXXVIII. THE EARL OF NORTHUMBERLANDS CASE.

The Earl of Northumberland brought debt for arrearages upon account. The defendant shewed, that before the said account, the plaintiff of his own wrong imprisoned the defendant, and he so imprisoned, assigned auditors, and so the account was made by duress. It was holden a good plea by the justices of both Benches.

PASC. 25 ELIZ. IN THE COMMON PLEAS.

CLXXXIX. CLARK AND KEMPTONS CASE.

Payment of Rents.

In ejectione firmæ the case was, the defendant leased for years to the plaintiff. rendring rent, payable at Michaelmas, and the Annunciation, or fourteen days after. Et si contingat the said rent to be behind post aliquod terminorum vel festorum prædictorum in quo solvi debet by the space of 14 days, post aliquod festum prædict. that then, &c. It was adjudged in this case, that the lessee had fourteen days after the said fourteen days mentioned in the reservation without danger of the penalty of the condition, and the last words post aliquod festorum prædict. for the contrariety shall be rejected.

1 Leon. 141. Smith and Burds case. Co. 10 Rep. 129. b.

PASC. 31 ELIZ. IN THE KINGS BENCH.

CXC. HARRIS AND WHITINGS CASE.

Debt upon an obligation by Harris and his wife, as executors of Giles Capel against Whiting, the condition was that if the obligor before the Feast of Pentecost pay such a sum, so as the obligee be ready at the payment thereof to enter into a bond of 200l.

with sureties to purchase such land, &c. that then, &c. The defendant pleaded that he was ready to pay, &c. and that the obligee was not ready to enter into such bond ut supra. The plaintiff replicando said, that he was ready absque hoc, that the defendant was ready to pay. It was moved that the traverse was not good, for the first act here was to be done by the obligee, viz. to enter into the bond, ut supra, for otherwise the obligor had not any means to compel the obligee to enter into it. But by Wray, Chief Justice, the first act is to be done by the obligor, and at the payment the other party is to do that which to him belongs to do.

[92] TRIN. 29 ELIZ. IN THE KINGS BENCH.

CXC. RALPH MORRIS CASE.

Ralph Morris and his wife libelled against one in the Ecclesiastical Court, for that the defendant called the wife of the plaintiff veneficam, sortilegam, & incantatricem dæmoniorum. And now came the defendant into the Kings Bench, surmising that the matter of the libel is determinable by the law of the land, and thereupon prayed a prohibition: and it was holden, that although the offence of witchcraft be in some cases punishable in our law, yet the same doth not take away the jurisdiction of the ecclesiastical law; and to call one witch generally, an action doth not lye in our law, as it hath been adjudged. But to say He hath bewitched such a one, an action doth lye: and by Wray, Witchcraft, which is made felony by any statute is not punishable by the ecclesiasical law; but in case of slander upon such a witchcraft, such slanderous words are of ecclesiastical jurisdiction; and for witchcraft which is not felony, the Ecclesiastical Court shall punish the party; and afterwards in the principal case a consultation was awarded.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CXCI. TYRRELS CASE.

Tyrrel warden of the Fleet of an estate of inheritance, let the said office for years and afterwards is condemned in London in many actions of debt, and is there detained in execution for the sum of fourteen hundred pounds, and now one Iden sued the said Tyrrel in the Common Pleas, in an action of debt for 50l. and had judgment to recover, and thereupon the said Tyrrel is brought to the Bar, and Iden prays he be committed to the Fleet in execution for his debt. It was first moved by the Court, if there was not a practize between Iden and Tyrrel for to deliver him out of the Compter in London to a more easie prison, &c. But it was moved by Fenner, who was of counsel with the creditors in London, that it should be very dangerous to commit Tyrrel prisoner to the Fleet, because he had the inheritance of custody of the said prison, and if the lessee under whose guard he shall be, surrenders his interest, or if he doth not pay his rent, so as in default thereof Tyrrel re-enter, or if that the term expire before that the creditors of Tyrrel be satisfied, then here is an escape and discharge of execution, and we are without remedy. But as to that it was said by Rhodes, Windham, and Anderson, that if the lessee surrender it shall be an escape in him, and he shall answer for the same. Afterwards [93] by order of the Court Tyrrel was committed to the Fleet in execution, and the Sheriffs of London discharged.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CXCII. OWEN AND MORGANS CASE.

The case between Owen and Morgan which was agreed Trin. 29 Eliz. was this, Richard Owen was seised of, &c. and levied a fine to Owen and Morgan, and to the heirs of Owen, and they granted and rendred the said land to the said Richard and Lettice his wife (not party to the said writ of covenant, nor to the conusans) and to the heirs of the body of the said Richard, the remainder over to the said Owen now demandant in fee: the husband alone without the wife suffered a common recovery, the wife died, the husband died without issue. If this recovery by the husband only should bind the remainder, was the question: and now the Lord Anderson declared openly in Court for himself, and in the name of his companions, the other justices, that the demandant ought to have judgment, & that the said recovery should not bind the remainder: but first he spake to the fine itself, for the wife is not named in the writ of covenant, nor the conusans but in the render, the land is rendred to the husband and wife, and the heirs of the body of the husband, and he said a scire facias did lye upon the fine well enough, for the fine is not void, but only erroneous, and being in its force, this writ doth well lye. And he cited to this purpose 7 E. 3. Fitz. Sc. fac. 136. where upon such a fine levied, and such exception ut supra taken to it: to which it was said by Herle, that forasmuch as the fine is excepted and yet in its force, we ought to grant execution, and also 30 H. 6. none can take the first estate in the fine, but he who is named in the writ of covenant, but every stranger may take by way of remainder, and such was the opinion of the whole Court: as to the matter in law all the Court agreed, that notwithstanding the recovery the demandant should have execution, for here the land which by pretence of the said recovery, shall be recoverd in value, cannot go to the estate which is given, for the estate given was to the husband and wife, and the heirs of the body of the husband, and then the tenant against whom the recovery was had was impleaded as sole tenant, in which case the vouchee, when he comes in, is to warrant a sole estate, but not another, but now the land to be recovered in value shall go to the husband alone, and the wife shall have nothing, so as the true estate is not warranted and so not answered: and he cited the case of 38 E. 3. 5. in a formedon, the tenant vouched himself for to save the tail, and shewed that one A. was seized, and gave the land in demand, to the now tenant, [94] and to E. his wife in tail, which E. is now alive, and by award the voucher was disallowed. Because it was there said by Knevyt, the recovery in value cannot be according to the gift, 45 E. 3. 18. Tenant in tail discontinues, and takes back an estate in fee, is impleaded, and voucheth the donor, he shall be ousted of the voucher, for that he is in of another estate, and afterwards the plaintiff had judgment to have execution.

Ante 26. Post. 222.

MICH. 33 ELIZ. IN THE COMMON PLEAS.

CXCIII. FOLES AND GRIFFINS CASE.

Debt upon obligation by Foles against Griffin; the condition was, that if the obligee may enjoy certain tythes demised to him by the defendant, during his term, against all persons paying yearly the rent of three pound, that then, &c. to which the defendant said, that the plaintiff did not pay the said rent, &c. Beaumont Serjeant moved, that the plea is not good, but he ought to say, that the plaintiff enjoyed the tythes until such a feast, at which time such rent was due, which rent he did not pay, for which &c. Quod Curia concessit.

MICH. 33 ELIZ. IN THE KINGS BENCH.

CXCIV. YOUNG AND TAYLORS CASE.

In debt upon an obligation upon condition to perform the arbitrament: (the ligation was laid to be made in the parish of Bow in London) and the submission s of all things depending between them; so that they made an award of the emisses before such a day: and said further, that no arbitrament was made. The aintiff replicando said, that the arbitrators made an award in the parish of Pancras Warda prædict. and layed a breach, &c. The defendant rejoyned, that 3000l. was pending in controversie between them for a certain thing of which no arbitrament s made: upon which they were at issue, and tryed by a visne of the parish of Bow ly, which passed for the plaintiff. It was moved in stay of judgment, that the al was not good, for no place is alledged where the controversie of 300l. is pending; for which cause it shall be tried where the bond and arbitrament was ade; to which it was said, that the alledging the place where the arbitrament s made is superfluous; for which cause the trial is good: and also the submission ing conditional, the award ought to be of all things submitted, or else it is void; ntrary if it be no condition, vide Cook 8 Part, Baspoles case.

[95] MICH. 32 ELIZ. IN THE COMMON PLEAS.

CXCV. THE QUEEN AND THE BISHOP OF LINCOLNS CASE.

The Queen brought a quare impedit against the Bishop of Lincoln and others; d the case was, that F. Bishop of Lincoln, predecessor of the defendant, was patron the Church, and presented to the same, being void, one Garth, who being inducted, ok another benefice, by which, by reason of the statute of 21 H. 8. the first benefice came void, and remained void by the space of seventeen years, whereupon the ueen was entituled to present to the same by lapse. The said F. then bishop esented to the same, and afterwards was translated to Winchester, and the defen- nt, now bishop, was suffectus. And he certified into the Exchequer, that the cumbent presented by the said F. refused to pay his subsidy, upon which he was prived; and if now the Queen shall present by reason of her title by lapse, not- thstanding the plenarty after, or if the title by lapse of that presentment of the shop was, &c. was a great question: and the case late adjudged between Beverly d Cornwel was cited; but there the case was, that the clark presented (where the esentment appertained to the Queen by lapse) died, but here he is deprived, which ay be the covin betwixt the Ordinary and him. Fenner argued to the contrary, d put divers cases to prove that the prerogative of the Queen did not alter the right the parties; as the Queen hath a seignory consisting of homage, fealty, and rent, d the Queen grants the seignory to a stranger, reserving the rent, and afterwards e tenancy escheats, the rent is gone: the Queen leases for years, rendring rent to stranger upon condition, who enters upon the lessee, the condition of the Queen is spended. The Queen purchaseth lands in borough English hath issue a son, and 'eth seized he hath the land now by descent; afterwards a younger son is born, at land shall be divested out of the possession of the King, and the royalty of his rson doth not alter the right of descent: and afterwards forasmuch as the same privation is the act of the incumbent, the refusal the act of the Ordinary himself, e sentence and not the act of God in the case before cited. It was the opinion of e Court, that judgment should be given for the Queen.

[96] CXCVI. WINDHAM AND MEADS CASE.

Windham brought an action upon the case upon the common law of England ncerning hostlers: the case was, that the servant of Windham brought his masters

horse to the inn, and there it was stollen. To which the defendant said, that the said servant brought the said horse to the said inn to be put to pasture, and thereupon the said horse was put to grass, and was there stollen; it was ruled in that case that the inn-keeper should be excused; but if the inn-keeper of his own head, without direction of the owner, or his servant, had put the horse to grass, and afterward the horse is stollen, there an action upon the case doth lye.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CXCVII. NEALS CASE.

In a false imprisonment by Neal against the Mayor, Sheriffs, Citizens and Commonalty of the City of Norwich; the original writ was directed to the coroners of the said city And exception was taken to the writ, because it was not directed to the sheriffs of the said city, but to the coroners. Sed non allocatur, for the sheriffs are parcel of the corporation, as it is to see by the name by which they of Norwich are incorporated. And also it hath been adjudged, that a sheriff cannot summon himself, and therefore by the award of the Court, the writ was allowed to be good.

TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CXCVIII. SIR JOHN BROMES CASE.

Sir John Brome 33 H. 8. acknowledged a fine of certain lands, the Kings silver was entred, and the conusans taken; but the fine was never engrossed, and now he who claimed under the fine came in Court, and prayed that the fine might be engrossed, and the Court examined them upon their oaths, to what use the fine was levied, and in the seisin and possession of what persons the lands whereof the fine was levied, had been after the fine? Upon which examination it appeared fully to the Court, that the party to whom the fine was levied, was seized after the fine, and suffered a common recovery of the land, and that the said land had been enjoyed according to the said fine at all such times since, &c. whereupon the Court commanded that the fine be ingrossed. Vide Acc. 8 Eliz. Dyer 254.

[97] TRIN. 29 ELIZ. IN THE EXCHEQUER.

CXCIX. THE LORD DACRES AND PHILIP FINES CASE.

The case between the Lord Dacres and Fines was tenant in tail in remainder upon an estate for life of lands holden in capite, levied a fine thereof without licence; and process issued against the tenants for life; it was holden by all the barons, that by plea he should be discharged; it was holden, that if the conusor had any other lands ubicunque in Anglia, the fine for alienation should be levied upon them. But it was moved, if the tenant should be driven to plead it, because it appears upon record that the conusor was but tenant in tail in remainder, and that was in an office containing such matter which was pleaded by another in another cause before, by which office it appeared, that the Lord Dacres was tenant in tail, the remainder in tail to Philip Fines; and now Fines had levied a fine sur conusans de droit, &c. and because the same appeared on record, Manwood awarded that the process against the tenants of the Lord Dacres should be stayed.

3 Leon. 261.

TRIN. 29 ELIZ.

CC. PASTON AND TOWNSENDS CASE.

In trespass by Paston against Townsend, the defendant pleaded that Tindal was seized in fee, by protestation and dyed seized, and the land descended: to which the plaintiff replyed, and said, &c. absque hoc that Tindal was seized in fee, upon which they were at issue. On the part of the defendant to prove the issue, it was given in evidence to prove the issue in his right, that the said Tindal long time before his death was seized, and aliened, and never after was seized: it was said that that evidence did not prove the issue for the defendant, for the seisin in fee intended in the issue is in the nature of a dying seized; and so Periam conceived that the defendants plea did not intend any other seisin, a dying seized, and the dying seized is taken by protestation to avoid the doubleness. So as the seisin upon which the issue is taken ought to be intended a seisin continuing until the time of the death of Tindal, and seisin at large, or a general seisin at any time during the life of Tindal, quod Anderson concessit.

[98] TRIN. 29 ELIZ. IN THE KINGS BENCH.

CCI. GRIFFITH AND PRICES CASE.

Error by Griffith against Price, upon a judgment in Chester in ejectione firmæ, and the error assigned was because the original bore date 16 April, 28 Eliz. and the plaintiff declared of an ejectment 17 April, 28 Eliz. So as it appeareth, that the action was brought before there was any cause of action: and that was holden to be error: and also ejectione firmæ is not a personal action; and afterwards the judgment was reversed.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCII. HARRIS AND CAVERLEYS CASE.

A judgment was given in London between Harris and Caverley upon the statute of 5 E. 6. for buying of woolls; and upon that error was brought in the Kings Bench, quod nota, for this writ of error upon a judgment given in London ought to be sued before the maior, vide F. N. B. 22, 23. And Wray asked, wherefore the writ of error was brought here. To which it was answered by Dodding clark, that the record was removed by certiorari out of the Kings Bench at the suit of the defendant, to the purpose to bring a writ of error, quod coram vobis residet. And the error was assigned in this, that by the statute of 18 Eliz. cap. 5. it is enacted, that upon every information that shall be exhibited, a special note shall be made of the day, month and year of the exhibiting of the same into any office, or to any officer, who lawfully may receive the same: and here upon this information there is not any such note, according to the said statute: and in truth, no information may be exhibited, for there is not any officer there appointed for that matter, for the entry in such cases in that Court is, talis venit & deliberavit hic in Curia Miloni Sands, &c. But in the case at Bar, the entry is, talis venit & deliberavit in Curia, but without shewing to whom. (But note that the words of the said statute of 18 Eliz. are in the disjunctive, into any office, or to any officer) and that such information shall not be of record but from that time forwards, and not before, wherefore here this information is not upon record, and then no judgment can be given upon it. Cook, This information may be well sued in London, for the words of the said statute of 5 E. 6. give suit in any Court of Record of the King: and the Court in London is a Court of Record of the King, and every Court of Record [99] hath an officer to receive declarations and pleas, and if it be delivered into the office, it is good enough. 2. The offence is laid in the parish

of Bow in Warda de Cheap, & alibi in civitate London, and so there is not any place laid where the offence shall be tryed. Cook, This alibi is a nugation.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCIII. PENSON AND HIGBEDS CASE.

In assumpsit, the plaintiff declared, that in consideration that he by his servant had delivered to the defendant two bills of debt amounting to the sum of 80l. solubiles eidem querenti to be received by the defendant at Roan in Normandy, to his own use, the defendant promised to pay to the plaintiff 60l. and upon this matter judgment was given; and now a writ of error was brought and assigned for error, because it is not shewed in the declaration that the bills were sealed, or that they were made to the plaintiff, and here is not any consideration, for the defendant hath not any remedy to compel the parties to pay the said debts if they refuse. Godfrey, If the mony be not paid at Roan to the defendant, he shall have an action upon the case, for this is an assumpsit in law, which Wray concessit, for it is a mutual promise and agreement: and it was argued to the contrary, that here is not any sufficient consideration, for it doth not appear that the defendant hath any remedy for to recover the mony. And 13 Eliz. it was holden, that where the plaintiff declared in an action upon the case, that in consideration that he had delivered a bill of debt to the defendant, and hath made a letter of attorney upon it, &c. the defendant promised to pay to the plaintiff 20l. and because that the plaintiff (notwithstanding that) might release the debt, or revoke the letter of attorney, and so defeat the defendant of the whole profit, &c. that the action upon the matter did not lye: also for another cause the consideration is not sufficient, for it is illegal because maintenance; but if it was upon the consideration precedent, it had been good enough: as if J. be indebted to A. and B. is indebted to me, J. may assign to A. the debt which B. oweth me. Golding, Although the consideration be but of small value, yet it is good enough. And if A. in consideration B. will assure to him the manor of D. promise to pay to B. 100l. although the party hath not any interest or title to it, yet it is good, and also though the consideration be executory, yet it is valuable, for if the mony be not paid at Roan, the defendant shall have an action upon the case against the plaintiff: it was also objected that upon the declaration it doth not appear that the defend. if the [100] two bills be not paid, may have an action upon the case against the plaintiff, for there is not any express assumpsit on the plaintiffs part, that the monies due by the bills to the plaintiff shall be paid to the defendant, for if it had been so, then it had been good, for then there had been a reciprocal promise which is not here, nor can be collected by any words in the declaration. Cook, It doth not appear upon the declaration by whom, nor to whom the mony due by the two bills shall be paid, for it may be that they are due to the defendant, and then the delivery of the two bills is not any consideration, quod Clench & Gawdy concesserunt. The case was adjourned.

CCIV. TEMPS ROIGN ELIZ.

The case was, A. enfeoffed B. upon condition that if he pay ten pound to the feoffee, his executors and assigns, within three years next ensuing, that then, &c. The feoffee hath issue three sons, whom he makes his executors, and dyeth before the day of payment. The Ordinary commits letters of administration to J. S. during the minority of the executors. It was the opinion of Dyer, that it was the surest way for A. to pay the monies to the executors, notwithstanding the administration committed to another, for the administrator in such case is but a bailiff or receiver to the executors and shall be accountable to them; which Harper concessit: and Manwood said, that if in that case, the monies be paid to one of the executors, it is sufficient; and the monies to be paid upon that conditional feoffment, are as a sum in gross, and not in the nature of a debt, quod cæteri justiciarii concesserunt.

CCV. Temps Roign Eliz.

A lease is made of certain lands for years, proviso that the lessee shall not put his cattel upon the land from Michaelmas to St. Andrews tide, the question was, If this proviso and restraint shall reach for the whole term, or but to the first year. Dyer, Conditions are stricti juris, and ought not to have liberal constructions; therefore he conceived that the condition should be restrained to the first year, and should not further extend. Manwood, If I be bound that I will not go to London between Easter and Michaelmas, it shall not extend only to the first year after the date of the obligation, but for my whole life.

[101] Hil. 32 Eliz. In the Common Pleas.

CCVI. Doughty and Prideaux Case.

Action upon the case by Doughty against Prideaux upon these words, Thou art a wicked and perjured fellow, and art forsworn in the Court of Star-Chamber, as it appeareth by an exemplification here under the seal of that Court: the defendant justified by reason of a bill exhibited in the said Court, by one Brooks against the now plaintiff, for conspiring with another to endite the said Brook of certain felonies, and the defendant, now plaintiff in his answer to his said bill, denied upon oath the said conspiracy, and sentence was given in the said Court against the now plaintiff, ubi revera, such conspiracy was. The plaintiff by replication said, that the said Brook was arraigned and endicted upon the said indictment, and prayed his clergy, whereupon it appeared, that the said Brook was not legitimo modo acquiet'; and the same can be no conspiracy in the now plaintiff, to prove the said Brook to be indicted: and by Walmsley and Periam, the replication is not good, for it may be that Brook was acquitted, and yet that the plaintiff conspired, upon which a writ of conspiracy perhaps will not lye, but an action upon the case without doubt, for the replication doth not prove that the plaintiff did not conspire, but that the plaintiff was not punishable for such conspiracy.

3 Leon. 269.

CCVII. Pasc. 33 Eliz. In the Common Pleas.

An abbot made a lease to three men for eighty years, and in the end of the said lease there was a clause, proviso, that if they dyed within the said term, that then the lessor might enter. The possessions of the abby came to the King, who granted the reversion to J. S. who made a new lease to J. D. for twenty and one years, to begin after the expiration, determination, or surrender of the former lease: the three lessees dyed within the term, if J. D. might enter before J. S. had entred, was the question. It was the opinion of the justices, that he could not, for it is in the election of J. S. if he will take advantage of the condition, and defeat the lease, but that ought to be by entry, and none can make such entry but the lessor himself, or by his express direction.

[102] Trin. 31 Eliz. In the Kings Bench.

CCVIII. Barlow and Piersons Case.

Barlow brought a plaint of debt in London against Edward Pierson, which was his very name, and he caused himself to be removed into the Kings Bench by the name of Edmund Pierson, and in Easter last he put in bail Edmund Pierson, and we declared against him by the name of Edward, his true name, and judgment was given for us; and now when we are to resort to the bail we cannot find any such person,

wherefore all our labour is lost, and now we would declare de novo upon that bail, and we pray that the Court will give way to answer. Kemp, The ancient use was, when any removed himself hither by habeas corpus, the plaintiff might declare against him at any time within a year after; but of late time the justices, to avoid overlong delays, have taken this order, that the plaintiff in such case declare within two terms; and this is the second term in your case, wherefore you may declare: and it was said, that because that the defendant had removed himself by the name of Edmund, he is estopped to say the contrary: but if it were upon an original writ here, it is otherwise. And afterwards the plaintiff declared against him by the name of Edmund.

MICH. 27 ELIZ. IN THE COMMON PLEAS.

CCIX. KIGHTLEY AND KIGHTLEYS CASE.

Debt by Eustace Kightley against Charles Kightley executors of the last will of Francis Kightley: the defendant pleaded that they had fully administred. The case was this, Francis Kightley made the defendants his executors, who being within age administration was committed to another until they came of full age, and after they were of full age, the jury found, that in the hands of the administrator, fuerunt bona & debita testatoris amounting to the value of 4000l. To which administrator the executors did release at their full age all manner of demands; and if that release were assets in the hands of the executors was the question. Puckering Serjeant argued, it was not assets, for a release of a thing, which is not assets in the hands of an executor, cannot be assets, and things in action, before they come in possession, cannot be assets: but a gift of goods in possession is assets. And there is a difference betwixt a certain thing released, and a thing incertain, of a certain it is assets, for by such means he hath given a thing which is assets, but contrary of an incertain. And this difference is proved by **[103]** 13 E. 3. Execut. 91. where it is holden, that if executors release to the debtor, he shall account for such sum before the Ordinary by Parn, but Trew said he shall not account. The whole Court was against Puckering: and Anderson said, it is a clear case, that this release is assets, for he hath thereby given away that which might have been assets. And the law doth intend, that when he releases he hath recompence and satisfaction from the party to whom the release is made: and it is not requisite, that every assets be a thing in possession, or in the hands of the testator, for a thing may be assets which never was in the hands of a testator, as monies for lands or other goods sold. So if they come by reason of another thing, which was in the testators hands: as the encrease of goods by the executors in their hands by merchandizing with the goods of the testator or goods purchased by the villein of the testator after his death, shall be assets. So monies received by the executors of the bailiff of the testator after his death shall be said assets. Windam Justice, So it is if the testator hath sheep, corn, or swine, and dyeth, and they have young lambs, pigs, or calves, they are assets for the reason aforesaid: and he agreed that the release is assets, and he said it had been so adjudged, and he denied the difference taken by Puckering. Periam agreed with the rest in all; and also denied the difference. And he said, the incertainty must be such that the same cannot be proved to the Court, or unto a jury; that the thing released might not by possibility have been assets. For if trespass be done to the testator by taking his goods, and he dyeth, and the executors release all actions, the same is assets, because it might be proved to the jury, that had they not released, but brought their action of trespass de bonis asportatis in vita testatoris, that they might have recovered damages which should have satisfied the debts or legacies of the testator, and therefore it shall be assets: and yet the thing recovered cannot be in the testator, or a thing in possession, or certain in the hands of the executors. With whom Rhodes agreed. And Periam conceived that such administrators made durante minori ætate of the executor, could not by our law neither sue or be sued: for as he conceived, the infant was the executor, and an infant executor may either sue or be sued, and may release if there be a sufficient consideration given him; wherefore he said, if an administrator

doth release where he hath no cause nor good consideration, he shall be answerable of his own goods when he cometh of full age, for the wasting of the estate, and such a release shall be assets: and it was holden, that a release before probate of the will is good, and it is assets also. And the same term judgment was given, that the release of the executor was assets.

[104] CCX. Temps Eliz. In the Common Pleas.

Note by Dyer upon the words of the statute of 32 H. 8. cap. 28. that a feoffment of the lands of his wife, it shall not be a discontinuance (mes que) but that the wife may enter after the death of her husband, is an abridgment of the words precedent, for in some cases such a feoffment is a discontinuance; as if, after the feoffment they be divorced, she cannot enter, but is put to her writ cui ante divortium.

CCXI. Pasc. 29 Eliz. In the Kings Bench.

Note by the opinion of the whole Court: a man made his will in this manner, I will and bequeath my land to A. And the name of the devisor was not in all the will: that yet the devise was good by averment of the name of the devisor, and proof that it was his will; and if a man lying sick, having an intent to make his will by words makes such a devise, but doth not command it to be put in writing, but another without his knowledge or command puts the same in writing in the life of the devisor, it is a good devise, for it is sufficient if the devise be reduced into writing.

Pasc. 29 Eliz. In the Common Pleas.

CCXII. Brasiers Case.

Note, it was agreed by all the justices, and affirmed by the prothonotaries, that if the disponee levieth a fine, and the disseisee in preservation of his right against the said fine, enter his claim in the record at the foot of the said fine, that the same is not any claim to avoid the said fine upon the statute of 4 H. 7.

Pasc. 29 Eliz.

CCXIII. The Queen and Sir John Savells Case.

A bill of intrusion was exhibited by the Queen in the Exchequer against Sir Robert Savell kt. who pleaded in bar her pretence, and upon issue joyned, the matter was tryed by the records, and thereupon judgment was given for the Queen, and an injunction for the possession awarded accordingly. Sir Robert dyed, and now Sir John Savell, son and heir of the said Sir Robert brought a writ of error in the Exchequer Chamber upon the statute of 31 E. 3. the perclose of which writ was, ad grave damnum ipsius Johannis Savell filii & hæredis dicti Roberti. [105] It was objected against the writ, that no writ of error upon the said statute of 31 E. 3. lay upon such proceedings which at the time of the making of the said statute was not in force: for tryal of an issue in the Exchequer by record, was enacted by the statute of 33 H. 8. and the statute of 31 E. 3. extended to give a writ of error upon such judgments which were given by verdict, confession, or demurrer, and not upon tryal by records, which was given but of late times. But to this objection it was answered by the Lord Chancellor, and the other Judges, that long time before the said stat. of 33 H. 8. issues joyned in the Exchequer have been tryed by the records; and he, when he was the Queens Solicitor, had seen divers presidents to that intent in the time of Hen 6.

MICH. 29 ELIZ. IN THE KINGS BENCH.

CCXIV. HOUTIERS CASE.

Debt was brought upon a concessit solvere according to the law of merchants and custom of the City of Bristol. Exception was taken, because he did not mention the custom in his declaration: and because in the end of his plea, he saith, Protestando se sequi querelam secundum consuetudinem civitatis Bristol, the plea was awarded good, and the exception disallowed.

CCXV. MICH. 29 ELIZ. IN THE KINGS BENCH.

A man was indicted upon the Statute of 4 Eliz. of Perjury in a Court-leet: and the indictment was, that he at the leet of the Earl of Bath, super sacramentum suum coram senescallo, &c. Exception was taken to it, because it saith at the leet of the Earl of Bath, whereas every leet is the Kings Court, although that another hath the profit or commodity of it: and it was said that the steward of a leet is not an officer of record; and also his oath was, if he had done a rescous, or not, with which he was charged. And by Drew, It is not within the statute; for it ought to be either before a jury in giving evidence, or upon some article. But the justices in that were of opinion against him.

[106] MICH. 25 ELIZ. IN THE COMMON PLEAS.

CCXVI. HOWEN AND GERRARDS CASE.

It was adjudged in this case, that partition of lands made by the bayliff of a franchize, was not good within the Statute of 31 H. 8. of Partition, but it ought to be done by the sheriff himself.

MICH. 28 ELIZ. IN THE KINGS BENCH.

CCXVII. STRANGDER AND BURNELLS CASE.

An action upon the case of trover of goods, and converting them to his own use in Ipswich. The defendant pleaded, that the goods came to his hands in Dunwich in the same county, and that the plaintiff gave to him all goods which came to his hands in Dunwich, absque hoc that he is guilty of any trover or conversion in Ipswich. It was holden to be a good manner of pleading by reason of the special justification. Vide 27 H. 6. But where a justification is general, the county is not traversable at this day, vide 19 H. 6, 7.

62 ELIZ. IN THE COMMON PLEAS.

CCXVIII. HODGES CASE.

If one enfeoffeth his son and heir apparent, and no use is expressed, nor consideration, it was said, it should be to the use of the son, and so hath the law been taken; and so it is in case of a covenant to stand seized to the use of the son. The Court said that there was a difference betwixt the cases; for in the case of feoffment they seemed to be of opinion, that the deed should have no operation; but in the other case it may be otherwise upon construction of the result of the use to the father.

28 ELIZ. IN THE KINGS BENCH.

CCXIX. MARK STEWARDS CASE.

An assumpsit before action brought may be discharged by word, otherwise after action brought.

[107] MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCXX. VERNEY AND VERNEYS CASE.

In dower by Verney against Verney: the case was, That lessee for years by fine to whom the land was rendred by fine for years upon the default of the tenant, prayed to be received, and it was counter-pleaded, because the Statute of Gloucester gave no receit, but where the termor might have recovery by writ of covenant, but where the lease, as in our case, doth commence by render by fine, there cannot be any recovery by covenant. But it was the opinion of the Lord Anderson, that such a termor shall be received.

CCXXI. MICH. 32 ELIZ. IN THE EXCHEQUER CHAMBER.

In the Exchequer Chamber before the Chancellor, Treasurer, &c. a writ of error was cast upon the statute of 31 E. 3. cap. 12. It was moved by Egerton Solicitor to the Queen, for the defendant, that the writ of error ought to abate for false Latine, for the writ is pertenet, where it ought to be pertinet. But by Manwood, Anderson, and Wray, the same is no exception, but notwithstanding that, the Court may proceed to the examination of the errors; for the same is not properly a writ, but rather a commission to the Chancellor, Treasurer, &c. and therefore it was ordered that the party should proceed to the assignment of the errors.

MICH. 31 ELIZ. IN THE EXCHEQUER.

CCXXII. THE QUEENS, FANES, AND THE ARCHBISHOP OF CANTERBURIES CASE.

The Queen brought a quare impedit against Fane, the Archbishop of Canterbury, the Bishop of Chichester, and Hudson incumbent; and counted that John Ashburnham was seized of the advowson of Burwash, and was outlawed in an action of debt, during which outlawry in force, the church voided, by which it did appertain to the Queen to present. The archbishop and bishop pleaded that they claimed nothing but as metropolitan and Ordinary. Fane pleaded, that King E. 4. ex gratia sua speciali, &c. and in consideration fidelis servic. &c. granted to the Lord Hastings the castle and barony of Hastings, and hundred, &c. Et quod ipse haberet omnia bona & catal. tenentium, residentium & non residentium, [108] & aliorum resident. quorumcunq; hominum de & in castro, baronia &c. seu infra eadem pro numero debit. &c. tam ad sectam Regis, &c. quam &c. utlagatorum. Et quod ipsi liceret per se, vel ministros suos, &c. and from him derived to the now Earl of Huntington as heir, &c. and the said earl being so seized, and the said Ashburnham seized of the said advowson as appendant to the mannor of Ashburnham, holden of the said barony, the said church during the outlary in force became void: for which cause the said Thomas Fane ad ecclesiam prædict. usurpando præsentavit the said J. H. who was admitted, and instituted, and demanded judgment. If, &c. with this that the said Tho. Fane will aver that the said church of B. is, and at the time of the said grant

was infra præcinct. libertatis & franchesiæ prædict. & quod prædict. manerium de Ashburnham tempore concessionis prædict. was holden of the said barony. And the incumbent pleaded the same plea: and if by that grant of King E. 4. to the Lord Hastings, scil. bona & catalla, the presentment to the church passed or not, was the question. Shuttleworth of counsel for the Queen, he said and confessed, that the Queen might grant such a presentment, but it ought to be by special and sufficient words, or such words so as it might appear to the Court by them, that the intent of the Queen was to grant such a thing, for the general words omnia bona & catalla, would not pass such a special chattel in the Kings grant. And he said he conceived, that by the words subsequent, that no goods and chattels should pass by such grant, but such which might be seized, the which the advowson of a church could not be: Et quod ipsi liceret per se vel ministros suos ponere se in seisinam, 8 H. 4. 114, 115. The King granted to the Bishop of London that he should have catalla felonum & fugitivorum de omnibus hominibus, & tenent. de & in terris & feodis prædict. & de omnibus residentibus infra terr. & feoda prædict. ita quod si prædicti homines, tenentes & resident. de & in terris & feodis prædict. seu aliqui eorundem, seu aliquis alius infra eadem terras & feoda pro aliqua transgressione sua, seu quocunque alio delicto vitam, vel membrum debeat, vel fugerit & judicio stare noluerit, seu aliquam aliam transgressionem fecerit pro qua ipse catalla sua perdere debeat, in quocunque loco justitia de ea fieri debeat. Ipsa catalla sint ipsius Episc. & per ministros Episc. in manus ipsius Episc. sesiri possint. Tirwhit, The goods of those that are put to penance do not pass, so the goods of a felo de se, vide 42 Ass. 5. where one being impanelled upon the grand inquest before the Justices of Oyer and Terminer, pleaded the Kings Charter of Exception from Inquests; and because in the said charter there was not this clause (licet tangit nos & hæredes nostros) without challenge it was rejected, and he charged, and sworn. And if the King grant to me to appropriate an advowson, which in truth is holden of the King, such a grant is void. So if there be not special words, by which it may appear that the King **[109]** hath notice of it, and that his intent was, that the grant should extend to the same, it doth not pass, 16 E. 2. Fitz. Grants 58 and 33 E. 3. Grants 103. So here this presentment is a special chattel: and it is not usually intended, or thought upon when a man speaks generally of goods and chattels, but that it passeth, yet the presentment doth not lye for the defendants, for they do not derive any interest under that grant, but are meer strangers to it, and therefore they shall not take any advantage in laying this grant in the Queens way; for the Queen hath good title against all persons, but those which claim under the said grant, but that is nothing to the defendants. For one cannot cross the title of the King, if he doth not make a title to himself. As 39 Ass. 18. 17 Ass. 11. if the title of the King be found by a false office, the party grieved cannot traverse the title of the King, without making a title to himself, and then the King may choose whether he will maintain his own title found by the office, or traverse the title of the other. Walmesley to the contrary: This title of presentment is a chattel, rex habebit omnia catalla felonum, &c. Terminus annorum is a chattel, so exitus & proficua terrarum utlagatorum pro felonia; so a right of action for goods; so it is of an obligation made to the party delinquent, therefore also a title to present; therefore if a title to present shall accrue to the King by such general words, it shall pass also from the King by such words; and as to that which hath been objected, that the grant of King E. 4. extends only to such goods and chattels which may be seized. He cited the case 39 H. 6. 35. where the grantee of a rent-charge, for a term of years granted omnia bona & catalla sua tam viva, quam mortua, the rent passed, and yet the grantee could not put him in seisin of it when he would, but ought to expect the day of payment. And this title to present is not a thing in action, for if no disturbance be made, the party may have the benefit of it without any action. Anderson held that this title to present could not pass by these general words, bona & catalla, for they do not extend to a right, or things in action, but to such things only which are commonly known and understood by such words. By grant of goods, chattels real do not pass. For when men speak of goods, houshold-stuff, mony, and the like, personal things only are understood. So a man cannot be said to have a chattel but where he is possessed of it, and here this interest is but jus præsentandi. Periam, This interest is a chattel; for if the church became void and before present-

ment the patron dyeth, his executors shall have the presentment, for that it was a chattel vested in their testator, &c.

1 Leon. 201.

[110] 19 ELIZ. IN THE KINGS BENCH.

CCXXIII. HIDE AND HILLS CASE.

In ejectione firmæ by Hide against Hill, the case was, Nicholas Throgmorton tenant in tail, without licence of the King, went beyond sea into Italy, and there married an English woman, and there continued in the service of Cardinal Pool, and their practised traiterously against the State here, and against his allegiance, within which time he had issue a son named Francis: it was holden that the said son was not inheritable to the tail; for if a subject goeth beyond sea with the licence of the King, and there continueth longer than his appointed time, by that he loseth the benefit of a subject. It was further given in evidence, that the said Nicholas was attainted of treason in the time of Henry 8. and afterwards went beyond sea, ut supra, and returned in the time of Queen Mary, and was restored by Act of Parliament: and upon all that matter it was holden that the said Francis was inheritable.

19 ELIZ. IN THE KINGS BENCH.

CCXXIV. GREY AND EDWARDS CASE.

In an attaint by Grey against Edwards it was holden by Wray, Gaudy, and Jeoffries, that if one makes a deed, and that by these words (dedi) conveyeth lands to another, without any words of bargain and sale, and that for a sum of mony; if the deed be debito modo enrolled, the use shall pass as well as if the words of bargain and sale had been in the deed, because that a sum of mony was paid for the land.

19 ELIZ. IN THE KINGS BENCH.

CCXXV. WEBBS CASE.

In action upon the case, the plaintiff declared, that whereas Cobham was indebted to J. S. and J. S. to the defendant, the said defendant in consideration that the plaintiff would procure the said J. S. to make a letter of attorney to the defendant to sue the said Cobham, promised to pay and give to the plaintiff 10l. It was objected, here was not any consideration for to induce the assumpsit; for the defendant by this letter of attorney gets nothing but his labour and travel. But the exception was not allowed of. For in this case not so much the profit which redounds to the defendant, as the labour of the plaintiff in procuring of the letter of attorney, is to be respected.

[111] TEMPS ROIGN ELIZ.

CCXXVI. HEGGOR AND FELSTONS CASE.

Copyholder. Surrender by Attorney.

In trespass, the case was, A copyholder surrendred to the use of his wife for life, and after to the use of his daughter in fee the wife is admitted: it was holden that the daughter, after the death of the wife, might without any admittance surrender the same land, for the first admittance was sufficient. And Manwood said that Roper was steward of a mannor, and one of the copyholders of the said manor being in Ireland, he made a commission to one to receive a surrender from him there, and it was holden a good surrender.

CCXXVII. TRIN. 32 ELIZ. IN THE EXCHEQUER.

Note by Manwood Chief Baron, for a rule to all counsellors, that they do not advise any collectors of subsidies or fifteens to exhibite any bills in the Exchequer Chamber for the not payment of subsidies; for such bills shall not be allowed hereafter, because they have remedy by distress. Also it was, that if any be assessed for the fifteens which he ought to pay, or if two towns ought to pay together, and one town be taxed more than it ought to be, or hath been accustomed, those who are grieved by such assessment, may have a commission out of the Exchequer, which is called ad æqualiter taxand. and that was put in practice in a case between Bartace and Hind, where one of these was Lord of Little Marlow, and the other of Hedfore. It was also holden, that fifteens are to be levied of goods and chattels properly, and a township is sometimes richer than at other times, and therefore it is not reasonable they pay their fifteens always according to the same proportion. But Clark Baron held, where the custom hath always been that the fifteens shall be taxed according to the quantity of acres, then the rate and proportion shall be always on whosoever holdeth the land. And as to the commission ad æqualiter taxand. Manwood and Fanshaw said, that they could shew twenty presidents of it.

[112] TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCXXVIII. HARRIS CASE.

The case of Harris of the Middle Temple, was, Tenant in tail in remainder upon an estate for life is attainted of felony, if he hath forfeited his remainder during his life. Popham Attorney General, He hath forfeited it to the Queen; for after his attainder, the law will not suffer it to remain in him, and it cannot vest in the lord of whom the land is holden; for the person attainted being tenant in tail in remainder, was not very tenant to the lord, therefore, if in none of them, the Queen shall have it, and the law shall punish the offence so sharply, that it suffer nothing to remain in him. So tenant in dower and by the courtesie: and it is a maxim, What a man hath in his own right he may forfeit, but it is not a certain rule, whatsoever a man may grant he may forfeit; as guardian in socage and executors may grant that which they cannot forfeit. A man seized in the right of his wife is attainted of felony, the Queen shall have but the profits of the land during the life of the husband, vide Register 292. Where the husband seized in the right of his wife of certain lands is outlawed of felony, the King seizeth, and hath the lands during the life of the husband, after the death of whom, issued a diem clausit extremum, vide F. N. B. 254. D. Cook, Tenant in tail in possession is attainted of felony, the King shall have but the profits, but as our case is, being tenant in tail in remainder upon an estate for life, nothing shall be forfeited during his life, and after the death of the tenant in tail, so attainted of felony, the issue in tail may enter, for the King hath not the freehold; for if the King had the freehold, the issue in tail could not enter without office, vide Old Natura Brevium in the writ of escheat, that the King shall have only the profits. At another day it was argued by Egerton Solicitor, that the Queen hath the interest of him in the remainder during his life; for a man so attainted cannot be receiv'd against the Queen; and if a man attainted of felony purchaseth land and dyeth, his wife shall not be endowed of it: and he said that this remainder vested in the Queen without office, then not pardoned by 23 Eliz. It hath been objected, that if the remainder be in the Queen without office, by this attainder of felony by the common law, then also in case of attainder for treason, and then what need was there that the statute of 33 H. 8. should be made, which enacteth, that in cases of treason it shall vest in the King without office. As to that, I answer, that that statute was made in affirmance of the common law, and also for other things given to the King by the statute, which were not given by the **[113]** common law, as conditions, rights, &c. So as the King might grant over without office, and also the subject have a petition of right before office, which was not at the common law, 33 H. 8. 20. in the saving in

the end of it: and as to the statute of 18 H. 6 cap. 6. such things were in the King without office, for by the common law before office, the King might grant them, but he could not grant them if they were not vested in him; and the said statute was made to such intent, that the Queen should be fully informed of her title, &c. by the office. Vide Stanford Prerogat. 54, 55. and vide 20 E. 4. 11. A. seized of a mannor with an advowson appendant, is attainted of treason, the church void, the King without any office shall have the presentment. But admitting that it is not in the King without office, yet the pardon of 23 Eliz. doth not extend to it: for the words of the pardon are, treasons, felonies, offences, contempts, trespasses, entries, wrongs, deceits, misdemeanors, forfeitures, penalties, and sums of moneys, and if by any of these words the matter be helped, is to be considered; and if any thing shall help it, it is the word forfeiture: but I conceive that the same doth not extend to this matter; for although it be an ample word, yet it shall be construed to extend beyond the words accompanied with it, which concern only personal things, as contempts, wrongs, trespasses, as the statute of 13 Eliz. cap. 10. which is penned by general words, as colledges, deans and chapters, parsons, vicars, and others having spiritual promotions, that statute doth not extend by construction to bishops, and they have spiritual promotion; yet the statute shall be construed to extend to the parties named, and other inferiour orders and degrees, and shall not be extended higher. So in the commission of the peace, ad diversas felonias, & alia malafacta, &c. those general words do not extend to treason, &c. Vide for the residue of this case, Venable and Harris's case, which was the same case, and is reported in Leonard 2 Part, fol. 122. Placito 169.

2 Leon. 122. Hughs Qu. 13. 3 Leon. 185. 1 Inst. 351. a. 2 Leon. 126.

PASC. 33 ELIZ. IN THE COMMON PLEAS.

CCXXIX. DOWNHALL AND CATESBY'S CASE.

In a formedon by Downhall against Catesby, the parties were at issue, and it was tryed by nisi prius: it was moved in bank, because that some of the jury did eat and drink before they gave their verdict that the Court would not receive the postea: Curia that we cannot do; for we not know whether your **[114]** information be true or not, and this matter ought to be examined by the Justices of Assize or nisi prius, before whom the trial was, and they are to certifie thereof, and then we shall have good cause to stay the entry of the postea. In that case it was said, if any of the jurors eat and drink before their verdict at their own costs, it doth not make the verdict void, but if at the costs of the plaintiff or defendant, it is otherwise.

3 Leon. 267.

CCXXX. HIL. 29 ELIZ. IN THE COMMON PLEAS.

The sheriff took an obligation of a prisoner bailable, upon condition that he should personally appear in the Kings Bench, &c. It was holden a good condition, not against the statute of 23 H. 6. So if the condition had been that he should appear for to answer: contrary, that he shall appear and answer; for in the principal case, the word (personally) is not of substance, for although he appears by attorney, yet the condition is well performed; and judgment was given for the plaintiff: Anderson reclamante. Vide 27 Eliz. B. R. Sedford and Cutts case.

32 ELIZ. IN THE COMMON PLEAS.

CCXXXI. HASELWOODS CASE.

The case of Haselwood; A. seized of land is indebted to the King by obligation, and enfeoffed B. of his land: and the case of Fleetwood 15 Eliz. was vouched, where

it was holden, that in purchase the debtor of the King was lyable. But by Pigot, who was of counsel with Haselwood, the obligation in this case was made before the statute of 33 H. 8. or otherwise he should be charged.

32 ELIZ.

CCXXXII. SIR WILLIAM PELHAMS CASE.

Sir William Pelham was Surveyor of the Ordinances, and delivered of the Kings money to Painter, Clerk of the Ordnance. It was holden, that for that money the Queen might have account against Painter. See this case before sect. 81.

[115] TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CCXIV. OGNELL AND UNDERHILLS CASE.

In replevin, the case was, as appeared upon the pleading, that Rob. Bouchier was seized of a certain farm called Cruchefield Grange, and leased the same to Sir William Raynsford for thirty years, who dyed thereof possessed, by reason of which the interest thereof came to Raynsford, as executor of the said Sir William Raynsford, who assigned the said farm, except a parcel of it called Hobbes, to Sir Henry Bear for parcel of the term, and afterwards assigned the said parcel called Hobbes for part of the term to Frekington and others, and afterwards granted the residue of the said term, not expired, to the said Bear and Frekington, and afterwards the said Rob. Bouchier granted a rent-charge of 40l. per annum percipiendum de omnibus terris & tenementis quibuscunque vocat. the Grange of Cruchefield, in the parish of Stoneleigh in the county of Warwick nuper in tenura, & occupatione William Raynsford milit. & nunc in tenura, & occupatione Hen. Bear. Bouchier granted the reversion of Hobbes to Lewknor in fee, to whom Scarre releaseth all his right, estate, and demand in the said land called Hobbes; the lease expired, the rent behind, Lewknor leased at will to R. the first question was, if the said rent-charge shall be said issuing out of the said lands called Hobbes; for if &c. then by that release the rent is gone: but the whole Court was clear of opinion, that the rent was not issuing out of Hobbes, but out of the lands then in the possession of Bear, and not out of the lands in the possession of Frekington: although it was objected by Walmesley Serjeant, that the words in the grant of the rent, (in tenura & occupatione Bear) shall be construed in the disjuncive, quasi sive; and then the close called Hobbes, although it was not in the occupation, yet it was in tenura of Bear. The matter was at another day argued by Fenner Serjeant for the plaintiff, and he much relyed upon the word quibuscunque in the grant of the rent de omnibus terris quibuscunque, commonly called Cruchefield Grange: as if I grant to you all my trees, my apple-trees shall not pass; but if the grant was omnes arbores meas quascunque they pass, and that by the emphasis of this word quibuscunque: so if I grant you common for your cattel in such a place, none shall have common but those which are commonable, shall have common there; contrary where the grant is pro averiis quibuscunque: and it was adjudged in the Chancery in the case of the Bishop of Ely, that where the said bishop leased all the demeasns of a manor for years, that by the said lease the **[116]** park within the said manor should not pass. But perhaps if such a lease had been omnes & singulas terras dominicales quascunque, the park would have passed. And afterwards the counsel of the plaintiff seeing that the Court was of opinion with the defendant, took exception to the pleading: the defendant made conusans ut ballivus administratoris of the grantee of the rent, and doth not shew the letters of administration. And as to that, it was agreed by the Court that that had been a good exception if the matter had not been relieved by the Statute of 27 Eliz. of Demurrers. Another matter was objected upon the statute of 32 H. 8. cap. 37. upon the words of the said statute, so long as the lands remain in the possession of the tenant in demeasn, who ought immediately to have paid the said rent. And it was said by Anderson and Rhodes, that the conusans was

good enough, and within the relief of that statute: for Lewknor was the immediate purchaser, and although he had let the lands to another at will, that did not make any thing, for yet the estate of the land is within the words of the statute, for the land remains in the seisin of the first purchaser. And note that in this case Bouchier dyed before the lease expired, so as the rent was not determined in his life. And afterwards judgment was given for the defendant.

MICH. 30 ELIZ. IN THE KINGS BENCH.

CCXXXV. RAWLINS AND SOMERFORDS CASE.

In ejectione firmæ, the case was, Cartwright possessed of a house for the term of 30 years, demised a stall parcel of it to Wartow for two years, and afterwards assigned the whole house to Rawlins for all the years; Rawlins redemised the same stall to Cartwright for twenty years, but Wartow did not attorn; but before the said redemise, Cartwright by deed indented, demised the said stall to Wartow for six years after the said two years ended, and afterwards Rawlins redemised all the house to Cartwright for 21 years, rendring rent, with clause of re-entry, and upon the indenture of the said redemise was endorsed that before the sealing and delivery, &c. it was agreed between the parties, that Wartow should have the said stall according to the lease for six years to him made: and afterwards Cartwright redemised the said stall to Rawlins for ten years, and afterwards the rent was behind, and if the rent reserved by Rawlins upon his demise to Cartwright, was suspended, or not, was moved a question. Cook argued it was not suspended, for Rawlins had in the estate but an interest in futuro, which cannot suspend the rent before in possession, and he put the case **[117]** 31 E. 1. Fitz. Discent. 17. Lord and tenant, the tenant is attainted of felony, and dyeth, now the seignory is not presently extinct: for if the lord takes fealty of the son, the seignory doth continue in esse, and vide Acc. Fitz. N. B. 144. 26 E. 3. 72. Houghton, The rent is suspended, as if I lease land and an advowson, rendring rent, and I take back an estate in the advowson, now the rent is suspended. But as to that it was answered, that there the party hath a present interest in the advowson, but so it is not in the case at Bar. And by Cook, A. seized in fee of three acres makes a lease of two of them for 21 years rendring rent, and afterwards the lessee leaseth one of the said acres for years to the lessor to begin two years after, it is not a present suspension of the rent until the lease come into possession, &c. And afterwards it was adjudged, that by the lease in futuro the rent was not suspended, Pasch. 28 Eliz. Rot. 255.

MICH. 26 ELIZ. IN THE EXCHEQUER.

CCXXXVI. THE GUARDIANS OF THE MONASTERY OF OTLERIES CASE.

In the Exchequer, it was found by special verdict, that the Guardian and Chanons Regular of Otlery were seized of the manor of O., &c. and that 22 H. 7. at a court holden, granted the lands in question to W. and W. his son, for their lives, by copy, according to the custom of the said manor, and afterwards 30 H. 8. they leased the same land by indenture to H. rendring the ancient and accustomed rent, and afterwards surrendred their colledge, &c. and afterwards W. and W. dyed. And if the said lease so made, during the estate customary notwithstanding the statute of 31 H. 8. were good or not, that was the question, being within a year before the surrender, &c. And it was argued by Egerton Solicitor, that the said lease was void by the statute, the words of which are, Whereof, or in the which any estate or interest for term of life, year or years, at the time of the making of any such lease, had his being or continuance, and was not then determined, finished, or expired. And therefore we are to see, if this right or possession which W. and W. had at the time of the making of the said lease was an interest, or estate for life: and as to the word estate est nihil

aliud, than measure of time; for an estate of fee-simple, is as much as to say, an interest in the lands for ever, and so of the rest, and therefore W. and W. had at the time of the making of the lease an estate for the thing demised. And although such customary tenants are termed in law, tenants at will, yet they are not simply so, nor meer tenants at will, but tenants at will secundum consuetudinem manerii: which **[118]** custom warrants his possession here for life, and therefore it is a more certain estate, than an estate at will, for the copyholder may justifie against his lord, and so cannot a tenant at will, whose estate is determinable at the will and pleasure of his lessor; and although this estate is but by custom, and by no conveyance, yet it is such an estate which the said statute intends, & non refert by what conveyance the estate is raised, so it be an estate; and this estate being supported by custom, is acknowledged in law to be an estate, and so accounted in our law; and the law hath notably distinguished copyhold tenancies by the custom, and tenancies at will at the common law, for a copyholder shall do fealty, and have aid of his lord in an action of trespass; he shall have and maintain an action of trespass against his lord; his wife shall be endowed; the husband shall be tenant by the curtesie without a new admittance: so customary tenancies are within the rules and maxims of our law: as in the case of Horewood, there shall be a possessio fratris of it without admittance; and it was adjudged 8 Eliz. in the Kings Bench, that if a copyholder surrender to the use of another for years, and the lessee dyeth, his executors shall have the residue of the term without any admittance. M. 14, 15 Eliz. A copyholder made a lease for years by indenture warranted by the custom, the lessee brought ejectione firmæ, it was adjudged maintainable in the Common Pleas; although it was objected, that if it be so, then if the plaintiff recover, he should have an habere facias possessionem, and there copyholds should be ordered by the common laws of the land. 10 Eliz. Lord and copyholder for life, the lord grants a rent-charge out of the manor whereof the copyhold is parcel, the copyholder surrendreth to the use of A. who is admitted, he shall not hold the land charged; and so it was adjudged in the Court of Common Pleas. 1 Leon. 4.

CCXXXVII. Mich. 23 Eliz. In the Common Pleas.

It was holden by all the Justices in the Common Pleas, that the Queen might be put out of possession of an advowson by two usurpations, and shall be put to her writ of right of advowson, as a common person shall be, for it is a thing transitory; and if the Queen after such usurpations grant the advowson, the grant is void, and so it was adjudged.

CCXXXVIII. Mich. 23 Eliz. In the Common Pleas.

The case was, Tenant in tail, the remainder over to another in fee, makes a lease for life according to the statute, and afterwards dyes without issue; and afterwards he in the remainder grants his remainder by fine before any entry, **[119]** and by Fenner, the conusee cannot now enter upon tenant for life, nor avoid his lease, for by the livery to the tenant for life, a freehold passeth, which cannot be avoided without an entry. As if a parson makes a lease for life, rendring rent, and dyeth, the successor accepteth the rent, now the lease is affirmed, vide 18. E. 4. 25. and then when before any entry, he in the remainder grants his remainder, the grantee shall have it but as a remainder, and so the estate of the tenant for life, which before was voidable, is now made good; and so it was holden by Windham and Periam: but by Mead and Dyer, by the death of tenant in tail without issue, the lease for life is become void, for the estate out of which the estate for life is derived, is determined by the dying without issue, ergo &c. Vide 21 H. 7. 12. A lease for life is made upon condition, that if the lessor pay to the lessee at such a day 20l. that his estate shall cease, now by the performance of the condition the estate is determined without any entry.

CCXXXIX. 32 H. 8. In the Common Pleas.

Note by all the Justices of the Common Pleas, that if a man holds of the King in chief by knights service, and also holds of another lord by knights service, and dyeth, his heir within age, and the King seizeth the wardship of the body and land, and afterwards the heir cometh of full age; and before livery sued, the other lord grants over his seignory to another, and the heir attorns, it is a good attornment; and also seisin of the services had by such lord by the hands of such an heir before livery sued, is good enough, and shall bind him afterwards in an avowry, &c.

Temps H. 8. Vide 31 H. 8. Rot. 420.

CCXL. Sir William Hollis Case.

Sir William Hollis brought a quære impedit against the Bishop of Coventry, Godfrey Fuliamb Kt. and William Waltham clark; the case was, Sir Ralph Langford Kt. was seized of the manor of D. to which the advowson was appendant, and presented to the same church one A. his clark, who was admitted, &c. And afterwards the said Sir Ralph granted the next avoidance of the same church to Sir Godfrey Fuliamb, James Fuliamb, George Fuliamb and William Walton, & eorum uni conjunctim & divisim, afterwards the said Sir Ralph granted by fine the said manor with the advowson to Sir William Hollis in fee; the church became void, the said Sir Godfrey Fuliamb presented the said Waltham his clark, who was admitted, &c. And upon argument at the Bar and Bench, it was adjudged against the plaintiff, and the presentment of Sir Godfrey sole **[120]** without the others, was good; notwithstanding also that Waltham the presentee was one of the grantees of the next avoidance, Tr. 31 H. 8. Rott. 420. Vide 21 E. 4. 66. 35 H. 6. 62. See this case lately reported in Sir George Mores Reports by the name of Sir Godfrey Fuliambs case.

CCXLI. Temps Roign Eliz.

Note by Hind and Hales the Kings Attorney, Justices of Assize in the county of Essex, in the case of the Bishop of London and one Heron keeper of Cronden Park: if the keeper of my park or any of his servants without his assent, of their own heads, and without my commandment kill my deers within the said park, being within his keeping, or abateth, or pulleth down any house within the park, or barn for to lay hay for the deer there, or cutteth any trees, wood or underwoods there growing, and sells the same, or gives it to another, that in all these cases the keeper of the park shall forfeit his office; and it was agreed by them that such a keeper hath not any estate or possession in the park, or in the lodge, but the possession remains always in the owner of the soil of the park, and the keeper hath but the occupation, and keeping, and the surveying of the same; for such a keeper cannot justifie the holding of the lodge with force in a writ brought upon the statute of 8 H. 6. by the owner of the park, but it was agreed that he who hath the inheritance in such an office, shall not forfeit his office for the causes aforesaid.

Hil. 29 Eliz. In the Common Pleas.

CCXLII. Fitz and Pierces Case.

In ejectione firmæ by Fitz against Pierce: Pierce was outlawed and now came, and shewed by way of plea, that the outlawry was erronious in this, videlicet ad com' meum tent' 30 Jan. 29 Eliz. whereas the said day was Dies Dominicus, and so there was no County Court: it was the opinion of Windham, that the same matter did well lye in plea, for it is matter apparent within the record, as in the case of Brecket and

Fish, Plowd. Com. 266. Rhodes and Periam were of a contrary opinion, and said the case cited is not like to the case at Bar, for there it appeareth to the Court, as Judges, when every term beginneth and endeth; but it is otherwise in our case, si 30 die Januarii be Dies Dominicus necne, for it shall be tryed by the country, &c.

[121] TRIN. 32 ELIZ. IN THE KINGS BENCH.

CCXLIII. KEENES CASE.

Indictment. Nusance. Addition.

Ralph Keene Vicar of B. was indicted for stopping quandam viam valde necessariam, for all the Kings subjects there passing: exception was taken to it, because it wanted the word Regiam; and the word necessariam doth not imply any matter, for a foot way is necessary: also here the party hath not any addition: it is R. K. but it is not said Clarke, and for these causes the party was discharged.

TRIN. 32 ELIZ. IN THE KINGS BENCH.

CCXLIV. PEAKE AND POLLORTS CASE.

Words.

Action upon the case by Peake against Pollort, upon these words, Thou art a malicious and sedicious man, and movest the Queens subjects to sedition: it was the opinion of the Court, that the words were not actionable, for they were too general; for it may be that the defendant hath stirred up the tenants of a manor to tumults and sedition, which is not any great scandal. And the statute of 23 Eliz. is, If any person do any thing to move the people to sedition, the same is felony; but then it must be sedition against the Queen: and of that opinion was the whole Court.

TRIN. 32 ELIZ. IN THE KINGS BENCH.

CCXLV. RATCLIFFE AND SHIRLEYS CASE.

Words.

The Lady Ratcliffe brought an action upon the case against Shirley, for these words, My Lady Ratcliffe is a beggerly lady, and giveth thread-bare coats; she bought sheep, and cosen'd men of their money, and she is as very a thief as he that robbeth by the high-way. Upon not guilty, the jury found that the defendant spake these words, She is a worse thief than he that robbeth by the high-way: it was holden that the words found by the verdict were actionable, as well as if the defendant had called the plaintiff thief generally. But it seemed to the Court, that upon that verdict the plaintiff should not have judgment; for it may be that the defendant dixit utrumque at several times, and so several causes of action. And it is not like to the case 3 Ma. 118. where part of the words is found, & quoad alia verba non dixit, and so expressly acquit him of the remnant, so it is not here, for this verdict doth not acquit him of the other words; and for that cause judgment was stayed.

[122] HIL. 26 ELIZ. IN THE KINGS BENCH.

CCXLVI. HERNE AND CROWES CASE.

In an action upon the case by Herne against Crowe, and declared, that whereas certain Irish merchants had imported furs here into England, which were offered to be sold in London; which furs the defendant desired to buy, but because he was a foreigner he could not buy them without peril of forfeiture, and then the plaintiff was in communication with the merchants to have bought them, that the defendant in consideration that the plaintiff promised to the defendant, that when he had bought the said furs, the defendant should have such a quantity of the said furs as he pleased upon equal price, assumed and promised that he would speak no more with the said merchants for the buying of the said furs; yet, that notwithstanding he proceeded in the said bargain, and offered to the said merchants sixty pound more than any other, by reason of which the plaintiff could not have them for such reasonable price, as he might have had them before. It was holden by Wray Chief Justice, that the declaration here was insufficient, upon which the defendant might have well demurred.

MICH. 26 ELIZ. IN THE COMMON PLEAS.

CCXLVII. BAKERS CASE.

Estrepement.

A writ of partition by Baker heir of Gertrudi Marquess of Exeter, who devised all his lands to Blunt, by which the third part descend to the plaintiff, and prayed a writ of estrepement; and it was the opinion of the Court, that the writ is not to be granted, for the plaintiff may have a more proper remedy upon the statute, cum duo, vel tres, and in a writ of partition no land is demanded.

CCXLVIII. MICH. ELIZ. IN THE COMMON PLEAS.

Conditions.

A man was bound in an obligation that he should release all his right in Black Acre to the obligor, and in the performance of the said condition, he made such a lease, and delivered the same to C. to the use of the obligor. The opinion of the whole Court was, that the condition was not performed, because the obligor had not the lease in his own hands to plead, but is put to his writ of detinue against C. which was not the intent of the condition.

[123] MICH. 31 ELIZ. IN THE COMMON PLEAS.

CCXLIX. SEAMAN AND BROWNINGS CASE.

Seaman brought debt, in an obligation against Broshnin and others, executors of one Marshall; the condition was, that whereas the said Marshall had sold certain lands to the plaintiff, if the plaintiff peaceably and quietly enjoyed the said lands against the said Marshall, &c. and assigned the breach. That the said Marshall had entred upon them, and cut down five elms there, upon which they were at issue: and it was found that a servant of the said Marshall had entred and cut them, and that in the presence of the said Marshall his master, and by his commandment: it was the opinion of the Court, that the condition was broken, and that the master was the principal trespasser.

TRIN. 30 ELIZ. IN THE COMMON PLEAS.

CCL. BABINGTONS CASE.

Amendment.

Humphrey Babington brought a writ of disceit, and counted that T. S. was seized of land, and held the same of the manor of Rodely, which manor is ancient demeasn; and that the said T. S. being so seised, a writ of entre sur disseisin was brought against him, in which T. S. pleaded and lost, and judgment was given against him. Et quod ipse Humphridus extitit dominus manerii prædicti, and concluded, ad exhæredationis ipsius Humphridi periculum manifestum. Exception was taken to the count, because the words are, quod cum ipse existit dominus manerii prædicti: where he ought to say further, Et tempore Judicii prædicti existebat; for if the recovery was before he purchased the said manor, his action doth not lye, which Rhodes and Anderson concesserunt, wherefore day was given to the plaintiff to amend his count.

32 ELIZ. IN THE EXCHEQUER.

CCLI. SIR WILLIAM PELHAMS CASE.

The case was, A. tenant for life, the remainder in tail to B. &c. A. by deed indented and inrolled, bargained and sold the messuage so conveyed to W. P. in fee, who suffered a common recovery, in which A. is vouched; and so a common recovery had and executed; and this was before the statute of 14 Eliz. And if the recovery should bind B. and **[124]** his remainder in tail was the question, or if it be a forfeiture. Altham argued that here is a forfeiture: 1. It is to see if a common recovery suffered by tenant for life (which here is the bargainee) be a forfeiture or no by the common law, if no execution be sued upon the same recovery. 2. If it be executed, then, if he in the remainder may enter for the forfeiture. When the tenant for life bargains and sells the messuage, although upon it an estate in fee be limited, yet nothing passeth from him, but what he may lawfully pass, and that was the estate for life of the bargainor, for such an estate only he might lawfully pass; and here the vendee is but tenant for the life of another, and when of his own assent he suffers a common recovery, and that without right, it is a forfeiture: by matter in fait a particular tenant may commit a forfeiture, as well as by matter of record: by matter in fait he cannot commit a forfeiture, if not thereby the reversion be not pulled out of him in the reversion: as if a lessee for 10 years make a lease for 1000 years, it is not a forfeiture, for by that the reversion is not touched; but if he by matter of record do any thing which sounds to the disinheriting of him in the reversion, although in truth the same doth not touch the inheritance, yet it is a forfeiture, vid. 39. E. 3. 16. If tenant for life pleads any thing against the right of him in the reversion, it is a forfeiture, and by Finchden and Belknap, he cannot plead in the right, 5 Ass. 3. Tenant for life is impleaded in a præcipe by a stranger, and confesseth the action, upon which the demandant hath judgment, the lessor enters, against whom the demandant sueth execution: the lessor brought an assise, and had judgment to recover, for it is a forfeiture, because the tenant for life hath admitted the reversion in another, because it is an alienation to the disinheriting of the plaintiff and of the lessor: 12 E. 3. Fitz. Resceipt 14. Where tenant for life pleaded in chief, or cannot deny or gainsay the action of the demandant, or makes default by covin, he shall forfeit his estate: but if a rent be demanded against tenant for life, and he rendreth the same, it is no forfeiture, 12 Ass. 31. Tenant for life is impleaded by covin, between him and the demandant, and pleads in chief without aid prayer, upon which judgment is given, he in the reversion enters in a juris utram against tenant for life, who pleads feintly, traversing the point of the action, he in the reversion shall not be received; for in as much as the tenant hath traversed the action, he is not within the Statute of West.

2, 3, 5. Default, reddition, but he in the reversion may enter by the common law, 22 E. 3. 2. In scire facias to execute a fine against tenant for life, who pleaded to the inquest, whereas in truth the land in demand was not comprised within the fine, judgment is given for the demandant **[125]** in the scire facias, he in the reversion may enter: in our principal case, here is apparent and manifest covin; for the tenant for life voucheth without cause, and this recovery is by assent, and is to the use of the vendee, who is tenant for the life of another, and therefore, by the common law, he in the remainder may enter before execution sued: and it is well known that these common recoveries are used for to dock remainders in tail, and that was the scope of this recovery. And as to the case of 5 E. 4. 2. tenant for life is impleaded in a præcipe quod reddat, who voucheth a stranger, the demandant counterpleads the voucher, and it is found for him, he in the reversion hath no remedy but by a writ of right, and if the vouchee entreth, and loseth by action tryed, or default ut supra; that book is to be intended of a recovery executed; for there in such case he in the reversion hath not an entry, but is put to his writ of entry by the common law, vide Br. Title Forfeiture 87. 24 H. 8. Tenant for life is impleaded, and prays in the aid of a stranger, he in the reversion may enter; but if he doth not enter until the other hath recovered, then he cannot enter, but is put to his writ of entry, ad terminum qui præteriit, vel de ingressu ad communem legem, and therein he shall falsifie the recovery; and there, by Brook, voucher of a stranger is not cause of forfeiture, for it doth not disaffirm the reversion in the lessor: and he vouched 24 E. 3. 68. where tenant for life pleaded in the right with aid prayer: and so he argued, that before execution he in the remainder might enter, but after execution is put to his action: but in our case, although that execution be good, yet he in the remainder may enter, for it is found by verdict, that at the time of the recovery he was within age, and that when he dyed, that he in the next remainder was within age, and then no entry shall be imputed, and then he shall not be driven to his action: as if tenant by the courtesie makes a feoffment with warranty, and dyeth; and the same descends to his heir within age, yet he shall enter, although he hath not avoided the warranty in the life of his ancestors: also he said that the statute of 32 H. 8. extended to this case; for Sir William Pelham the vendee was but tenant for life, and although that he be but tenant for the life of another, yet he is tenant for life as fully as if he were tenant for his own life, (or otherwise tenant for life or lives.) Note this, the words of the statute. As upon the statute of 20 E. 1. which gives resceipt, de defensione juris, the words are, cum quis aliquod breve Domini Regis impetret versus tenentem per legem Anglæ, vel feod' taliat' vel sub nomine dotis, vel alio modo, ad terminum vitæ; upon these words it is holden 11 H. 4. that where land was given to one and his heirs for the life of another, that **[126]** upon such an estate, he in the reversion should be received, by reason of these words, vel alio modo ad terminum vitæ, &c. And although he who enters at the time of the recovery, was not next in remainder to the particular estate, yet he is within the statute of 32 H. 8. For he was in remainder at the time of the recovery, and at the time of the entry he in the immediate remainder was dead, and then he the next in remainder. Vide 15 E. 4. 9. by Litt. If I grant my services to one for life, and he in a præcipe brought against him, pleads in the right, or grants to another the said services in fee, it is not a forfeiture, for it is no discontinuance. It will be objected, that the words of the statute of 32 H. 8. are, that such recoveries shall be utterly void, and if so, then he in the reversion cannot be damnified, and then no cause of forfeiture. So that it may be easily answered, that where tenant for life doth any thing which sounds to the disinheriting of him in the reversion, by matter of record, although the same doth not devest, or otherwise prejudice the inheritance, yet it is a forfeiture. Cook, to the contrary. Here in our case is not any covin in Sir William Pelham the bargainee, he was deceived by the bargainor; for he did not know but that the bargainor was seized in tail according to the covenant in the indenture, by which the bargainor covenanted that he was seized in tail at the time of the bargain; and also to do any other act for assurance of the estate of the bargainee; and it was lawful for him to vouch his bargainor, and although he voucheth a stranger, it is not a forfeiture. 39 E. 3. 16. Aid prayer of a stranger is a forfeiture, and the reason of that is, because he acknowledgeth the reversion to be in a stranger, and that is the cause of a forfeiture. Vide Book of Entries 254. where upon

aid prayer, the party to have aid shewed such special matter: but in our case the tenant for life hath vouched his bargainor, and not without cause, for he hath a warranty from him, and the demandant cannot counterplead it, for he had a seisin, whereof he might make a feoffment. As to the case 14 E. 3. Fitz. Resceit 135. Lessee for life in a præcipe against him without aid prayer pleadeth to the enquest the first day, he in reversion may enter: it is true, he may enter, and enter into the resceit, but not into the land for a forfeiture; for then Fitzherbert would have abridged that case in the title of entre congeable, and not in the title of resceit: and the book in 5 Ass. 3. is good law, for there the tenant doth confess the reversion to be in another; but in our case the tenant voucheth, which is a lawful act, and according to the covenants of his purchase. And although the recovery was by agreement, yet it is not for that a forfeiture; for if the tenant for life voucheth truly, it is not a forfeiture. Before the statute **[127]** of West. 2. cap. 3. which gave resceit to a woman, and to those in reversion, where the particular tenant is impleaded, and made default, & reddere noluerit, no remedy for these cases, but a writ of right, but no entry; and that was for the credit which the law gave to recoveries, car si puissoit, then is resceit given, but that only in the two cases aforesaid: but afterward, because it was found that many particular tenants being impleaded, would plead faintly: the statute of 13 R. 2. gave resceit in such case. And upon what reasons were these Acts made, if in such cases the entry was lawful? But after these two statutes, another practise was devised; for such particular tenants would suffer recoveries secretly in such sort that those in the reversion could not have notice of it, so as they could not ante judicium, and prayer to be received; for the remedy of which mischief the statute of 32 H. 8. was made; by which, all recoveries had against the tenant by the curtesie, or otherwise for life or lives, by agreement of the parties, of any land whereof such particular tenant is seized, should be void as tenant by the curtesie, &c. should be void against him in the reversion: and yet an evasion was found out of that statute; for such particular tenant would make a feoffment with warranty, and then the feoffor should be impleaded in a writ of entry, and he vouch the tenant for life, who should vouch over, and such a recovery was out of the statute of 32 H. 8. for the recovery was not against such particular tenant, &c. For the remedy of which mischief the statute of 14 Eliz. was made; by which, it was provided that such recoveries had, where such particular tenant shall be vouched, should be void, if such recovery be had between them by covin. And he conceived, that the forfeiture is not in respect of the recovery it self, but of the plea pleaded by the tenant: and here in our case there is not any covin found, or that Sir William Pelham knew that he was but tenant for life; but it was found that the recovery was with their assent, and that was lawful, as this case is, for they may agree to have such recovery for further assurance; and so Sir William Pelham hath not vouched any but his bargainor, and that according to their covenants, and this bargainor was not a bare tenant for life, but had also a remainder in tail, although not immediately depending upon the estate for life, which he cut off; therefore it was not meerly a feigned recovery: and vide 5 E. 4. 2. & Br. Forfeiture 87. where tenant for life being impleaded in a præcipe voucheth a stranger, it is not a forfeiture, for it doth not disaffirm the reversion, &c. contra of aid prayer, for a stranger may release with warranty to tenant for life, upon which he may vouch: and he reported in his argument, that Bromley Chancellor of England sent him to **[128]** the two Chief Justices to know their opinions upon these points, and they were of opinion, that the voucher of a stranger was not any forfeiture, and also that after the recovery was executed, he in the remainder could not enter; but they conceived that the right of him in the remainder was not bound: and he said, that after the recovery executed, he in the remainder could not enter, which see Br. Forfeiture 87. 24 H. 8. For if entry in such case had been lawful, infiniteness of suits would follow, which would be a thing against the credit of recoveries. As to the objection of the infancy the same will not help the matter, 6 H. 8. Br. Saver default 30. Recovery had against an infant in which he voucheth, and loseth, is not erronious; contrary upon default: and if an infant tenant in tail suffereth a recovery, it is discontinuance, for in such recovery infancy is not respected. And in a scire facias upon a judgment had against the father, the heir shall not have his age. And he cited a case out of

Bendlowes Reports, 5 Eliz. tenant for life, the remainder over to a stranger in fee, tenant for life is disseized by covin, in a præcipe quod reddat against the disseisor he voucheth the tenant for life, who entreth into the warranty generally, and voucheth over the common vouchee, it was adjudged that that recovery was out of 32 H. 8. for the recovery was not had against the particular tenant, but he was but tenant in law quia vouchee; and also the recovery is a good bar to him in the remainder, notwithstanding that he was within age at the time of the recovery. And at another time it was argued by the barons, and Clark said, that he conceived that the entry of him in the remainder was lawful: it hath been objected that Pelham did not know that the bargainor had but for life, or that any other person had any remainder in the land, that is to no purpose to excuse him; for 42 E. 3. every purchasor ought at his own peril to take notice of the estates and charges upon the lands which he purchaseth: for the law presumes that none will purchase without advice of counsel, and without knowing the titles of the land. And although statutes have been made to provide against the practises of particular tenants, yet that is no argument that no other remedy was before. And by Littleton, If tenant for life joyneth the mise upon the meer right, it is a forfeiture. And he held strongly, that the judgment did not take away the entry, a cause of forfeiture being given before the judgment. 5 Ass. 3. He in the reversion after judgment and execution may enter. See also 22 Ass. 31 to the same purpose. For where tenant for life is impleaded, he ought to wait upon him in the reversion, and expect instructions from him in defence, &c. and therefore if he maketh default, or confesseth the action, it is a forfeiture. And as to **[129]** the supposed recompence, the same doth not help the case, for this common recovery is no other but an assurance, and recoverors are but assignees, and they shall take advantage of conditions by 32 H. 8. and a recoveror shall be seized to the use of him who suffers the recovery, if no other use be expressed. And he also held, that when tenant for life bargains and sells his land by deed inrolled, although no fee passeth, yet it is a forfeiture; and that by reason of the inrollment, which is matter of record: and he said, that if an infant tenant for life be disseised, the disseisor dyeth seized, and afterwards the infant dyeth, that he in the remainder may enter: Gent. to the same intent: If tenant for life, &c. the same is not simply a forfeiture; for he may have a warranty, or a release, or a confirmation made to him: attornment doth not give a right, but is only a consent, yet if he who hath nothing in the reversion will levy a fine of it to another, and afterwards the conusee bringeth a quid juris clamat against the tenant of the land, and he attorns, it is a forfeiture. Manwood to the same intent: this is a new case, and I have not read the case in any book, nor seen any president of it: and it is a great case, and a general case, and worthy to be argued; and I conceive clearly, that here is a direct and express forfeiture at the common law, without any aid or restraint of any statute to make it a forfeiture: the dignity of judgment in the repute of law hath been urged, which ought to stand in force until they be reversed by error, or attaint; and also Littleton hath been urged 481. where upon the Statute of West. 2. cap. 3. he saith, that before the statute aforesaid, if a lease had been made to one for life, the remainder to a stranger, and afterwards a stranger by feigned action had recovered against the tenant for life by default, and also the tenant for life dyed, that he in the remainder had not any remedy: but there Littleton doth not report the same as his own opinion, but as an opinion conceived by a remainder upon the said statute; and it is in truth but a meer conceit. And as to the main point he took this diversity: such recoveries, in which the title of the demandant stands indifferently to the Court, and non constat, if it be good or not, being suffered by tenant for life by default or confession without aid prayer of him in the reversion, do not make any forfeiture, although the tenant for life hath not dealt well with him in the reversion, not having prayed in aid of him: and in such case, if a lease be made for life, the remainder over in fee upon such a recovery, he in the remainder shall have a formedon in the remainder, or a writ of right, and shall not oust him who recovered without action, and that by the common law. Then came the Statute of West. 2. cap. 3. which gave to the wife cui in vita upon a recovery against the husband by default, whereas before she **[130]** had not any recovery but a writ of right, and notwithstanding her former recovery, ulterius necesse habet ostendere jus suum secundum formam brevis quod prius impetraverat, and if his right

be not better than the right of him in the reversion, he shall lose the land, notwithstanding the judgment given before for him: and that statute gave resceit or entry ad terminum qui præteriit, and that statute is to be intended of such recoveries where a good, or at least an indifferent title is so as non constat Curiæ, if it be good or not: after that, tenant for life was driven to a near shift, and would not make default, or lose by nient dedire, but would plead, but yet faintly; for the remedy of which mischief the statute of 13 R. 2. was made, which gave resceit in such case; the particular tenant being restrained by that statute: he jugled yet, and practised to suffer a recover secretly, without notice of him in the reversion: to remedy which mischief the statute of 32 H. 8. was made, and that made such recovery had against such particular tenant void against him in the reversion. It hath been objected, that the statute of 32 H. 8. doth not give any forfeiture in that case, but makes that the recovery be void, therefore he in the reversion ought to tarry till after the death of the particular tenant: to that I shall speak after. But how our case is a common recovery, and constat Curiæ, that the demandant hath not any right, for the tenant might have barred him, and in truth he who recovereth is but a purchasor: also this recovery is not to the use of the recoverer, but to the use of him who was tenant in it, and not paramount, as in the case of a recovery upon a good title, a lease for years made by him who after suffers a recovery, is good, and shall not be defeated by the recoveree; otherwise it is where the recovery is upon a good title. Vide Statute of Gloucest, cap. 11. Where upon default of the tenant, resceipt is given for lessee for years, yet if the tenant vouch upon default of the vouchee, the lessee for years shall be received; and now resceipt of lessee for years is out of the book, for by the statute of 21 H. 8. he may falsifie: but no resceipt lyeth in the case of a common recovery, for he who recovereth cannot oust the termor. As to that which my brother clark hath said, that the bargain and sale in this case is not any forfeiture, but when the deed of bargain and sale is inrolled it is a forfeiture. I am not of that opinion; for although that the inrollment be of record, yet the deed is not of record; for against the deed inrolled a man may plead infancy, although none can plead non est factum to it. Also he held, that although by the bargain and sale, and the inrollment of it, the bargainee had not fee; for by such act the reversion is not removed; yet by the recovery, and the execution of it, the bargainee had gained the fee out of the lessor; for the re-[131]-covery is to the use of the bargainee against whom it was had &c. It hath been objected, that he is only a voucher, which peradventure was lawful in this case, by reason of the warranty paramount, or of a release or confirmation with warranty, and two cases have been vouched to such purpose, viz. 5 E. 4. 2. tenant for life being impleaded in a præcipe, vouched a stranger, the demandant counterpleaded the voucher, which was found for him, he in the reversion had no remedy but by a writ of right: so if the vouchee had entred and lost, &c. As to that case we ought to consider, that every book reported in our law is not law: but let us observe of what authority the case is, truly it is the conceit of the reporter himself, for he puts the case, and resolves it, but there is no Judge or serjeant named in the case, &c. The other case is 5 E. 4. 2. Note by Hendon clearly; If my tenant for life voucheth a stranger who entreth into the warranty generally, and doth not know how to bar the demandant, the tenant shall recover in value, and the reversion of him who hath in value shall be to me in lieu of my former reversion, as release to tenant for life shall enure to him in the reversion: but that is but the opinion of one serjeant, &c. But I answer to these books, if the demandant in such recovery have a good title, so as the tenant or the voucher, as Hendon saith, know not how to bar the demandant, there such a voucher of a stranger is not a forfeiture, nor such recovery suffered thereupon; for against his will and volens nolens he suffered it: but if the tenant had good matter to bar the demandant, and no good cause of voucher, that the vouching of a stranger, or suffering of a recovery is a forfeiture of his estate: and here in our case, the defendant had not any title, the tenant or vouchee had not any warranty, or cause of voucher. But the tenant might have barred the demandant if he pleased. And he said, that the voucher only doth not make the forfeiture; but much rather the recovery; for when judgment is given, and execution had, then is the fee plucked out of him in the reversion. 6 R. 2. If tenant for life claimeth a fee it is a forfeiture; but here Pelham hath done more, for he hath gained fee by the judgment,

therefore à fortiori it shall be a forfeiture. But let us a little see, what medlings or attempts by the particular tenant, are causes of a forfeiture, and what not, 5 Ass. 3. Where A. brings an entry against tenant for life by collusion to oust B. of his reversion, supposing that the tenant for life held of his lease: the tenant confesseth the action, upon which judgment is given, B. enters, and his entry adjudged lawful; for that recovery is adjudged in law but an alienation to the disinherisin of him in the reversion; and here it appears that such recovery by covin, is but an alienation, and without any strength of a recovery. And he cited many other cases cited **[132]** before by Altham, 14 E. 3. Resceit 135. where tenant for life pleads in chief, or prays in aid of a stranger where he might bar the demandant, and will not, it is a forfeiture: and also 22 E. 3. 2. & 27 E. 3. where tenant for life in a quid juris clamat attorns unto the conusee upon a fine levyed by him who hath not any thing in the land, the same is a forfeiture, and yet that attornment doth not divert the reversion out of the lessor. 50 E. 3. 7. & 8. land was given by fine in tail, the remainder over to a stranger in fee, the donee took a wife, and dyed without issue, the wife accepted dower assigned by a stranger, he in the remainder brought a scire facias against the wife, that she is tenant in dower of the assignment of a stranger, and pleaded to the title, the demandant recovered, she hath lost her dower, for she hath not pleaded dutifully as she ought, being a particular tenant. Temps H. 4. tenant for life loseth his land in a recovery against him against his will, and thereupon brings quod ei deforceat, and declares upon an estate tail, and recovers, the same is a forfeiture, because he hath challenged a higher estate, &c. 5 H. 7. tenant for life joyns the wife upon the meer right. 2 H. 6. lessee for years being ousted, brings an assise and recovers. 1 H. 7. accepts a fine of a stranger sur conusans, &c. come ceo que il ad de son done. All these are forfeitures. In our principal case here, the tenant who suffered the recovery did not plead at all to defend the right; but where he might have barred the demandant, he gave strength to his pretended title, and made it a perfect title, and by suffering the recovery and judgment to pass, had taken away the reversion out of the lessor to whom he owed fealty, and therefore it is a forfeiture: and without doubt it is apparent to the Court, that the demandant in this recovery hath not any title; for the recoverers in such cases are but assignees and purchasors: which appeareth by the statute of 7 H. 8. cap. 4. which gives distress and avowry to recoverers, &c. As to the inventing of recoveries, it was a necessary device; for it was to take away estate tails which were the causes of grand mischiefs and inconveniencies in this realm; and it was great reason, for tenant in tail might by the common law alien his land post prolem suscitat', and then he had an inheritance and might commit waste: but he was so restrained by the statute of Westm. 2. all the realm, and the subjects of it, were inveigled thereby; joyntures of wives, leases of farmers, mortgages to creditors, statutes, and other assurances defeated by their deaths, which was against the common law and all conscience: these matters tending to the knowledge of the justices, and the mischiefs thereupon ensuing very frequent, and that tenant in tail was become a perillous fellow, and there was no safe dealing with him; then they taking into consideration that several war-**[133]**-ranties and assets, and collateral warranty without assets, for that in it self implyed assets did bar him, scil. the entail upon that consideration they grounded the practice and usage of common recoveries; so that by that means tenant in tail has potestatem alienandi, as he had at the common law, because his authority was restored to him, and injury done to no man: but as to tenant for life, he never had potestatem alienandi: and as to that which had been said, that the recovery shall stand in force till after the death of the tenant for life; and in our case here, tenant in tail is living; certainly if the law should be such, great mischief would follow, for then greater joyntresses, the widows of great persons, having allowed unto them great and sumptuous houses, and lands furnished with timber of great value, might suffer such recoveries, and so having plucked the fee out of the heirs, might commit waste, and the same should be dispunishable, &c. which should be an intolerable mischief. And so he concluded that this suffering of a recovery was a forfeiture, and judgment was given accordingly.

1 Leon. 264 its not forfeited. 2 Leon. 60, 65. 3 Inst. 251. b. Mores r. 212.

CCLII. Grendon and Albanies Case.

John Grendon brought trespass for breaking of his close against Tho. Albany: and upon the pleading, the case was, that Francis Bunny was seized, and 1 May, 20 Eliz. by deed indented enfeoffed N. H. to the use of the said Fr. Bunny for term of his life, the remainder to D. in tail, the remainder to E. in tail, the remainder over to F. in fee: in which deed of feoffment a proviso was, that if it should happen one P. P. to dye without issue male of his body, that then it should be lawful for the said Fr. Bunny at any time during his life, by his deed indented to be sealed and delivered in the presence of three credible witnesses, to alter, change, diminish or amplifie any use or uses limited by the said deed, & aliquem usum vel usus inde alicui personæ, &c. Limitare post mortem ipsius Fr. to begin: after which the said Fr. Bunny 1 Aprilis, 23 Eliz. by his deed indented, did renounce, relinquish, and surrender to the said N. H. D. E. & F. all such liberty, power and authority which he had after the death of the said P. P. without issue, ut supra: and further remised, released, and quit-claimed to them the said condition, promise, covenant and agreement, and all his said power, liberty and authority, and further granted to them and their heirs, that at all times then after, as well the said condition, promise, covenant and agreement, as the said power, liberty and authority should cease, and to all purposes should be void; after which P. P. dyed without issue, 1 Maij 23 Eliz. after which 20 March 24 Eliz. the said Fr. Bunny, by indenture between him and the said D. **[134]** sealed and delivered, ut supra, altered the former uses, and covenanted and agreed with the said D. that from thenceforth the said N. H. and his heirs should be seized to the use of the plaintiff and his heirs, &c. And note, that in this case Fr. Bunny being but tenant for life, enfeoffed one Tomson, upon whom the said D. entred for a forfeiture. And it was argued by Altham, that by the feoffment by Fr. Bunny to Tomson, the liberty and power aforesaid was not extinct or lost, for this liberty and power was not then a thing in esse, for then was P. P. alive; and also the liberty is meerly collateral to the land whereof the feoffment was made, 39 E. 3. 43. Fitz. The son and heir apparent disseised his father, and thereof made a feoffment to a stranger, the father dyed, now against his own livery the son shall not enter; but if the son dyeth, then his son shall enter, which proves that the livery is not so violent to determine a future right, but that afterwards it may be revived, à fortiori in our case where the thing pretended to be extinct is meerly collateral. 36 E. 3. Fitz. garr. 69. In an Assise of Common, the release of the father with warranty is not a bar, because it is of another thing. 15 H. 7. 11. Cestuy que use, wills by his will, that his feoffees shall sell his lands, and dyes, the feoffees make a feoffment to the same use, yet they may well sell, so as against their livery, the authority to sell remains to them: and he put Brents case, Dyer 340. A future use limited to a wife which shall be, shall not be prevented by a fine or feoffment; and so by the Statute of Fraudulent Conveyances, 27 Eliz. cap. 4. where a conveyance is made with clause of revocation, if afterwards the party who made such a conveyance, shall bargain, sell or grant the said land to another for money, or other good consideration paid or given (the first conveyance not being revoked) that then such former conveyance against the latter purchasor shall be void &c. The other matter was, admitting that the said power and liberty be not extinct by the said feoffment, if by the indenture of renunciation, relinquishment, release, &c. it be destroyed; and he said that a thing which is not in esse, cannot be released, Litt. 105. & 4 H. 7. 10. A lease for years to begin at a day to come, cannot be released before it comes in esse, 11 H. 6. 29. Br. Damages 138. In detinue, the defendant would confess the action, if the plaintiff would release the damages, and the plaintiff would have so done, but could not before judgment; for before judgment the plaintiff had not interest in the damages, but he is intituled to them by the judgment: so lands in ancient demesne are recovered at the common law, and execution had accordingly, and afterwards the tenant releases to him who recovers; and afterwards the Lord reverseth the judgment; the tenant notwithstanding his release may enter, for his title which accrued to him by the reversal **[135]** was not in esse, at the time of the release, vide 98. contr. And it was adjudged 23 Eliz. in the case of one Falsor, that where lessee for years devised his term to his wife

if she should so long live, and if she dyed within the term, that then the residue of his term should go unto his daughter, which should be then unpreferred, and dyed, his daughter unpreferred, released to her mother all her right in the said land, the mother dyed within the said term, the release shall not bind the daughter, for that at the time of that release she had no title. Cook to the contrary: and he said, that by the feoffment the said power and liberty is extinct: and he agreed the case cited before 15 H. 7. for in such case the vendee of the feoffees shall be in by the devise, and not by the feoffees. 9 H. 7. 1. The husband makes discontinuance of the lands of his wife, and takes back an estate to him and his wife by which the wife is remitted they have issue, the wife dyeth the husband shall not be tenant by the curtesie; for he hath extinguished his future right by his livery. 12 Ass. P. ultimo. A præcipe against A. who loseth the land by an erronious judgment, and after execution had, enters upon the demandant, and makes a feoffment, his writ of error is gone, 38 E. 3. 16. In a scire facias to execute a fine, the plaintiff recovers, and makes a feoffment in fee, and afterwards the tenant by scire facias by writ of disceit reverseth the judgment, now the plaintiff in the scire facias shall not have a new scire facias, 34 H. 6. 44. A. recovers against B. by false oath, and after execution had, B. enters and makes a feoffment to a stranger, who enfeoffs him who recovers, it is a good bar in an attaint. 27 H. 8. 29. The feoffees to an use are disseised, the disseisor enfeoffs cestuy que use, who enfeoffs a stranger, now by that feoffment his right to the use is gone. And as to the release, the same is not properly a release, but rather a defeasance to determine the power and authority aforesaid, as if A. enfeoffed B. with warranty, and afterwards B. covenants with A. that the said warranty shall be void, the covenant shall enure to defeat and determine the warranty. And afterward judgment was given against the plaintiff.

CCLXXIII. Sir Francis Englefields Case.

Vide this Case Reported by Cook in Rep. 7. and by Popham 18.

The case to recite at large was this: Sir Francis Englefield kt. being seized in fee of the manor of Englefield in the county of Berks, and of divers other lands in the first year of Queen Eliz. departed out of the realm by licence of the Queen for a time, and remained out of the realm in the parts beyond the seas above the time of his licence, whereby **[136]** the Queen by her warranty under her Privy Seal required him to return, upon which he was warned, but did not come; whereupon the Queen seized his lands for his contempt. After which the Statute of Fugitives was made 13 Eliz. upon which by commissions found upon this statute, all his lands were newly seized; and afterwards 17 Eliz. by indenture made between him and his nephew, and sealed by the said Sir Francis at Rome, the said Sir Francis covenanted with his said nephew, upon consideration of advancement of his nephew, and after consideration to raise an use, that he and his heirs, and all others seized of the said manor, &c. shall hereafter stand and be seized of them, to the use of himself for the term of his life, without impeachment of waste, and afterwards to the use of his nephew, and of the heirs males of his body, and for default of such issue, to the use of the right heirs and assigns of the nephew for ever, with a proviso, that if the said Sir Francis shall have any issue male of his body, that then all the said uses and limitations shall be void, and that the said manors, &c. shall be as before. Afterwards the said Sir Francis was attainted of treason, supposed to be committed by him, 18 Eliz. at L. in partibus transmarinis; and the attainder was first by outlary, and afterwards by Act of Parliament 28 Eliz. by which the forfeiture of the said condition was given to the Queen; and at the same Parliament it was enacted, that all and every person and persons, which had, or claimed to have any estate of inheritance, lease, or rent, they not entred of record, or certified into the Court of Exchequer, of, into, or out of any manors, lands, &c. by or under any grant, assurance, or conveyance whatsoever had or made at any time after the beginning of Her Majesty by any persons attainted of any treasons mentioned in the said Act, after the 8 day of Feb. 18 Eliz. or within two years next ensuing the last day of the section of the said Parliament, shall openly

shew in the Court of the said Exchequer, or cause to be openly shewn the same, his or their grant, conveyance or assurance, and there in the term time, in open Court, the same shall offer, and exhibit, upon his or their oath, affirming that they have not the same, nor can come by it, or that it was never put in writing, then the effect thereof to be entred and inrolled of record, or else every such assurance should be void, and of none effect to all intents and purposes, saving to every person and persons, (other than the parties and privies to such conveyance, and such as shall not exhibit the said conveyance according to the true meaning of this Act) all such rights, &c. Whereupon the said Francis the nephew, the 20 day of November, 30 Eliz. in his own person affirmed upon his oath, that he had not the said conveyance, nor knew not how to come by it, but delivered the effect of the assurance, omitting the time when it was made, otherwise than that it was **[137]** made after the beginning of the Queens reign, and before the treason committed by Sir Francis, and before the statute of 13 Eliz. against fugitives, and omitting also the last clause of the tender of the King; and this he offered openly in the Court of the Exchequer the same day: after which the Queen being moved with the said condition, made a warrant by letters patents under the Great Seal, dated 17 Martii, 13 Eliz. to Rich. Broughton and Henry Bourcher esquires for her, and in her place and stead, to deliver or tender to the said Francis the nephew a ring of gold, to the intent to make void the uses and limitations limited by the said indenture, and to return their proceedings upon it into the Court of Exchequer; whereupon they made a tender of a ring of gold to the said Francis the nephew the 18 day of November, 31 Eliz. which he refused to receive. And the two years after the said session of Parliament was the 13 day of March 31 Eliz. and the said Broughton and Bourcher returned all this that they had done as before, with their commission out of the Exchequer: and this case being a great case, and consisting of many doubts and questions, was often argued. And this term, scil. 33 Eliz. it was argued by Moor of counsel on the part of Francis Englefield; and he said, when Sir Francis Englefield covenanted to stand seized to the use of himself for life, &c. this was not any new use, but part of the ancient use which was in Sir Francis before, for there was no consideration to raise a new use to himself; for a consideration is a cause, or an occasion meritorial requiring a mutual recompence in fait, or in law, Dyer 16 Eliz. 33. b. mutual. 1. of each part, and here this ancient use remaineth. For Sir Francis cannot simul & semel agree and suffer, and here is a bare covenant without any consideration on the part of Sir Francis, which see Dr. and Student, 100. cited by Br. Feoffments to Uses 46. A man cannot limit an use to himself to be a new use upon an estate executed, as upon a feoffment, but it shall be the ancient use; much less upon a covenant. And that was Milfords case, Pasch. 31 Eliz. Rot. 154 in the Kings Bench, where an use limited to the right heirs of the feoffor was holden the ancient use, quod vide also in the case of the Earl of Bedford, and there is no difference between our case and the said cases, unless in the said cases the use is limited in the end, and in our case in the beginning of the conveyance. But perhaps it will be objected, that the particular estate shall be good for necessity for to support the estate limited in the remainder, which is limited upon good consideration, for otherwise the remainder shall be distrained: that is not any reason, for that conceit in Bayntons case in Plow. Com. 307. 8 Eliz. hath been over-voted to be no law in the case of the Lord Paget in this Court very lately. And he said, that the condition conceived in the proviso is not given to the **[138]** King. By the common law in case of escheat, the party comes in the post; but a condition runs in privity: and although the statute of 33 H. 8. gives to the King conditions, yet it doth not give the performance of them, or ability to the King to perform them. And there are three reasons wherefore this condition cannot pass to the King: 1. There is a condition in the proviso which precedes the condition of the tender, viz. If the said Francis my nephew be given to intolerable vices, then if the said Sir Frances deliver or offer, &c. and in the whole pleading it is not averred, that the nephew was given to intolerable vices; therefore the precedent condition not being performed, the second condition is not ripened, nor in season. 2. The substance of this condition consists in the will and pleasure of Sir Fr. Englefield, therefore it cannot be given to the Queen. 3. The prejudice which should come to Francis the nephew if this condition should come to the Queen, vide Br. Temps H. 8. A foundership cannot escheat, or be forfeited by

attainder of felony or treason, for it is a thing annexed to the blood which cannot be separated; and he said also that the condition was gon before that tender, for the conveyance by which the condition was granted, was made void by the Act of 29 H. 8. cap. 3 by which it is enacted, that every person within two years after the last day of this session shall openly shew and bring forth into the Exchequer his conveyance, and there in the term time, in open Court shall exhibit the same to be entred and inrolled of record; and here the end of the session was such, that all the terms of the said two years were passed before the tender made by the Queen; and although the two years were not past, yet all the terms were past, and the conveyance ought to be shewed in term time, therefore the true time is incurred before the tender, and then the conveyance is void, and by that the condition gon. When the Queen was tenant for the life of Sir Francis, and makes a lease for years, and afterwards by the condition hath the inheritance, if now she shall avoid the lease made by her when she was tenant for life? A disseisor makes a lease, or grants a rent-charge, and afterwards the disseisee releases unto him, he shall not avoid his own act. A man seized in the right of his wife makes a lease for years, hath issue, and so is intitled to be tenant by the curtesie; the wife dyeth, he shall not avoid his lease: feoffor and feoffee upon condition joyn in a lease for years, the condition is performed on the part of the feoffor, he shall not avoid his lease: and the prerogative of the Queen shall not alter the matter against æquum & bonum: as to the statute of 29 Eliz. it was not the intent of that to avoid estates claimed for, or by the Queen; for the estate was made for the benefit of the Queen. As to the words of the statute, every person or persons which hath, or claimeth to have, &c. the Queen is not **[139]** within the words. If a statute ordains attendance, or restraint of any liberty which was before at the common law, there the Queen shall not be within it: as to attendance, the Queen is not bound to make claim upon a fine levied: as to re-grant, the Queen is not bound by the Statute of Westm. 3. Quia Emptores Terrarum: also where matter of penalty is imposed. Also here is an oath to be taken, &c. the Queen being tenant for the life of another, leaseth the woods, and grants to the lessee power to cut the woods, and convert them to his own use. Now, if after the inheritance cometh to the Queen, if the Queen may impeach her grantee; truly the property of the woods and trees was in the Queen at the time of the grant, and although the inheritance came to the Queen afterwards, yet the same shall not overthrow the first interest of the grantee. Lessee for life, or for years, before the Statute of Gloucester, could not be impeached for waste; therefore, as I conceive, the property of the trees was in him, for there was no remedy for them against him. See the reason of that in Dr and Student, quasi, the property of the trees pass to the lessee with the demise, which shall be taken strongly against the lessor. If the lessee cutteth the trees, the lessor shall not have trespass against him, nor detinue for the trees. Lessee without impeachment of waste cutteth the trees, and leaves them upon the land, and dyes, his executors shall have them, and not the lessor. The lessor grants omnes boscos, & arbores suas, nothing passeth, for they pass to the lessee, if they be not excepted. The lessor against his own lease cuts the trees without the agreement of the lessee, trespass lyeth, 5 H. 4. 56. The heir being in ward, cut trees in his lands in the possession of his guardian, who brought an action against the heir, it was adjudged maintainable, although the free-hold was in the heir. Egerton Solicitor to the contrary. Admit the use in Sir Francis be the ancient use, yet it is but for life; and then when the Queen, having the estate of Sir Francis, makes a lease for 40 years, with the grant of the woods, the said lease was void, for the Queen was deceived in her grant: Sir Francis was punishable for waste; therefore the Queen having his interest, ought not in justice to have cut the great wood. And it is to be presumed, that if the Queen had known the smallness of her estate, she would not have made so great a lease, nor such a grant of the wood. The King seized of land in his own right, reciting by his letters patents, that he hath it by attainder of J. S. gives the same to another, the gift is void. The King licenceth one to appropriate an advowson, without being informed that the same is holden in chief, it is void. A licence to alien, whereas in truth the land is holden in tail, the reversion or remainder in the King, is also void; and here in our case, the Queen hath but a particular estate for the life of another, **[140]** and here out of that petty estate is drawn a lease for 40 years,

where lessee for life was 60 years of age at the least, and also a grant of all the trees: if the Queen hath a particular estate, and grants totum statum suum, without reciting of such particular estate, the grant is void; the Queen hath the profits of the lands of one who is outlawed in a personal action, and grants to another the land it self, it is void, for it is a wrong to a third person, which the King cannot do. But here, the special interest of the Queen ought to be recited; now when the Queen being tenant for the life of another, makes leases ut supra, and afterwards the fee cometh to the Queen, the estate out of which the leases are derived being determined, the leases also are determined, scil. the estate for the life of another by the accession of the fee-simple, and the Queen is in by a new right: it was adjudged 29 Eliz. here, that where the Queen had the land of a fugitive for the life of another, and leased the same to another quam diu in manibus nostris fore contigerit, and after the fee-simple of the fugitive came to the Queen by his attainder, the same lease was void. King E. 6. gave to his sister Mary manerium de B. for her life, secundum tenorem & effectum testamenti sive ultimæ voluntatis of King Hen. 8. whose will was, that she should have it as long as she remained unmarried; she granted a rent-charge, King E. 6. dyed, by which the fee descended to the said Mary, being Queen of England: and afterwards she married. He made it a quære, if the rent be not gone. Dyer 3 & 4 Phil. & Mary 240. But Bendloes reports the same case to be adjudged, that the rent was gone. Sir Francis Englefield 1 Eliz. with leave of the Queen went beyond sea, his licence expired, the Queen directed to him a privy seal with her commandment to return, which he received, but did not return, but adhered to the Queens enemies there, upon which the Queen seized his lands and 8 Eliz. granted a manor parcel thereof, and all profits thereof, quam diu in manibus nostris fore contigerit, afterwards by Act 14 Eliz. (for there was some doubt if the Queen might make leases, grant copyholds or usual woodfalls of such lands, or only take the ordinary profits thereof, as vesturam terræ) it is explained, that during the interest of the Queen, she might do, ut supra, as tenant for the life of another might do, upon which a new seizure was made for the Queen, and a steward appointed by the Queens letters patents, who held a court, and took surrenders in the hand of the Queen, and granted admittances, &c. And it was resolved by the two Chief Justices, that the two seizures gave not the Queen any other or better seisin in the said manor than she had before, by the first seizure at the common law, notwithstanding both the said statutes, and so the Courts holden by the Queen void, and all surrenders and admittances also: and so it is adjudged 23 Eliz. Dyer 375. upon **[141]** which it may be concluded, that if by the said statute, or any of them had had a new right, the last copy had been good, notwithstanding the grant of the manor before: also for 8 Ass. the King grants custodiam terræ & hæredis quam diu in manibus nostris fore contigerit, the heir being a daughter, and after a son is born, now the grant of the King is void; tenant in tail, the reversion in the King discontinues, the discontinuee is attainted, the King seizeth, and leaseth for years, tenant in tail is attainted of treason; now the Queen shall avoid her own lease. So if the disseisor be attainted, upon which the Queen seiseth, and leaseth, and afterwards the disseisee is attainted: and he cited the case of the Abbot of Colchester, 13 Eliz. The abbot committed treason, and afterwards by the statute, or by surrender, the abby came to the Crown, who leased the land for years, the abbot is attainted of the said treason: now the King shall be seized by force of the attainder, and shall avoid his lease. As to the leases made to the defendant by the Queen, one was made after the statute of 29 Eliz. and the same is not saved by the saving there; for the words are, of estates then in esse. 1. Such estate as they had before the making of the Act: as to leases made before they are drowned in the fee-simple, which accrued to the King by the attainder &c. and here by this statute, the estate of the Queen for the life of another is not saved by the statute, and then the leases derived out of it are not saved. The Queen is not bound by the said statute to exhibit any conveyance, for she shall not take any oath, according to the statute; and if the Queen be not within the body of the Act, she is not within the saving. Now as to the condition, the statute of 33 H. 8. gives to the Queen uses, rights, conditions. It hath been objected, that such conditions are intended to be given to the King, which are to be performed on the part of the donee, lessee, grantee, covenantee, but not on the part of the grantor, &c. For it was in the will of the grantor if he would perform them or

not, and a will cannot be transferred over. But as to that it may be answered, that a will by Parliament may be transferred over, for Parliamentum omnia potest. It hath been objected, if that shall be said the will of Sir Francis, which now is the will of the Queen, it shall be a great prejudice to Francis Englefield the nephew; for now he shall be doubly bridled by his uncle, and by the Queen. It hath been objected, that here is a conditional condition, 1 If the nephew shall be given to intolerable vices, and it is not added to enable the Queen to take advantage of the condition, that he is otherwise than of good behavior and conversation, but the words of the proviso clear the matter, 1. Lest he should be given to intolerable vices, and not if he be given, &c. So as it is not a condition to a condition, but a motive to a condition. And **[142]** the statute of 29 Eliz. by which Sir Francis was attainted, gives to the King all conditions. It hath been objected, that in the said statute of 29 Eliz. is a saving, by which leases made by the Queen are preserved: but if that proviso be well observed, it doth not extend to our case. 1. That Act extends to make void any grant, lease, &c. made by the Queen after the treason committed, &c. but that shall be of such force, as if the said Act had not been made. As to that I say, that this statute doth not add or detract from such leases, but leaves them as it found them; for the statute gives to the Queen the condition, which condition avoids the said leases: for it avoids the estate of the Queen out of which the said leases are derived: and although that the conveyance, as to the benefit of Sir Francis or his nephew, be void by the statute for not inrollment of them, yet it is not utterly void as to the Queen also. The statute of 1 Eliz. enacts, that leases made by bishops against the form of the statute, shall be void: yet they shall not be void against the bishop himself or against the lessor: exception hath been taken, for that the tender of the King is not found by office: but he needs no office, for the tender is the act of the Queen her self, there she ought not to be informed of it; for to what purpose shall the Queen be certified of that which she her self hath done: the Queen makes a lease for years, upon condition that the lessee surrender to her the manor of B. here for the not doing of it, no office is requisite. Tenant of the King in capite aliens by fine, that needs no office, for that appears upon record; so here. And although the condition be returned in the Exchequer after the term; yet it is well enough, for the Exchequer is never shut, as to take and receive money, certificates made to be inrolled; although it be shut as to all judicial acts. And although no tender at all be certified, it is not to the purpose, for the tender makes the estate void without any other thing: and it is not like to a capias ad satisfaciendum, for that is ita quod habeas corpus, &c. therefore the arrest is not sufficient by it self; but the same ought to be remembered with an ita quod, &c. But as to that which hath been said, that the Queen shall not avoid her own lease, the same is not so, nor in case of a common person: as if tenant in tail enfeoffeth his heir within age, who makes a lease for years at his full age, tenant in tail dyes, now the issue shall avoid his own lease, for he is remitted: a disseisor levies a fine to a stranger, the disseisee enters upon the conusee, and enfeoffs the disseisor, now he shall avoid his own fine, à multo fortiori in the case of the King. Now it is to see, if the grant of the wood by the Queen, being tenant for the term of anothers life, be good, or not. He conceived it was not; for she was deceived in her grant, not knowing that she was but a particular tenant: it **[143]** was objected, that the Queen hath property and right in the trees and woods, forasmuch as no waste or trespass lyeth against her if she cast them down: certainly the lessee, if the trees and woods be not excepted, hath the property in them, but not the absolute property, for the writ of waste shall say, ad exhæred' querentis, for he cannot cut them, id enim tantum possumus, quod de jure possumus, perhaps the lessee shall have the wind-falls, because they are severed from the inheritance by the act of God, not of the lessee himself; and see 27 H. 6. Waste 8. and also in Statham titulo Waste. A. leaseth to B. for life, without impeachment of waste, a stranger cuts trees, and the lessee brings trespass, he shall not recover damages for the value of the trees; for the property of the body and the tree is in him who hath the reversion, he may give it, by which it appeareth, that the lessee is not to recover, but only for the cropping and the breaking of his close, à fortiori in case where the lease is made without the clause absque impetitione vasti, as the case at Bar is: and therefore when the Queen having so feeble an estate, makes such a grant, scil. grants all the woods, &c. the grant is void, for she was deceived in her

grant; by which (if it should be good) she should wrong her subject: a grant to the Queen shall have a reasonable construction, as the grant of a common person. A. grants to the Queen common in all his lands, the Queen by that grant shall not have common, but in lands commonable, not in his land where his corn is growing, or in his orchard, or gardens: tenant for life grants all the wood upon his land, nothing passeth but that which he may lawfully grant. So in cases of grants of the King, 22 Ass. 49. the King grants to one bona & catalla tenent' suorum, fugitivorum & qualitercunque dampnorum; the grantee shall not have the goods and chattels of one who hath killed the Kings messenger. So in grants of amercements, the grantee shall not have a special amercement, &c. So here, the grant of all woods ought to be intended of such woods (as underwoods) which the Queen might lawfully grant without wrong to another. And he said, that when the Queen hath granted the land and the woods for 40 years, that grant cannot be divided; and the words of the grant are, that it shall be lawful to cut the woods during the space of 43 years: now forasmuch as the lease is surrendred ut supra, the liberty of cutting the woods is gon also. A man bargains and sells his manor with all woods upon it growing, the deed is not inrolled, so as the manor doth not pass, the woods shall not pass in gross, for the grant shall not be divided. See more after Sect. 269.

[144] TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCLIV. BROWN AND PETERS CASE.

Philip Brown executor of Eliz. Brown, brought an action upon the case against John Peter, as executor of W. Brown, and declared, that the said William Brown was indebted to the said Eliz. in 80l. Cumque ad specialem instantiam of the said William Brown, it was agreed, that the said William Brown should retain the said sum in his hands until the said Eliz. should come of full age: in consideration thereof he promised to give her 100l. It was found for the plaintiff, who had judgment to recover, and now the defendant brought error, and assigned for error, because the place of the agreement was not shewed, sed non allocatur; for that is the consideration which is not traversable; also it is not shewed certain, that Brown retained the 80l. for so long time, sed non allocatur, for he shews in his declaration, that the said sum was in the hands of the said William Brown, and it shall be intended that so it there continued.

TRIN. 31 ELIZ. IN THE KINGS BENCH.

CCLV. HIGHAM AND COOKES CASE.

Ejectment.

Ejectione firmæ by Higham against Cooke, the plaintiff declared upon a lease for years, to have and to hold to him from the sealing and delivery of it; and declared that the sealing and delivery was 1 Maij, and the ejectment the same day: and this matter was moved in arrest of judgment, that the ejectment could not be supposed the same day, for the lease did not begin till the next day ensuing the sealing, &c. But the exception was not allowed by the Court; for where the lease is to begin from the time of the sealing and delivery, or by these words for 21 years next following, the ejectment may be well supposed to be the same day; for the beginning of the lease is presently upon the sealing and delivery, and such a lease shall end the same time and hour as it began.

CCLVI. Trin. 28 Eliz. In the Kings Bench.

In an action upon the case upon assumpsit, the case was; Land was devised to a feme sole for term of her life, and she let the same to the plaintiff for 5 years, to begin after the death of the said woman, and afterwards by deed bearing **[145]** date 18 October, leased the same land to the same plaintiff for 21 years to begin at Michaelmas before, and in pleading, it was shewed, that virtute cujus dimissionis (posterioris) the plaintiff entred, & fuit possess. crastino Michaelis. which was before the making of the lease, and the plaintiff in his declaration declared, that the defendant in consideration that the plaintiff had assigned to him the said leases, had promised to pay to him 630l. It was found for the plaintiff. Cook, For where the plaintiff in an action upon the case declares upon two considerations, in such case although the one be void, yet if the other be good and sufficient, the action is maintainable, but the damages shall be given without respect had to the consideration insufficient, and the plaintiff was to declare upon both considerations; for the assumpsit upon which the action is conceived, was in consideration that both the leases were assigned to the defendant, and our declaration ought to be according to the assumpsit, and it was not material, although that one of the considerations was utterly void. Another exception was taken, because the lease is set forth to be made 18 October, and that by virtue thereof the plaintiff entred, Cro. Mich. Then the plaintiff entring Cro. Mich. was a disseisor, and then being in by disseisin, he could not assign his interest to another, and that appears clearly to the Court upon the whole matter. But Cook said, That shall not hurt us, for it is but matter of surplusage to say, virtute cujus, &c. As 20 H. 6. 15. the plaintiff in trespass supposed by his declaration, that the trespass for which the action was brought, commenced 10 H. 6. with a continuando until the day of the action brought, viz. idem 14 Febr. 17 H. 6. where the writ bore date 12 die Octobris, anno 17 H. 6. And exception was taken to the declaration, because the continuance of the time was not put in certainty. But the exception was not allowed, for it is certain enough before the viz. the day of writ brought, and so the viz. is void, and all that which follows upon it. And so here, this clause virtute cujus est, totum sequitur est omnino void, 7 H. 4. 44. Br. action upon the Case 37. The writ was quare toloniam asportavit, & illud solvere recusavit. Exception was taken to the repugnancy, for it would not be carried away, if it were not paid before; yet the writ was awarded good, and the first word toloniam asportavit holden void: so here in the principal case. As to the other exception, it is clear, that here is not any disseisin upon this entry of the plaintiff before the making of the said lease; for there was a communication betwixt the parties of such a lease to be made, or of such an assignment, and peradventure the entry was by assent of the other part, and then no disseisin. And posito, it should **[146]** be a disseisin, yet the plaintiff hath assigned all the interest quod ipse tunc habuit, according to the consideration, and delivered to the defendant both the indentures of demises, and so he hath granted all that which he might grant: and if it be a void assignment or not, is not material, for quacunque via data, the consideration is good, and then the assumpsit good also. Egerton Solicitor contrary: In every action upon the case upon assumpsit, three things ought to concur, consideration, promise, and breach of promise; and in this case the assignment of the lease to begin after the death of the lessor, is void, being but tenant for life, and no consideration upon the confession of the plaintiff himself. And upon the second consideration it appeareth, the lessor, viz. the wife who held for life, had but a right to the land demised, for she was disseised; for he to whom the land was after let, entred before the lease was made; for it doth not appear that he entred by force of any agreement made before the lease; therefore by his entry he was a disseisor. It was also moved, that here was not any sufficient consideration, for by a bare or naked delivery nihil operatur; and here is not any word of give or grant. To which it was answered, that the delivery of the indenture was not a bare bailment, but a delivery to the use in the indenture, and so it is pleaded, and therefore thereby an interest passed, for such a delivery cannot be countermanded. An indenture with an averment shall never make an estoppel. Clench

Justice, If I deliver any thing to one for his proper use, an interest passeth; but if it be to the use of another, no interest passeth: the party may have usum, but not proprietatem.

CCLVII. MICH. 18 ELIZ. IN THE KINGS BENCH.

Contract.

If a contract be made betwixt two here in England, scil. that one of them shall carry certain goods of the others to Burdeux in France, and sell them there, and with the mony thereof coming, shall buy other goods for the use of him who was the owner of the first goods, and safely them deliver to him in London: if now the party sell them in Burdeux, and buyeth others with the monies thereof, and brings them into England, and there converts them to his own use; upon this matter an action lyeth at the common law for the contract, and the conversion being the cause of the action, was made in England: but if the contract only was in England, and the conversion beyond the seas, the party at his election may sue at the common law, or in the Court of Admiralty: and if a merchant here write to his factor in France to receive certain merchandizes which he hath sent to him, and to merchandize **[147]** with them for his use: if the factor receiveth them, and converts them to his own use, the father [? factor] shall be sued in the Admiralty.

25 ELIZ.

CCLVIII. THE EARL OF HUNTINGTON AND THE LORD MOUNTJOYES CASE.

It was agreed by the two Lord Chief Justices, upon conference had with the other justices in the case between the Earl of Huntington and the Lord Mountjoy, that where the Lord Mountjoy by deed indented and inrolled, bargained and sold the manor of Camford to Brown in fee, in which indenture a clause was proviso semper, and the said Brown covenants and grants cum and with them the Lord Mountjoy, his heirs and assigns, that the said lord, his heirs and assigns, might dig for ore in the wasts of Camford. And also to dig turf there to make allom and copperice, without any contradiction of Brown, his heirs and assigns; that now here is a new grant of an interest to dig, to the said lord and his heirs in the lands aforesaid, and not a bare covenant; and it was holden also, that the said lord could not divide the interest granted to him in form aforesaid, viz. to grant to another to dig one part of the said waste, &c. But they were of opinion, that Brown, his heirs and assigns, notwithstanding the said grant to the said lord, owners of the soil there might dig there. It was further moved in this case, that the said lord had demised the said interest to one Laycott, who assigned it over to A. and B. and if the said assignment to two were good or not, was a further question; for if to two, so he might do to twenty, and so a surcharge might be to the tenant of the soil. And as to that, the said justices were of opinion, that the said assignment to two was good: but the two assignees ought not to work severally, but together, with one stock, and with such workmen as belonged to them two. And note, it was holden in this case, that this word (proviso) being coupled with other words of covenant and grant, did not create a condition, but should be of the same nature as other words of grant.

1 And. 308.

[148] CCLIX. PASC. 25 ELIZ. IN THE COMMON PLEAS.

It was found upon a special verdict in trespass, that the place where, &c. was copyhold land, and that the custom there is, that every feme covert there might devise her customary lands to her husband, and surrender the same in the presence

of the reeve, and six other persons; and it was further found, that A. was seized of certain copy land, having issue B. and C. his daughters, and dyed, they both took husbands, and B. devised her part by her will to her husband in the presence of the reeve and six other persons, and afterwards at another day she surrendred to the use of her husband, who was admitted accordingly: the wife dyed, the husband continued the possession, and the husband of the other daughter brought trespass. Rhodes, Serjeant, The custom is not good, neither for the surrender, nor for the will; for it is not certain what estate she might devise by the custom, and also it is against reason that a feme covert surrender to the use of her husband: and he cited the case in Fitz. 13 E. 3. Dum fuit infra Ætatem 3. where custom is pleaded in the City of Gloucest. that every person might alien his land when he knew how to tell 12d. and to measure an ell of cloath, and that custom was disallowed for the incertainty, for he ought to have shewed the certainty of the time, scil. at what age, and the certain number of years. Vide also 19 E. 2. Fitz. Gard. 127. that an infant should be out of ward when he could do as aforesaid. And as to the surrender, it is against reason that a feme covert should give to her husband, for the wife hath not any will but the will of her husband; and the Statute of Wills utterly excepts feme coverts as an unreasonable thing to suffer them to make devises: and although the statute doth not extend to customary lands, yet the like reason, the like law. But by Anderson, the equity of that Act extends to copyholds as also doth the Statute of Limitations: and it was said by some of the serjeants, that because the husband was admitted, trespass did not lye against him, for his entry was continued with a lawful ceremony. In this case, it was moved by Anderson, if a copyholder maketh a lease for years by word, if the lessee might maintain ejectione firmæ, and he conceived not, for that ought to be a title in facto, and not by conclusion; for neither the Judge nor the jury are estopped: and he said, that if the tenant at will makes a lease for years, that it is not a good lease between the parties to it, but that the lessee might well say that he had nothing, &c. Mead contrary: and Anderson said, the Book of 12 E. 4. 12. is not law, scil. **[149]** if tenant at will makes a lease for years it is not disseisin, but the said book is contrary: also Anderson said, that in the principal case the prescription is not well laid, quod quælibet fœmina cooperta viro poterit, &c. whereas there should be also words, scil. et usæ fuerunt, &c. And it was said, that if the devise be good, then the plaintiff and defendant are tenants in common, and the action not maintainable.

Pasc. 30 Eliz. In the Kings Bench.

CCLX. Jeroms Case.

Customs. Justice of Peace not by Prescription.

Jerome made an affray, of which complaint being made to the mayor, the said mayor sent the defendant, being constable, to bring the said Jerome to him, by virtue of which they went to the house of the plaintiff, and signified to him the command of the mayor, and would have brought the plaintiff to him, and the plaintiffs wife assaulted them, and they gently lay their hands upon the wife, which is the said assault, battery and wounding, &c. upon which it was demurred. Cooke for the plaintiff; The custom is not good nor reasonable, vide Magna Charta 29. Nullus liber homo capiatur, nec imprisonetur, &c. nisi, &c. per legale judicium parium suorum vel per legem terræ; ergo, shall not be taken and imprisoned upon a bare suggestion. Vide 24 E. 3; Br. Commissions 3. That where a commission issued to apprehend all who were notoriously suspected for felons and trespassors, although they were not indicted, it was holden against law, and therefore was revoked. Vide the statute of 1 E. 3. cap. 9. 25 E. 3. 4. 28 E. 3. 3. 37 E. 3. 18. & 42 E. 3. 33. 2. To be a justice of peace doth not lye in prescription; for no justice of peace was before the statute of 1 E. 3. and the beginning of them being known, prescription cannot be. 3. Admit that the mayor was a justice of the peace, yet he cannot determine any thing out of sessions. 4. The prescription is, that the mayor may send for him, and doth not say within the city; and it shall be an unreasonable prescription to say that

the mayor may send for him; for in such case in any place within England may he send. 5. It is not shewed that they had a corporation which might prescribe. 6. The wounding is not answered, for molliter injicere manus cannot be taken for a wounding, nor for an answer to the battery. Fleetwood Serjeant and Recorder of London. If the Statute of Magna Charta should be observed, no felon is duly handled at Newgate; and here we have not pleaded by way of prescription, but of usage. Consuetudo and usage are all one: and afterwards judgment was given for the plaintiff; for the plea in bar was holden to be **[150]** naught, because the wounding was not answered, and the custom is too general; and also for the fourth exception.

MICH. 32 ELIZ. IN THE KINGS BENCH.

CCLXI. GORAM AND FOWKS CASE.

Prohibition.

The case was, The defendant libelled in the Spiritual Court, that whereas he was administrator to one A. and was bound in the Spiritual Court to bring in a true inventory of all the goods of the intestate, that the plaintiff detained jura & credita, by reason of which he could not put in a true inventory; and upon that the plaintiff prayed a prohibition, surmising that he himself claimed property in the said goods; and the Ecclesiastical Court would not allow of it; and the trial of the said goods did belong to the common law: and a prohibition was granted.

TRIN. 33 ELIZ. IN THE KINGS BENCH.

CCLXII. MOUNTJOYES AND ANDREWS CASE.

Execution. Return of Writ.

In scire facias upon a judgment in debt; the defendant pleaded, that heretofore a fieri facias at the suit of the now plaintiff issued, directed to the Sheriff of Leicester, by force of which the said sheriff took divers sheep of the defendant, & adhuc doth detain them: it was holden by the Court a good plea, although he doth not say that the writ was returned; for the execution is lawful notwithstanding that, and the plaintiff hath remedy against the sheriff.

CCLXIII. Vide this Case reported by Cook 1 Part, by the Name of CAPELL'S CASE.

The case between Hunt and Gately in the Exchequer Chamber, was now argued by Fenne, that the rent granted by him in the remainder upon an estate tail is good, and shall bind the land after the estate tail determined, notwithstanding the common recovery suffered by the tenant in tail in possession. Before the Statute of Westm. 2. of Donis Condic', &c. no remainder could be limited upon an estate tail, for that which remained in the donor was but a possibility, and therefore then a formedon in remainder did not lye: but the said statute which provided a **[151]** formedon in the descender, provided also by equity a formedon in the remainder; for a formedon in the reverter, as appeareth by the said statute, was in use in Cancellaria. And now here in our case is a remainder lawfully vested in the grantor, which he may dispose of as he sees good; and therefore when he grants a rent-charge out of it, the same is a thing vested in the grantee, and by no subsequent act can be divested, and although the estate which was charged be now charged by the recovery, yet it is the same land which was charged, and therefore the charge shall continue; as if a gift in tail be rendring rent, and the donee levieth a fine, yet the rent remaineth, and the donor

shall distrain. 48 E. 3. 3, 9. So here, if after the grant of this rent, tenant in tail in possession levies a fine, by which the remainder which was charged is discontinued, and afterwards the conusor dyes without issue, the grantee shall distrain upon such possession which passed by the fine. As if A. lease to B. for life, and afterwards grants a rent out of the same land to C. B. aliens in fee and dyes, although that A. cannot re-enter, but suffers the said torcious estate, gained de novo by wrong, to continue; yet B. upon such possession shall distrain for the rent, for it is the same land which was charged; and by law a thing in abeyance may be charged: as if a parson grant a rent-charge to begin after his death, and the patron and Ordinary confirm it, it shall bind, although the grant doth not take effect in the life of the grantor, but when the freehold is in abeyance: so if the patron and Ordinary in the time of vacation grant a rent-charge out of the parsonage, the same is good, and shall bind the successor, and yet at the time of the grant the freehold of the thing granted is in abeyance. Vide 5 E. 6. Dyer 69. that a rent which is not in esse shall be bound by a judgment. 22 E. 3. 19. 5 E. 3. Fitz. Dower 343. By Bracton, jus, concerning a real thing, is threefold: 1. Jus terræ, scil. the ownership of the land. 2. Jus in terra, as a rent, common &c. 3. Jus ad terram, scil. right permanent. And by this common recovery in our case jus terræ shall be bound, but not jus in terra: and he said, that if land be given to A. in tail, the remainder to the Kings villain in fee, and before any claim by the King, A. suffers a common recovery and dyes without issue, this recovery shall not bind the King. And as to the case of 26 H. 8. 2. which hath been objected against the falsifying of the recovery, where a parson made a lease for years, and afterwards in a quare impedit brought against him and the patron, they pleaded faintly, to the intent to make the lessee lose his term, now such a lessee cannot falsifie; in such case the parson by another way might have defeated the lease as by resignation; but in our case the grantor of this rent by **[152]** no way might defeat his grant: and he said, a common recovery did not bind dower, therefore nor this rent. And if tenant in tail in possession grants such a rent, and after suffers a common recovery, the rent shall stand, why not also in the case of a remainder; for upon them both, as well the remainder, as the possession, the recovery operatur: and recoveries shall always bind the possession, and no farther, and shall not disprove the right, but the possession. And the recovery by itself doth not bind the possession, but in respect of the voucher, without which no recovery shall bar, and that in respect of the recompence which the law presumes, &c. which recompence cannot extend to this rent-charge, and then there is no reason that he to whom it was granted should be prejudiced by this recovery; and always in case of recompence the law is very precise. As if I grant unto you an annuity of 30l. per annum until you be presented to a competent benefice, a litigious benefice is not a recompence intended, nor shall determine the annuity, nor a benefice of 15l. If two make an exchange for their lives, and one of them dyeth, the exchange is not determined, but the heir of him who dyeth shall enter and retain the land as long as the other shall live. Ad quod Manwod Chief Baron subsidebat: and there is a great difference between a lease for years and a rent-charge; for at the common law upon such recovery the lessee for years was bound, contrary of a rent-charge; for it was unreasonable that a thing not demanded by the recovery should be bound by it, especially because that the land rendred in value shall not be charged with the rent. Walmesley Serjeant contrary: A remainder upon an estate tail is debile fundamentum, and cannot uphold with assurance a rent-charge against a common recovery; and it cannot be found in any book but in 5 E. 4. 2. That a remainder upon an estate-tail expectant may be charged, for an estate tail is in law presumed to be perpetual, and therefore, what lands are entailed by fee, the words of the fine are, sibi & hæredibus de corpore suo exeuntibus imperpetuum. And it is the common learning in our books that every estate of inheritance, be it fee-simple or fee-tail, shall be intended to be continued till the contrary be shewed. And the authority which the owner of a remainder hath upon it is but conditional, scil. if the tenant in tail in possession doth not countermand it by a recovery, &c. And also the possession upon which the avowry is made, is not the same possession which was charged, but is a foreign possession gained by the recovery, and therefore, before the proper possession be recontinued there can be no distress nor avowry, for the land is not reduced in the privity of estate which was charged; and if he in reversion upon such estate tail would **[153]**

grant his reversion rendring rent, and afterwards the tenant in tail in possession suffers a common recovery, and dyeth without issue; now the reversion being destroyed, the rent is gone. And he put this case: Tenant in tail grants a rent-charge to begin after his death without issue, and afterwards suffers a common recovery, and dyes without issue, it is a good rent, and shall bind the recoveror, &c. At another day in the Exchequer Chamber, the case was argued again by Snagg Serjeant for the defendant; and he was very long in proving that a remainder might be charged, as in this case: but the Court discharged him of that, and directed him to argue to this point, if this recovery did discharge the rent, &c. wherefore he argued, that these common recoveries are false and feigned things, false in the title, and covenous in the proceedings, and all in prejudice of a third person. And vide 14 H. 8. 3. such common recoveries are holden fraudulent, and therefore by fraud and covin being so odious in our law, we ought not to give and allow unto them so much force as is due to unfeigned recoveries; for these common recoveries do not go in disaffirmance of the former possession, nor in any eviction of it, but for the most part in affirmance; and the estate gained by this recovery is under the estate of him against whom the recovery was had, and he is in by him; for common recoveries are no other but common assurances: and in our case the imagined recompence cannot come to him who hath by the recovery lost his rent, and therefore it is not reason that the recovery should bind as to this rent. Vide 12 E. 4. 19, 20. Tenant in tail discontinueth, and takes back an estate to him in fee, and afterwards a common recovery is had against him, it shall not bind the tail, for the presumed recompence shall go to the estate which he hath lost, scil. the estate in fee, and not to the estate tail, whereof at the time of the recovery he was seized: so in our case, the land which by fiction of law is to be yielded in value upon this voucher, shall not extend to the benefit or recompence of the grantee of the rent-charge, but only to H. who hath lost his remainder, and his new remainder, which comes in lieu of the former, shall not be charged with this rent: and therefore the remainder, which by this recovery is drawn out of H. transit cum suo onere, & cum acciderit shall answer, and shall yield the rent according to the purport of the grant. As 33 H. 6. 4 & 5. two joyntenants are, the one grants a rent-charge, and afterwards releases to his companion, he shall hold the land charged, notwithstanding that he be now fully in by the feoffor. And if there be lord and tenant, and the tenant grants a rent-charge in fee, and dyeth without heir, so as the land goes to the lord in point of escheat, yet the lord shall hold the land charged. And as to the Statute of Fraudulent Con-**[154]**-veyances, 27 Eliz. cap. 4. the same cannot extend to this grant; for here, this grant is upon consideration of nature made to his own son for his advancement. Popham Attorney General to the contrary: and that neither the grantee of this rent, nor he who makes conusans in his right shall falsifie this recovery. And he put a difference where the party who leaseth or chargeth a remainder, is bound by the recovery voluntarily, and where involuntarily; for where the recovery is suffered voluntarily, there the grantee or lessee shall not be bound by that recovery, but they shall falsifie: but where as our case is, there the party who chargeth or leaseth is bound involuntarily by such recovery, there all interests are bound, and the charge is subject to the same mischief as the remainder it self, out of which it is issuing, vide 7 H. 7. 12. He in the remainder in fee shall not satisfie a recovery had against the tenant for life, but he is put to his writ of entry, ad terminum qui præteriit, in which he shall falsifie, and not by entry, much less he in the remainder upon an estate tail shall not falsifie; and falsifier lyes properly where the party who grants or leaseth against his grant or lease, practiseth by such recovery to avoid or defeat his own estate, and by consequence the interest of his grantee or lessee: but in our case there is not any such matter; for the grantor H. was not party or privy to this recovery, nor tenant, nor vouchee, and therefore no covin, and then no voucher; and all the cases in our law of falsifying of recoveries are upon such matter. And he put the case of 19 E. 2. Fitz. Title Assise 82. where the conusee of a statute merchant, having sued execution, one who had no right impleaded the conusor, and by covin recovered against him, and by execution upon that recovery ousted the conusee, it was holden he should have an assise and falsifie; for here he who

party to the recovery: donee in tail, the remainder over in fee upon condition suffers a common recovery, the condition is gone. And as to the statute of 21 H.

8. cap. 15. falsifying is not given in our case by the said statute, the words of which are, Where divers men have leased their land to farm, and afterwards, after such leases made, the lessors, their heirs and assigns have suffered recoveries: within which words our case is not; for he against whom the recovery was had was not our grantor, his heir or assign: so if there be tenant in tail, the remainder over to another in fee, he in the remainder makes a lease for years, and afterwards tenant in tail in possession suffers a common recovery, the lessee shall not falsifie; for that lease was not made by him against whom the recovery was had. And it is clear, that by the common law, the grantee of a rent-charge cannot falsifie against the grantor, his heirs or assigns: but it was a doubt as it appeareth. 7 H. 7. 11. If upon a faint pleader, the lessee **[155]** for years might be received, for the Statute of Gloucester extends but to default or re-disseisin; but now by the statute of 21 H. 8. cap. 11. in three cases, default, reddition, and faint pleading, such resceipt lyes, which proves that in case of rent, as the statute of 11 H. 8. hath ordained in case of a lease for years, where the lessor, his heirs or assigns, have suffered the recovery, and not otherwise. And afterwards he argued very much upon the reputation and dignity of common recoveries, that they are the strongest and most effectual assurances in the law, and therefore they ought to be countenanced rather by the Judges, than in any part diminished or disabled, and we ought to consider of them non ex rigore juris, rigida disquisitione, but according to the common use and practice, what is the ground and foundation of these recoveries: and so Judges have used heretofore to examine matters, which peradventure, according to the strict rules of the common law, drew them away. But they perceiving that a dangerous consequence thereby would follow to an infinite number of the Kings subjects, the law having been otherwise practised before, have framed their judgments, not according to the exact rules of law, but to avoid the inconvenience aforesaid, according to the common and received practice, &c. Nam communis error facit jus: and to that purpose he cited a case very lately adjudged in B. R. viz. A writ of error was brought in B. R. upon a judgment given in Wales, and the error was in this, that the writ was returnable coram justiciariis Domini Regis comitatus, &c. where it should have been coram justiciariis Magnæ Sessionis Dominæ Reginæ, &c. and such are the words of the statute of 34 H. 8. cap. 26. the which sessions shall be called the Kings Great Sessions in Wales; and notwithstanding that the justices in strict consideration of the law thought the same to be error (for the said statute had given to the said Court such name; yet because it was well known to the justices, that that was the common course in the said Court ever after the erection thereof; and also, if the said judgment should be reversed, for that cause many judgments should be also reversed, which should be a great disquietness and vexation to the whole country there, they in there discretion thought it convenient to qualifie the law in that point, and so to avoid the said inconvenience, affirmed the said judgment: so in the case at Bar, if this rent-charge should stand against the said recovery, no inconvenience should be so firm, but it should be impeached, no title so clear, but should be incumbred, and therefore for the common repulse of many the strict rules of the law ought to yield to common practice for the avoiding of a common inconvenience; it hath been holden for law, when tenant in tail maketh a feoffment in fee, the feoffee is impleaded, & voucheth the tenant in tail, now forasmuch as he cometh in as vouchee, it is now said that he cometh in of all his estates, I do not see **[156]** any reason for that, but common allowance, practice, and experience, &c. It was adjourned, &c.

MICH. 27 ELIZ. IN THE KINGS BENCH.

CCLXIV. BAXTER AND BARTLETS CASE.

In assise of freshforce by Baxter against Bartlet upon null tort, null disseisin pleaded, it was found for the plaintiff, who had judgment; upon which the tenant brought error, for that the assize have generally found the disseisin, but have not enquired of the force: and after many motions the judgment was affirmed.

CCLXV. Sir Henry Gilfords Case.

It was found upon a special verdict, that Henry Gilford citizen and freeman of London, 7 Feb. 6 E. 2. seized of a capital messuage, devised the same by these words: Lego, & volo, quod omnes domus & reddit' quæ habeo in villa de London, ordinentur & assignentur per executores meos ad sustentationem trium capellanorum qui pro vita celebrabunt in ecclesia Sancti Pauli, London: et ad hoc faciend' do eis plenam potestatem; and made his executors William Staunton and others, and dyed, the will was proved and inrolled according to the custom. Afterwards the executors by their deed bearing date 7 E. 2. granted and assigned the said capital messuage, and his other tenements in London to the Dean and Chapter of Pauls in London, and their successors, habend' & tenend' in forma sequenti. Hæc est finalis concordia, &c. That the dean and chapter shall have the said lands for ever, to find yearly a competent sustenance of 10 marks to a priest to celebrate mass for the said Henry Gilford, and all souls, and that the said priest at all hours of Divine obsequies should give his attendance in the said church, and faithfully do his office to say mass and prayers according to the degrees and customs of the said church, and that the dean and chapter should find bread and wine, and massing-cloaths, and torch-light, and granted the residue of the profits of the lands to celebrate an yearly obit, and for the perpetual security of the said chauntry, the said executors granted to the Mayor and Commonalty of London 20s. yearly rent for ever: ita quod, the mayor and chamberlain for the time being presented a meet and convenient chaplain to the said chauntry, to the said dean and chapter, within 15 days after the avoidance, the which chaplain the dean and chapter are bound to admit. And the form of the said conveyance was such; We the executors H. G. do grant and assign to the Dean and **[157]** Chapter of Pauls all the lands, tenements, and rents aforesaid, to have and to hold to them and their successors for the sustentation of a chaplain perpetual, and his clark for the said H. G. and all souls, receiving from the said dean and chapter 10 marks for the celebrating of the said obit of the said H. G. and that the grant and assignment of the said 20s. to the commonalty in the relief of the said chauntry, is such, scil. To have and receive of one shop in Cheap maintenance of the said chauntry aforesaid: and that the said dean and chapter oblige themselves and their successors, and the church, to pay the same to the said priest and clark and that it shall be lawful for the mayor and commonalty aforesaid to distrain for the said rents: by virtue of which will and indenture the dean and chapter enter, and were thereof seized in their demesne, &c. and that at all times after they had taken the profits thereof until 2 E. 6. and that the dean and chapter of the profits of the premises had yearly paid 10 marks for the stipend of the said priest. And further, the 27 July 16 H. 8. the dean and chapter demised the same to F. Cole for 40 years; and that afterwards 15 Maij 36 H. 8. the said dean and chapter leased the same to Nicholas Wilford for 50 years rendring 9l. rent with clause of distress if the rent was behind by half a year, being demanded, the lease should be void which N. W. 1 E. 6. devised the same to his wife, who devised the same to Tho. Wilford the defendant: and further found, that as it appeared by an exemplification out of the Exchequer, that it was a chauntry of H. G. and that Tho. was then a chauntry priest there, and that the said chauntry, with all the profits and obits were 6l. 13s. 4d. the tenth of which is a mark, which was payable to the King 26 H. 8. and that by another exemplification in 2 E. 6. it appeared that the Dean and Chapter of Pauls certified to the Commissioners of the said King, Cantaria H. G. A. & B. executores testamenti H. Gilford by force of the said will 7 E. 2. granted and assigned to the dean and chapter aforesaid, and their successors, the said lands and tenements, to the intent that they should maintain for ever a chaplain to pray for the soul of the said H. G. and all souls: and the incumbent of the said chauntry is one G. and that the said executors granted to the Mayor and Commonalty of London the rent of 20s. out of a shop in Cheap, with the patronage of the said chauntry, to the intent that they should maintain the chauntry accordingly; and recited all the said lands and rents assigned, and that the rent of them was 14l. 1s. (the salary of the priest, 6l. 13s. 4d. for bread and wine 3s. 4d. the Chamberlain of London 20s. being deducted) and so there remaineth 4l. 3s. 4d. and that the said

chaplain received above his wages yearly by reason of the said obit, other profits, as procession pence, and feeding days 33s. 4d. And found further, the Act of 1 E. 6. [158] and further said, that the church of St. Paul at the time of the said Act was a Cathedral Church, and the fee of the Bishop of London, and that the profits and rents devised and ordained to the said dean and chapter were in the said certificate of 2 E. 6. and that the said lands, at the time of the making of the said Act, and for five years before, were not in the actual possession of the said King H. 8. nor E. 6. and that by force of the statute of 1 E. 6. the said lands came to the possession of the said King as chauntry land, and that the said King granted it to Tho. Butcher in fee, who bargained and sold the same to Dobson, who thereof enfeoffed Thoragill, upon whom the said Nicholas Wilford entred, claiming his lease: and further found, that 45s. parcel of the said rent of 9l. due at the Feast of St. John Baptist 11 Eliz. for the said capital messuage was arrear by half a year after the said feast, and was lawfully demanded by the said Rich. Thoragill, and for not payment he re-entred, and let the same to Tho. Buttell, &c. Bell. The executors by this devise have not a bare authority, but an interest; for if one seised of lands in fee deviseth, that his executors grant a rent-charge to one in fee out of his said lands, by that devise the executors have a fee-simple in the land, otherwise they could not make such a grant: so here in the case in question: and also by the same reason the executors have a fee-simple in the land, for otherwise they could not grant a rent in fee, nor the land to the dean and chapter in fee, by which the chaplain in perpetuity ought to be found: and although but one chauntry was erected where three were intended, but the land devised was not sufficient for all three, so that now by the erecting of one chauntry only, the executors performed the truth as near to the intent of the devisor as it could be, and as the land devised might extend unto; it is not material, if here be a condition, or a confidence in the words of the grant to the dean and chapter ad inveniendum, &c. for if it be a condition, and broken, no advantage shall be taken of it, for it is out of the statute; and if it be a confidence, then it is performed as near the intent of the devisor as it might be, and the condition being performed, although not exactly yet so near as it may be, it is well enough performed: as a feoffment upon condition, that the feoffee shall make a gift in tail to husband and wife, and the heirs of the body of the husband, the husband dyeth, now the gift cannot be modo & forma, and therefore if it be, it may be, scil. as near the intent of the parties as it may be, it is good; and therefore if the land be given to the wife for life without impeachment of waste, the remainder over, it is sufficient in case of a trust and confidence. 1. It was moved, if here be any chauntry in the case: and a chauntry is nothing else but a sustentation for a priest that chaunts in a place certain for the souls of the dead: [159] and chauntries are in two sorts; the one incorporated, as by the King by his letters patents; the other not incorporated, as our case is: and truly the greatest number of chauntries were not corporal, but were chauntries but in reputation, and not revera; but yet such chauntries in reputation are within the statute, which see by the words of it, accepted, taken or reputed, as part or member of any chauntry. It hath been objected, that nothing passeth to the King by that statute, but that which is parcel or belonging to the chauntry, but this land is not parcel nor belonging to any chauntry, for all the land is in the dean and chapter. As to that, we ought to have regard unto the intent of the devisor, which was to make the land a chauntry: and so in the time of Hen. 8. it was retorned in the Exchequer for the first-fruits of the chauntry of Hen. Gilford, and we ought not to respect the conveyance it self, which was made by the executors to the dean and chapter, but also the disposition of the devisor so as both ought to be put together, if they be not contrary one to the other and if they be then, the last shall be taken. And when the intent of the debtor may stand with the act of the executors, to construe, that the land shall make the chauntry according to the intent of the devisor; for the executors have given all the land to the dean and chapter to find a priest, and things belonging to a chauntry; and the executors have given the said land to the said intent, and the assignment of the special portion out of it, is but a shewing how the profits of the lands shall be bestowed: for I conceive, that the land at the time of the disposition aforesaid, was not of any better value, than it was appointed to be imployed as aforesaid; and if the dean and chapter by their industry have made and improved it to a greater value,

they shall take advantage thereof till it be given to the King by the statute, and it shall not be said properly a rent, but rather a portion of the profits, &c. and therefore the land shall be said the chauntry, and not the sum; and here the intent of the statute extends to the intent of the founder: so that if the intent of the founder was to give the land to superstitious uses, the same is within the statute: if cestuy que use wills that his feoffees have the profits of his lands ut supra, to the sustentation of a chauntry priest, and the feoffees imploy but 20l. per annum, whereas the land is of the value of 100l. per annum, by this statute the King shall have all; for the intent of the founder was, that all should be imployed: and so here; for upon the matter the dean and chapter are but as feoffees; and see that this Statute of Chauntries makes a great difference between obits and lights, and chauntries; for in the case of obits and lights, the King shall not have but that which was imployed. Whetstones case was, that Whetstone seized of the manor of **[160]** Cocke, made a feoffment thereof to certain feoffees to find two obits in such a chappel, and with the residue of the profits to maintain the chappel; and judgment was given for the Queen. Here the condition knit to the reversion upon a lease made by the dean and chapter to Nicholas Wilford passeth to the King by the Act of Parliament; for a condition is an hereditament, and when the King grants over the reversion to Butcher, the condition also passeth by 32 H. 8. Bromley Solicitor, The statute extends to chauntries in existence only, and not to chauntries in reputation. Chauntry hath divers significations in law; 1. For the service which the chauntry priest is to do, as cessavit de cantaria. 2. Sometimes for the advowson of the chauntry, scil. quod permittat præsentare ad cantariam. 3. Sometimes for the body of the chauntry, scil. the land of which it is endowed, and in that sense it is taken by the statute. I will agree, if the same had been an ancient chauntry time out of mind, &c. and the incumbents thereof had taken the profits, and made leases of it, that then it should be a chauntry within this statute, for it might be corporated by prescription: but the chauntry here in question is not a chauntry by prescription, for the beginning of it is known, so it is a chauntry in reputation only and not in facto. And he said, that in that case the rent limited to the sustentation of the priest shall go to the King and not to the land, for the land was not given for the sustentation of a priest, but the rent only; so as the land was not immediately imployed for the finding of the priest: and he resembled this case to the case lately in question upon the statute of 31 H. 8. An abbot was seized of a great wood, which was never imployed in kind to the use of the house, being seven miles distant from the house, but was never in lease, but was yearly sold by parcels, and the woodward rendred an account of the same to the auditor: and the opinion was, that a lease for years made of it within a year before the dissolution, was not within the said statute, for it was not immediately imployed for hospitality. But see the same reported by the Lord Dyer to the contrary, 3 & 4 Eliz. 207. that such a demise was void, although that the wood was not immediately imployed, &c. And see also the words of the statute, scil. that the land shall be in the actual possession of the King in as ample manner as the priest had it, and the priest had nothing in the land but only in the rent: it was adjorned to be further argued, &c.

[161] TEMPS ROIGN ELIZ.

CCLXVI. HARVEYS CASE.

Harvey seized of a manor, made a feoffment thereof to divers persons to the use of himself for life, and after to the use of his son and the heirs males of his body, and if the said son, or any of the heirs males of his body discontinue or alien (otherwise than for 21 years, or three lives) that then his feoffees should be seized to the use of Nic. Harvey his brother in fee: the feoffor dyed, the son made a lease for 21 years and afterwards discontinued against the proviso, if that lease should bind Nic. Harvey who came in by the latter use, &c. Dyer, It is hard to avoid the lease, for at the time of the making of it, the lessor had a good interest and authority to make the lease, and the act which impeacheth the estate of the lessor commenceth after the lease by the discontinuance, and therefore shall not avoid the

lease. Manwood, The second use doth determine the first use, and all estates derived out of it. Mounson contr', For here this word (otherwise than for 21 years, &c) so as such a lease is excepted: as if a man makes a feoffment in fee to the use of J. S. and his heirs, until J. D. shall pay to him 20l. and then to the use of J. D. and his heirs, here if J. S. makes a lease for years, and afterwards the monies are paid to J. D. now J. D. shall hold the land discharged of the lease, for there is no word (otherwise) &c. for these words (otherwise) qualifie the second use. Dyer, The word (otherwise) amounts to an exception. Manwood doubted of it, and moved and demanded if the wife of the cestuy que use should have dower or not. Barham conceived that she should, &c.

CCLXVII. MICH. 31 ELIZ. IN THE COMMON PLEAS.

Tenant in socage made a lease for four years, and dyed, his heir within age of 8 years, the mother being guardian in socage, leased by indenture to the same lessee for 14 years; it was holden, that in this case the first lease is surrendred, but otherwise it is of a lease made by guardian in nurture.

[162] CCLXVIII. MICH. 29 ELIZ. IN THE COMMON PLEAS.

A Release pleaded after Judgment and Verdict. Audita Querela pleaded.

In debt it was found for the plaintiff 20 Eliz. and 21 Eliz. the plaintiff released to the defendant, and the continuance was made until this term, scil. Mich. 29 Eliz. per Curiam advisare vult: and now the plaintiff against his own release prayed, and had judgment without any knowledge to the defendant, and process of execution issued; and now Walter, a Clerk of the Court, on the behalf of the defendant, shewed the release to the Court, and also the whole special matter, and prayed the release of the Court against this practice. Anderson presently granted a supersedeas: but afterwards, before the process issued forth, he and the other justices were of opinion, that the defendant could not plead the said release, nor any further matter after verdict, and demanded the question of Nelson chief prothonatory, who advertised the Court, that he could shew a president where an arbitrement had been pleaded after a verdict, and issue joyned upon it, and that was 100 years since: quod mirum videbatur Curiæ hic: and afterwards the Court said to Walter, Sue your audita querela, and upon that you shall have a supersedeas.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CCLXIX. SIR RICHARD LEWKNORS CASE.

Sir Richard Lewknor seized of Willingford Park, leased the same for years, and dyed; the lessee assigned over his term, excepting the woods and underwoods standing growing, and being in and upon the premises, the assignee committed waste, the term expired, the daughters and heir of Sir Rich. and the husband of the third daughter coparceners, being dead, as tenant by the curtesie, brought an action of waste against the assignee, and the opinion of the Court was, that the husband ought not to joyn in that action, for he can recover nothing, for damages he cannot have, for the waste was not done to his disinheresin, and the land he cannot have, because the term is expired. Snag Serjeant, I conceive that the exception in the assignment is good; for an exception of trees by the lessor himself in his lease is good, and by reason thereof the lessee shall not have fire-bote, hey-bote, &c. which otherwise he should have, and the property of the trees is in the lessor, and also the soil, 14 H. 8. 1 & 2. 28 H. 8. Dyer 19 & vide 46 E. 3. 22. a lease for years was made with such exception, and the lessor brought an action for the trees cut, quare clausum fregit, and that proves that the

soil also is excepted, and then the action of waste lyes against the lessee, who hath excepted to himself the wood and the soil, and not against his assignee. Walmsley Serjeant to the contrary. And he said, where land is demised the absolute property of the great **[163]** trees is in the lessor, and the lessee hath in such case, a qualified property: and he cited 2 H. 7. 14. the lessor commands the lessee to dig gravel in the land demised, or licenseth him so to do, such commandment or licence is not good for the lessor hath nothing to do with the gravel, nor hath any property in it, but such licence to cut trees had been good; and vide 10 H. 7. 2 & 3. Waste is assigned in the breaking de uno muro lapideo; the defendant pleaded the licence of the plaintiff to break it, and upon that they were at issue: and he said, if the lessor cutteth trees, upon which the lessee brings an action of trespass, he shall not recover damages according to the value of the trees cut down; but for the trespass to the soil, and for the loss of the shadow, and the acorns, &c. and if the lessee cutteth down trees, the lessor cannot take them, because he hath other remedy. Where a reversion is granted to A. and B. and to the heirs of B. waste is done. A. and B. bring an action of waste, B. shall recover all the damages, and A. nothing; which proves that all the interest in the land demised is in B. and not in A. therefore here in the principal case the exception is void, for that which the law allows to the former, is only house-bote, hedge-bote, plough-bote, fire-bote: and he said that the lessee sells the trees and the vendee cuts them down, that waste lyeth against the lessee, which proves that in that case the soil doth not pass with the trees, by the exception of the trees, the soil is also excepted as a servant to the trees, viz. to nourish the trees; and if he who excepts the trees cuts them down, or roots them up, the lessee shall have the soil. And he said, that for the property that the lessor hath in the trees, if he cuts them down, the rent shall not be apportioned: and if the lessor granteth the trees to one, and his heirs, there shall be no attornment, which had been requisite if the soil had passed. At another day it was argued by Shuttleworth Serjeant, and exception taken, because it is too general, scil. quod fecit vastum in terris quas Sir R. Lewknor pater duarum querentium cujus hæredes ipsæ sunt præfato, Ford dimisit, &c. And the plaintiffs counted the reversion was entailed by Act of Parliament to the said Sir R. Lewknor; and so the writ ought to be special, scil. cujus hæredes de corpore ipsæ sunt; for although there be not any such form in the register, yet that is to no purpose; for in novo casu novum est remedium apponendum. And he compared it to the case in F. N. B. 57. where land is given to husband and wife, and the heirs of the body of the wife, the wife dyeth, the husband commits waste, the writ shall be, Idem A. de domibus in B. quas tenet ad vitam suam ex dimissione quam inde fecit præfato A. & M. quondam uxori ejus, & hæredibus de corpore ipsius M. matris dicti R. cujus hæres ipse est exeuntibus. And vide 26 H. 8. 6. cestuy que use leaseth for years, the lessee commits waste, the feoffees bring an action of waste, the writ containeth the special matter, **[164]** although there was not any such writ in the register. Fenner and Walmsley contrary; for there is not any such form in the register, cujus hæredes de corpore, &c. and we are not to devise a new form in this case, but it is sufficient to shew the special matter in the count; also the words in the writ are true, for the plaintiffs are heirs to Sir R. Lewknor, and the count is well, pursuant and agreeing to the writ; for they are heirs, although they are but heirs special of his body. And the Court awarded the writ good, and said that the case is not like the case in Fitz. N. B. 57. nor to 26 H. 8. before cited; for in the first case the plaintiffs cannot shew of whose demise the tenant holdeth, unless that he also shew the special conveyance, scil. that the land was given to the husband and wife, and to the heirs of the body of the wife, for always the demise to the tenant ought to be shewed certain, which cannot be in both these cases, if not by disclosing also the title to the inheritance and the estate in it. Another exception was taken to the count, that where the two defendants were tenants in common of the said lands demised, the writ is tenuerunt, which is intended a joynt-tenure. But this exception was not allowed: and vide 44 E. 3. in waste the plaintiff counted upon divers leases, and Fitz. N. B. 60. F. and the writ shall suppose one tenet, and not divers tenets. Another exception was taken to the writ because the two coparceners, and the heir of the third joyned in the writ, whereas the husband of the third sister, being tenant by the curtesie, was alive. Vide 22 H. 6. 21, 22. But that exception for the tenant

by the curtesie joyns to no purpose; for he is not to have damages, because the waste was not to his disinheresin, and the land he shall not recover against the defendant, for the term is not determined; and such was the opinion of the Court. As to the matter in law, Shuttleworth said, that the action of waste ought to be brought against the lessee himself, and not against the assignee, for when he grants over his term, excepting the trees, it is a good exception; for when the land upon which the trees grow is leased to another, the trees pass by the lease as well as the land, and the property of them is in the lessee during the term; by which when he grants his land, he may well except them, as the first lessor might have done; and if the lessee for years cutteth down the trees, the lessor cannot take them for that he hath other sufficient remedy, scil. an action of waste. Fenner and Walmsley contrary: and they conceived that the lessee had but a special property in the trees, scil. for fire-bote, plough-bote, house-bote, &c. But if he demiseth the land, or granteth his interest in it, he cannot except the trees, nor his special property in them, no more than he who hath common appendant may grant the land, excepting the common: and in such **[165]** case, the general property in the trees remains in the lessor, as parcel of his inheritance. And this appeareth by many cases: 27 H. 8. 13. Lessee for life and he in the remainder joyn in a lease for life, the lessee commits waste, the tenant for life, and he in the remainder joyn in an action of waste, the tenant for life shall recover the place wasted, and he in the reversion all the damages. Vide 2 H. 7. & 10 H. 7. cited before, that the lessor may licence the lessee to cut the trees, which proves that the property is in him. And vide 40 Ass. 22. the lessor shall have the windfalls. And as to that which hath been said, that by the exception of the trees, the soil it self is also excepted that is true, as to the trees for nourishment, and not otherwise; for if the lessor cutteth down the trees, or roots them up, he shall not after meddle with the land where, &c. but the soil shall be entirely to the lessee: the lessor during the term may grant the trees, so cannot the lessee; therefore the greater and better property in the trees is in the lessor and not in the lessee, and the trees proprie loquendo, are not parcel of the thing demised. If this exception of the trees or woods should hold place, inconvenience would follow; for as it is holden in 15 H. 7. 11. If the termor of wood commits waste in one corner of the wood, he should not lose all the wood, but that place only: but if in the said wood there are divers plats of land in divers places of the wood, if the termor commits waste in that wood he shall lose all the said plats, although he hath not done waste in them, for they are parcel of the wood. Vide temps E. 1. Fitz. Waste 127. and vide ibidem Waste 112. 8 E. 2. Waste done in parcel of an house, the whole house shall be recovered. Vide also 30 E. 3. Fitz. Amendment 67. and 4 E. 3. Waste 10. Now if that be law, and the exception be good, how shall the place wasted be recovered here, and against whom? It seemed to the Lord Anderson, that the exception was void, and that the action was brought against the assignee; and he said it was a knavish and foolish demise, and if it should be effectual in law, some mischiefs would follow which he would not remember. Windham was of the same opinion, and that the lessee could not assign his estate with such exception, for he hath but a special interest in the trees, scil, for fire-bote, plough-bote, &c. which should go with the land. Periam conceived, that as to such special property, that none could have it but he who hath the land, and therefore the exception is void; but as to the fruit-trees, such an exception might be good; and although that the trees are not expresly demised, yet quodam modo, and after a sort, they may be said demised, as annexed to the land, and if waste be brought against him who made the exception, scil. the lessee, he cannot say they were not let to him; and therefore he doubted of the exception: and Rhodes doubted also of the exception; **[166]** and Anderson said, that he was clear of opinion that the lessor should have the windfalls; and afterwards the case was adjorned to be further argued, &c.

Post 225.

TEMPS ROIGN ELIZ.

CCLXX. AUDLEYS CASE.

Uses.

The Lord Audley 12 H. 7. enfeoffed Hoddy and others of certain lands in the county of Somerset, and afterwards by indenture reciting the said feoffment, and the date of it, and also that it was to the intent that his feoffees should perform his will, as followeth in effect, viz. My will is that my said feoffees shall stand seized to the use that the said Hoddy shall receive of the said lands 100l. which he had lent to the said Lord Audley, and also to stand seized to pay all his debts upon bills signed with his hand, and after the debts paid, that the feoffees shall make an estate of the said lands to him the said Lord Audley and Joan his wife, and to the heirs of their bodies, &c. with divers remainders over. The said Lord Audley had issue by the said Joan, and also having issue by a former wife a daughter, the feoffees never made any estate to the said lord and his wife, and by the opinion of divers justices and sages of the law upon this matter no use was changed, for it is not a last will, but an intent; and although that the feoffees shall be seized to the use of the feoffor and his heirs, because no consideration was wherefore they should be seized to their own uses; yet the same could not make a new use to the said lord and his wife in tail, without conveying an estate, &c. for the wife is a stranger to the land, and the same cannot be a will or testament: for the estate mentioned in the said writing ought to be made to the said lord and his wife, who could not take by his own will; and this matter was depending in the Chancery. And the advise of the justices being there required, they delivered their opinions, that by that writing no use was changed, nor any use vested in the said lord and his wife, and a decree was made accordingly, until proof was made that such an estate was made, &c.

[167] TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CCLXXI. WALGRAVE AND SOMERSETS CASE.

In trespass by Walgrave against Somerset, the case was, that tenant at will cut down trees, and the lessor brought trespass vi & armis: and the Court was clear of opinion, that the action was well maintainable modo & forma, and judgment was given accordingly. Vide Litt. 25. that trespass lyeth, but he doth not speak of vi & armis. See for that 12 E. 4. 8. by Fairfax and Genny, 22 E. 4. 5.

CCLXXII. MICH. 30 ELIZ. IN THE COMMON PLEAS.

Trial.

In debt upon an obligation, the defendant said that the obligation was endorced with a condition for the performance of covenants contained in an indenture, &c. The plaintiff assigned the breach in this, that the defendant himself by the same indenture, that the said house was discharged of all former estates and incumbrances, &c. And further shewed, that the defendant had made a former lease of the said house to one A. B. in the county of Warwick; to which the defendant said, that tempore dimissionis he was within age; upon which they were at issue, and it was tryed in the county of Warwick, where it ought to be tryed where the writ was brought; but the whole Court held the contrary, that the tryal was well enough; as if in an assise the tenant pleadeth a release of the plaintiff in a foreign county; to which the plaintiff pleads, that at the time of the release he was within age, upon which they are at issue; the issue shall be tryed in the country where the release is pleaded to be made, and not where the writ is brought.

CCLXXIII. Temps Roign Eliz.

Nusance, Obstupavit. Action upon the Case. Prescription.

Action upon the case was brought for stopping a way: the plaintiff declared that the Duke of Suffolk was seized of a house in D. and let the same to the plaintiff for life, and that the said duke, and all those whose estate, &c. had used time out of mind, &c. to have a way over the land of the defendant to the park of D. to carry and re-carry necessary wood for the said house, from the said park to the said house: and further declared, that the defendant obstupavit viam: it was moved, that upon the matter no action upon the case did lye, but an assise, because that the freehold of the house is in the plaintiff, and also the freehold of the land over which, &c. is **[168]** in the defendant: but if the plaintiff had had but an estate for years, then an action upon the case would lye, and not an assise: and it is not material if the plaintiff have but an estate for years in the park, quod fuit concessum per totam Curiam. It was holden also that this word obstupavit was good enough without any more, scil. without shewing any special matter of disturbance, as the erection of some gate, hedge, ditch, &c. for obstupavit implyeth a nusance continued, and not a personal disturbance, as forestaller, or saying upon the land, &c. that he shall not go over, or use that way: but as to a local and real nusance, the word obstupavit amounts to obstruxit: and although in the declaration is set down the day and year of the stopping, yet it shall not be intended that it continued but the same day; for the words of the declaration are further, that he was disturbed in the way, and yet is; and so the continuance of the disturbance is alledged; and of that opinion was the whole Court. Leonard Prothonotary, He hath declared of a prescription habere viam tam pedestrem, quam equestrem pro omnibus & omnimodis cariagiis; and by that prescription he cannot have a cart-way, for every prescription is stricti juris. Dyer, That is well observed; and I conceive that the law is so; and therefore it is good to prescribe habere viam pro omnibus cariagiis, without speaking of horse or foot-way.

16 Eliz. In the Common Pleas.

CCLXXIV. The Archbishop of Yorks Case.

Toll.

The King granted to the Archbishop of York the toll of corn sold in the market of Rippon: and afterwards the King granted to the Mayor and Citizens of York to be discharged of toll through all the realm, and afterwards the archbishop exchanged his manor of Rippon with the King for another manor: it was moved, if now the citizens of York should be discharged of toll within the manor of Rippon. Dyer said that they are not discharged of toll, for the grant to the archbishop was eigne to the grant made to the citizens, and by the exchange the King had new right: and when the King grants over the manor of Rippon, the grantee shall have the toll, notwithstanding the grant made to the citizens, for the grant made to them was void as to discharge them of toll at Rippon, and the grant of the King to the citizens shall not take effect after the exchange; for the grant was void ab initio. But if the grant of the King to the archbishop had been made for life, then the grant of the King made to the citizens should take effect after the estate for life determined: and the better opinion was, that toll should be paid.

[169] HIL. 16 ELIZ. IN THE COMMON PLEAS.

CCLXXV. WILLIAM WALLERS CASE.

William Waller seized in fee 26 H. 8. made a feoffment to the use of his last will, and by that devised his manor of Russels to Rich. Waller his son in tail, and dyed. Rich. Waller entred, and was seized by force of the statute 27 H. 8. and afterwards 2 E. 6. by his deed in consideration of a marriage to be had between him and one Eliz. A. enfeoffed Worsley and others to the use of himself and the said Eliz. for their lives, and after the use of the said Rich. Waller, and his heirs, and dyed: Eliz. took to wife Clavell, they both by fine granted the said mannor to Tho. Lamb: habend' eidem Thomæ & hæredibus suis tota vita ipsius Eliz. Tho. Lamb entred, and dyed seized, Tho. his son and heir entred, against whom Thomas Waller, son and heir of Rich. brought a formedon, the said Eliz. being alive, the tenant said, he is within age, and prayed that the paroll might demur; but non allocatur, for he was but as an occupant during the life of Eliz.

CCLXXVI. RESIDUUM OF SIR FRANCIS ENGLEFIELDS CASE.

The case of Sir Francis Englefield was argued by Popham; and he said, that this condition was not such a private condition, or so running in privity, but that it might be transferred by 33 H. 8. or 29 Eliz. to the Queen; for although that the consideration which moved and induced Sir Francis to create the condition be private and particular, yet that notwithstanding the condition it self is general; for the private cause of the condition doth not make the condition private, but as in other cases, and he put the cases before of ransom: but if the condition had been conceived in these terms, scil. If my nephew shall be given to intollerable vices, then if I tender, &c. there it had been otherwise. Vide the statute of 33 H. 8. cap. 20. by which it is enacted, that if any subject is attainted of high treason by the course of the common law, the king by such attainder shall have such benefit and advantage as well of uses, rights, entries, conditions, &c. as of possessions, reversions, &c. as if it had been done and declared by authority of Parliament, that is as much as to say, as if the condition in its proper terms had been given to the King by Act of Parliament, &c. and vouched Dacres case 17 Eliz. cited by him before, where, upon a grant of all his goods and chattels revokable upon tender of 5s. it was resolved, that such a condition was given to the King, and by special grace **[170]** of the Queen Sir Tho. Gorge had the benefit of it: and here, although the cause of the proviso be private and special, yet the condition is not tyed in the cause, and the statute gives to the Queen all conditions which are usual, and for the benefit of the Queen; and at the time of the making of this statute such conditions were usual, & tunc temporis, the condition was pen'd, not by way of re-entry, but that the use should be void; and that such conditions were usual at the time of the making of the statute of 29 Eliz. appeareth by the statute made two years before, scil. 27 Eliz. for the repressing of fraudulent conveyances: by which it is provided by an express branch of it against such conditions containing power of revocation; and laws are for the most part made to give order for things which may happen: and I conceive, that this tender for the Queen is well enough for the time, notwithstanding all the terms are past, yet the two years are not incurred: I covenant within a year to suffer a common recovery, all the terms are past without any recovery suffered, yet no action lyeth upon that covenant before the year be fully expired, although that the terms be past, it being impossible to suffer a recovery within the time prefixed: A. covenants with B. in consideration of marriage to suffer a recovery before the Feast of St. Michael, and if A. before the said feast doth not suffer such recovery, that then he shall be seized to the use of C. Trinity Term passeth without any recovery had, yet no use shall rise before the said feast: and I conceive that there needs not here any office; but if the condition be to be performed on the part of the patentee, then the breaking of the condition ought to be found by office; contrary

where the condition is to be performed on the part of the King: for acts which subjects do, are matters in pais, therefore an office is requisite to make them of record; but where the Queen doth any thing, there needs not any office to make it of record; the Queen her self might tender the ring, but by commission under the Great Seal she hath authorized another to do it, and she hath taken sufficient notice that there was such a condition: and when the certificate is made and retorned, the same is sufficient to inform her that the condition is performed, for the certificate being retorned, is of record as well as the commission, as the retorn of the writ; and he cited the case before cited, Bartues case, 2 Eliz. Dyer. The King leased the manor of D. for years to A. upon condition, that if the King at any time during the term shall make a lease to the said A. of the manor of S. for life, then the lease for years shall cease and be void; the King makes the lease for life, the lease for years is void without any office, for the lease for life is upon record: the case of Auditor, 3 Eliz. Dyer 197. where the forfeiture of the office appears of record: and Baron Plags case 15 H. 8. ibidem, the determination of **[171]** the Office of Remembrancer by acceptance of the Baron shall bind in the Exchequer, void without a scire facias or office. Vide etiam Dyer (5 Ma. 159) he being Justice of the Common Pleas, was made Justice of the Kings Bench his first office was gone and determined: also he said, that the condition (being performed ut supra) sua vi & virtute, without any office shall make void the conveyance to which it was annexed. And if Sir Francis, being attainted, had tendred the ring, ipso facto as it worked to him, so ipso facto it should work to the Queen. When the Act of 29 Eliz. had made the assurance void, the land is in the Queen presently, by means of Sir Francis, to whom the land returned, and from him in the same instant vested in the Queen. Cook to the contrary: The condition is not given to the Queen: words make the plea; therefore the words of the condition are to be considered, in which it is to be seen if this condition be annexed to the privity of nature, or be general. The form of the condition is, Sir Francis being a man of great living, and having a great manor of his own name, in consideration of the preservation of his name and blood, &c. covenanted to stand seized, &c. And further, pro eo quod, his said nephew was of tender age, and his proof could not now appear, and it might be that in time to come he might be given to intolerable vices; therefore the said Sir Francis did not think it convenient to settle the said inheritance in his said nephew absolutely without a bridle to restrain him, therefore it was provided, that if the uncle delivered a ring of gold to his nephew, to the intent to make void, &c. And this is a special condition, private and peculiar to the person of Sir Francis incident to him, and to no other, and incommunicable; and therefore it is not given to the Queen: but such condition which the heir, lord by escheat, or executors may have, the Queen shall have by the statute 10 H. 7. 18. Lessee for years of a house covenants to repair it within six years, within which term he dyeth, no reparation being made, covenant lyeth against the executors; contrary if the covenant had been that he should repair during his life. It hath been said, that the things which are matters of privity are the considerations which caused Sir Francis to make this proviso, but they are not any part of the condition or proviso: truly the consideration raises the use, and precedes the proviso which is tyed to the consideration with an ideo, and all is but one sentence knit together with the ideo. And although consideration of blood be not parcel of the proviso, yet that which follows is, scil. for that his nephew, &c. And in this conveyance Sir Francis præstitit utrumque munus nutricis, ubera, & verbera. And Acts of Parliament do not give away things knit to nature, by the general words all things. Vide the Lord Brays case, 2 Eliz. Dyer 90. The father having the wardship of his son and heir ap-**[172]**-parent, if he outlawed shall not forfeit the same, for it is inseparable to him, notwithstanding that the land be holden of the Queen, and so nature cannot be transferred, therefore neither this proviso. And so is the tenure of frankalmoigne 35 H. 6. 58. and it should be a great rigour to take the bridle out of the hands of the natural uncle, into the hands of justice, which is manus Regia: and he cited the case of the Lord Norris, where it was rul'd, that where the act of attainder of Norris gave to the King all rights, titles, &c. yet a writ of error was not given thereby. (Manwood, Actions are not expresly given by the said act of attainder.) As to the second point, I conceive that the coveyance is become void when the terms within the two years are passed, and shall not expect until the two years be expired,

for the inrollment ought to be within the term; so that if all the terms of the two years be past, it is now impossible for to inroll the deed within the time limited by the statute, and then, by 29 H. 8. the conveyance is void, and then is the Queen seized in fee at the time of the making of the lease by the attainder of Sir Francis: as to the certificate, without office it is not sufficient to entitle the Queen to the land; and I deny the difference put by Popham between a condition to be performed on the part of the patentee, and on the part of the King: I confess that a certificate to inform the Queen, or her councel, of the quantity, quality, value, &c. of the land, is good without office, but not to entitle the Queen de novo to the inheritance of another; I grant that the commission is of record, but the tender of the ring is matter in pais, and not of record. Three things ought to be observed in every certificate, to make it a good and lawful certificate according to the course of the common law, unless it be in cases of necessity, as in case of ouster le mere, &c. 1. It ought not to be in the absence of the party. 2. It ought to be pendente placito convocatis in ea parte convocandis. 3. It ought to be directed to a known officer; but a thing certified by a private person, being no officer, cannot be good. Also a certificate according to the course of the common law, being good, is not traversable. At another day, the case was argued by Egerton Solicitor for the Queen: the condition is given to the Queen by 33 H. 8. and also by 29 Eliz. and this condition in it self is a general and ordinary condition, and rests not in privity, and such an act as may be made by any stranger as well as by Sir Francis himself, scil. the tender of the ring. The reasons which moved Sir Francis to knit this condition to the conveyance were natural, but the proviso and the performance of it not tyed to nature, and therefore all the cases of privity are here out of seisin. As to the Lord Brays case, the same was not any wardship, but only an order for the government of his son and heir; for the wardship of **[173]** the father in the son is not a chattel in him. As to the case of the Lord Norris, the writ of error could not accrue to the Queen, for by the act of attainder no actions were given to the King: and here is not any such privity as hath been pretended, for by the words of the proviso the ring might be tendred to his executors or administrators, therefore the condition might be tendred when he is dead, therefore without privity. Title for alienation in mortmain of lands purchased by a villain of the King, or for a condition broken, are not in the King before office: but here the condition is to be performed on the part of the Queen, which Her Royal Majesty cannot perform, and therefore commissioners are appointed to do it, which they have done, and upon the commission retorned, have informed the Queen of all the performance of it, and all is now upon record. And there is a great difference between certificates, as *in our case, and certificates which have been cited on the other side*, which are used to make tryals upon issues joyned betwixt party and party, and in such certificates I confess the law, as Cook hath argued: the sheriff is not known to be such an officer, but by his commission under the Great Seal, he upon a writ of the King to him directed, summons, disseisins, attaches, &c. these are matters in fait; but when the sheriff hath retorned his service, then it is become matter of record: so in our case, the retorn of the tender, &c. where the Queen is to be informed of the lands of the subject which she is to have, there ought to be an office; but here the Queen is to do an act, and that she hath done under the Great Seal by commission, by the retorn of which she is in the whole matter, therefore there needs not an office to inform her of that which she her self hath done by another authorized by her to do it: and he said that the leases made by the Queen, being tenant pur auter vie, were not void ab initio, but from the time of the two years, but now the estate of the Queen for life is determined, therefore also the leases derived out of it. Exception hath been taken to the information, scil. prædictus Franc' per indenturam suam factam inter, &c. without saying sigillo suo sigillat', that is good enough; for facta esse non potuit, nisi etiam sit sigillat', therefore facta includes sigillat': and afterwards Trin. 33. Eliz. this case was argued by the Barons. Clark puisne Baron said, that judgment ought to be given for the Queen. And first he said, I conceive that here upon this indenture is no use created in Sir Francis, for he shall pay for a licence of alienation if the lands be holden in chief; and they themselves in pleading the uses, say virtute cujus the said Sir Francis was seized in his demesne as of freehold for his life, the remainder thereof, &c. Although this condition be tyed to nature, and rests in privity,

as hath been objected, and so inseparable, yet by Act of Parliament it may be transferred. Impropria-[174]-tions, frankalmoign, frankmarriage, guardianship in socage cannot be given away regularly, but by Act of Parliament they may; which vide for impropriations by the statute of 31 H. 8. Impropriations of abbies and priories dissolved, nam Parliamentum omnia potest: it may alter the nature of lands, make gavelkind discendable according to the course of the common law, and so of borough-English: attaint, error, disceit, &c. are actions which lye in privity, yet by Act of Parliament they may be transferred: and in the case of the Lord Norris, if the act of attainder had given to the Queen all actions, she might have had a writ of error: and we see by experience, that the King and his assigns have advantage of conditions annexed by abbots to their leases, and that by 31 H. 8. and our condition is not so proper or peculiar to Sir Francis, for by the words of it any other person might have tendred the ring for Sir Francis, so as it is not tyed to his person. If the proviso had been, Because it may be my son will marry without my consent, or it may be I shall have more children provided therefore, that if I tender, &c. that pretence of marriage without assent, or plurality of children, is not any parcel of the condition. And he vouched the case between Clovell and Moulton; A. sold lands to B. and it was covenanted betwixt them, that A. upon request made unto him, or his heirs, should make further assurance to B. of the said land; A. is attainted, now the covenant is suspended, for A. hath not any heir, afterwards the heir of A. is restored by Parliament, with a saving to others of all their rights, &c. B. is not aided by that saving, so as he can make request to the heir of A. &c. And he said, that the tender of the ring is well enough for time; for although all the terms were past, yet the two years were not expired: A. covenants with B. that if A. doth not levy a fine to B. of the manor of C. within two years, that then A. shall be seized of the manor of D. to the use of the said B. Now although that all the terms be past so that no fine can be levied according to the covenant, yet no use shall rise out of the said manor of D. before that the two years are fully expired: and here needs not any office by which the tender ought to be found, the commission authorizing the tender, and the return of the certificate by the commissioners is sufficient; for the whole matter in fait is become matter of record; as the execution of a writ once by the sheriff being returned, and the party grieved by the certificate shall have a traverse to it; but where a certificate is in lieu of a tryal, as of bastardy by the bishop; in case of reddition or diminution certified in a writ of error, there no traverse lyeth to it; but upon certificate of not payment of tythes, the party grieved may have a traverse: in our case here, if the subject continues possession after such certificate made, he is an intruder. The Queen [175] when she made the lease was tenant for the life of another, and afterwards by the tender of the ring, according to the proviso all the conveyance, and the estates limited by it, are dissolved, and the fee-simple vested in Sir Francis, quasi ab initio, and immediately also in the Queen by the attainder, whose estate is paramount the conveyance made by Sir Francis, which is now, as if it had never been made, and so are all the estates created by it, and then the lease made ut supra is void. As to the exception which hath been taken to the information, (indentura sua) without saying, sigillo suo sigillat', it is well enough, for so much is said in effect; for non est indentura sua, if it be not sealed, and all necessary circumstances are not to be pleaded, as the delivery of the deed, or livery upon a feoffment, for a feoffment includes livery, and a deed delivery. Gent, Baron to the same intent: Here the words of the proviso are, Tender to Sir Francis, his executors or assigns, no words of heirs, and on the part of Sir Francis, if he, or any for him: but in Dacres case, if the said John Dacres himself, and yet the Queen took advantage of such a tender. Manwood Chief Baron to the same intent. As to the exception to the information, scil. per indenturam suam, without saying sigillo suo sigillat'; for if the indenture was not sealed, then it was not any deed, and then no covenant, and then no use, and then no condition, &c. But I conceive, that the information is good enough, for covenants by indenture include sealing and delivery, and other things which are of the essence of an indenture, which need not to be pleaded, because in law presumed: but for a clear answer to it, sealing and delivery are matters in pais, therefore confessed by the demurrer: and here the defendants have pleaded quod bene & verum est, that the said Sir Francis by the said indenture, &c. covenanted, &c. and if any imperfection be

in the pleading, it is now saved by the demurrer. An exception hath been taken to the Bar, because the defendants have pleaded three several leases of several parcels of the lands in question, and concluded, virtute quarum quidem concessionum, they were possessed and entred, &c. which cannot be good, because several interests and estates, but ought to have pleaded severally, scil. one lease of such land in which the intrusion is supposed, and so concluded virtute cujus, they were possessed, & sic de cæteris. and so to each interest one several conclusion: A. hath an annual rent of 10l. out of Bl. Acre, and another rent of 20l. out of, &c. and another rent of 30l. out of the same acre and takes a distress in Bl. Acre aforesaid, and avows for all the rents together, the avowry is not good, for how can the avowant have a retorn? when non constat Curiæ, how many of the cattel he took for one rent, and how many for another: as to the matter in law, first, if this condition doth extend to the estate of Sir Francis, nihil habet quæstionis; for by **[176]** the performance of the condition Sir Francis is in statu quo prius, and so all the estates limited by the said indenture quite plucked up by the root. As to the condition, I conceive that it is not knit in privity to Sir Francis, and doth not depend upon his liking or disliking: the act it self, in which is the performance of the condition, doth consist in the tender of the ring, the words preceding purporting the doubt of the proof of his son, and the bridle, &c. are his motives by which he was induced to make the condition, not to perform the condition, nor any part or parcel of the condition, or word of condition. The words of the condition are, If he himself, or any other by his appointment shall tender, &c. What privity is here? who knows who shall be his deputy to make the tender? It may be any person in the world, therefore no privity in the person who is to tender; and as to the person to whom the tender is to be made, there is no privity there, for it may be made to the nephew, his executors or administrators. Also no precise place is set down in the condition where the tender shall be, it may be in Ireland, Scotland, or in any other country, therefore the condition in all points general, and so free as an ordinary condition: but if the condition was to be performed by Sir Francis in his proper person, or by subscribing his name with his hand, or such like act, then it had been otherwise. The case of Littleton 76. A feoffment in fee is made upon condition, that if the feoffee pay to the feoffor such a day 10l. then the feoffee shall have the land to him and his heirs for ever, and before the day the feoffee makes a feoffment over upon a condition, the second feoffee tenders the mony, it is a good tender, and yet the words of the condition do not extend so far, but only to the first feoffee, who was privy to the condition; so where the payment is to be made on the part of the feoffor, and he dyes before the day, tender by the heir is good; and here this is a general condition, and therefore may be performed generally without being restrained to any person for the performance of it: and here, we are in an Act of Parliament, quod omnia potest, 32 H. 8. gave to assigns of the reversion which always before were fixed in privity. Monks dead persons in law, by Act of Parliament made capable of purchase and inheritance; gavelkind and borough-English made discendable at the common law, which the King could not do: an alien born is made denizen by the King, by which he may purchase, but yet not inherit: but an Act of Parliament may make him heritable; corruption of blood the King cannot take off, but it ought to be purged by Act of Parliament. As to the statute of 29 Eliz. it hath made the conveyance void as hath been objected; for the terms within the two years limited by the statute are past, and then the condition is gone, as against intail upon con-**[177]**-dition, if the intail be spent the condition is gone: but I conceive, that until the two years be fully expired, the estates limited by the conveyance continue, and the condition also. The words of the said statute are (shall within two years after the last day of this session, &c. openly shew and bring forth into the Queens Court of Exchequer, his conveyance, and there in the term time in open Court, shall offer and exhibit the same;) these words shew that the parties ought to shew the conveyance within two years, but doth not speak of any term, and in the other clause it speaks of term, but not of two years; so the time in which it ought to be shewed is two years, but the time of the inrollment might be in the term after the two years well enough? for there are two two times in the statute, the one to shew the conveyance, the other for the inrollment of it, and two things are to be done, shewing and inrollment, and two times answerable to them, two years, and term-time. And he

took it for a general rule, that time once expressed, shall not be afterwards by implication abridged. And if by your construction you make the time to end with the term, you abridge the time by a month at least, which was expressed before, two years. And for the reasonable construction of times, vide 28 H. 8. Dyer 44 Boulds case. If it fortune Joan Moll' to decease before the feast of, &c. without issue male of her body then living, &c. this word (then) shall be referred to the feast, and not to the time of the death of the party: for (as the reason of the case is) where the intent of the parties is to have continuance in the thing, the thing which they would have continue to the most extream time as may be: and if lands be given to one and the heirs males of his body begotten, and if he dye without heirs of his body, then it shall remain over; by this implication (if he dyes without heirs of his body) the donee shall not have general tail, but it shall be intended such heirs to whom it was limited before. And in our case here, there are some weeks between the ends of the terms, and the end of the two years, and those weeks shall not be utterly void, for in these weeks after the end of the terms, those of the Chancery shall take conusance of deeds: and here in our case, the party was only to shew the deed, which might have been done at any time after the terms, so as it be within the two years; if one be bound with condition, that if within two years he pays the Queens silver upon a fine to be levied, and then and there in term time ingross the same, if he pay the Queens silver within the two years, he hath saved his bond, although that the fine be not ingrossed until a term after the two years: so if one be bound to acknowledge a deed in the Chancery within two years, and there in the term-time to inroll the same, if he do ac-**[178]**-knowledge it within two years, it is sufficient, and he may inroll it afterwards: so in our case, the estates continuing, and the condition also till the two years are fully expired, therefore the condition is well performed; for the estate continues defeazable by the condition, because within the two years, and to abridge time is a violent thing. And now Sir Francis is alive, so as the power of the tender of the power of the King continueth: and I conceive, that the certificate is sufficient without any office, and the party grieved may have traverse to it: and I hold clearly, that as this case is office cannot be found, office properly is to be found of things in pais which happen before the office, as the nonage of an heir, or of an alien born, or of a villain; here to entitle the King an office is necessary to find things which have hapned before; and without doubt this certificate is traversable, as the certificate of the Bishop of Recusancy; and also the certificate of the Commissioners of Sewers, and here those who are to certifie, are to certifie a thing done by themselves, and therefore there needs not any office, because they do it virtute commissionis. If a commission be awarded to take a surrender of the bishoprick of N. or of a pentioner &c. there needs not any office to find it; and in the time of King Hen. 8 divers abbots surrendred their possessions to him, of which no office was found. And now for conclusion; the Queen comes in paramount her first estate which she had pur auter voy, scil. by attainder, and now she hath it by the condition, and so paramount the title under which the defendants claim: and afterwards judgment was given for the Queen.

Trin. 31 Eliz. In the Common Pleas.

CCLXXVII. The Scholars of All Souls and Tamworths Case.

This Case is Reported in the first Part of Leonard.

In a writ of right by the Colledge of All Souls in Oxon against Tamworth, the writ was, Quod clamat tenere de nobis in liberam, puram & perpetuam elemosinam. And exception was taken to it, because it ought to be liberam elemosinam, without puram & perpetuam. Also it ought to be with a double ee, and not elemosinam, sed *non* allocatur; for as to the first exception it is but surplusage, and as to the other, it is the common course. Another exception was taken to the writ, because that the words are, Quod clamat esse jus & hæreditat' sua, without saying in jure collegij. Anderson, The writ is good enough. If a parson pleads that he is seized, he shall say

in jure ecclesiæ, for he hath two capacities, and without those words he shall be intended to be seized in his **[179]** own right: but if an abbot plead that he was seized he needs not such words, for that he hath not any other capacity: and so of dean and chapter, mayor and commonalty, and afterwards the writ was awarded good, and that the tenant should answer over, vide Liber Entries, 236, 237. It was also moved, if the colledge should count of his seisin within 30 years, because that the corporation never dyes, and then if he count upon his own possession: and it was holden, that if the warden of the colledge that now is, was ever seised, he ought to count upon a seisin within 30 years: but upon the seisin of his predecessor he ought to count of a seisin within 60 years, as another common person: for the change of the head, if such seisin, is as the dying seized, and descent of a common person.

MICH. 15 ELIZ. IN THE KINGS BENCH.

CCLXXVIII. WOOD AND CHIVERS CASE.

In ejectione firmæ between Wood and Chivers, the case was, that the Bishop of Salisbury let the same Chivers the manor of Lanington for 80 years for 40l. rent, payable at four usual feasts, upon condition that if the rent be behind by the space of three months after any of the feasts in which, &c., then a re-entry: the bishop dyed, after confirmation, J. S. was created bishop, who granted to R. the office of receiver of all his revenues, &c. exercend' per se vel deputat. suum; and afterwards the bishop made a special letter of attorney to the said R. to demand the rent, and if it were behind to re-enter: R. at the last day of the three months came to the capital messuage of the said manor, an hour before the setting of the sun; for to demand the rent due at midsummer then last past, but none was there on the part of Chivers the lessee to pay the rent, for which R. left his servant in the hall of the said messuage, commanding him to stay there, and if any came to pay the said rent, that he give to him notice thereof, and afterwards he went out of the same house, and walked in a lane which was within the gate of the house, and did not return into the house until the sun was set, and then he returned, and because the rent had not been paid, he digged a clod of the land in the name of the bishop, and so re-entred: and afterwards the bishop let the said manor to W. for three years by deed, signed and sealed; and because Chivers continued his possession notwithstanding the re-entry, he made also a letter of attorney to M. to enter into the said manor in the name of the bishop, and to deliver the said deed of the said lease to the said W. upon **[180]** the land, as his deed and these two deeds the bishop in his chamber delivered to the said W. but not as his deed: but he said unto him, Here is the lease, and a letter of attorney to M. and he shall enter in my name, and deliver to you the deed of his upon the land, as my deed upon the land: whereupon he took the two deeds, and delivered them over to M. who by force thereof entred upon the land, &c. An exception was made, because it doth not appear here that the bishop delivered the letter of attorney to M. himself, nor to the use of M. and then it may be taken, that the deed of letter of attorney was delivered to M. to keep only, and not as his deed. But that exception was now allowed: for it was holden that the livery in the manor was good enough, and so the letter of attorney sufficient; for in all deeds of feoffments in which letters of attorney are contained, the livery of the deed is to the feoffee only, and no mention made of any delivery to the attorney, for by such letter of attorney no interest is to pass, but only an authority. And note, it was resolved by all the justices, that in the computation of these three months there ought to be allowed to every month 28 days: and now we are to see if this rent be well demanded, because the demand was made an hour before sun-setting, and then the party went out, and walked in the lane till the setting of the sun, without any other demand: and it was moved that this walking in the lane, which was not a common high-way, but a private way, and that the house of the said farm was of the one side of the lane, and the farm-land on the other, and so the land parcel of the farm, and then his walking there is a continuance of the demand; quod Catlin concessit, was the lane a high-way, or not, for the manor is on both side. And it was agreed by all the justices, that if the lessor cometh to

the land before the last hour, viz. in the morning, or in the afternoon, and demands the rent, and afterwards goes off the land, and is not there at the last instant of the day, the same is not a sufficient demand, although that return be presently after the sun is set: and by Gerrard Attorney-General, If the lessor cometh upon the land at the last day before the last instant, as in the morning, &c. and demands the rent, and continues there upon the land till the sun be set, without making any other demand, yet the demand for the manor is good enough, for his presence there is the continuance of the demand, quod fuit concessum per totam Curiam. And by Catlin, If the lessor after his demand in the morning departeth off the land, and before the last instant returneth, and stays upon the land till sun-setting, there is the continuance of a demand, without any further demand, which Wray Chief Justice concessit. And it was holden in this case, that where R. left his servant in **[181]** the house to stay there, and to signifie to him that if any person came to pay the rent, that that was not any continuance of the demand, for R. himself was but a servant, and he in that business could not make a servant: and Catline said, that the bishop himself might by word command his servant to demand a rent, and to make a re-entry, quod fuit concessum, but in our case R. had not commanded his servant to make any demand: and so here upon the whole matter is not any sufficient demand; and so Wray Chief Justice said.

CCLXXVIII. TRIN. 29 ELIZ. IN THE COMMON PLEAS.

Action upon the case was brought for these words, Thou wouldst have stoln my cloak if J. S. had not come in the way; and thou art a thief, and I will prove it. After verdict it was found for the plaintiff. It was objected in arrest of judgment, that these words were not actionable: for the first words, thou wouldst have stoln my cloak, &c. do not by law give any cause of action, and when the words subsequent, thou art a thief, are depending upon the said former words, and to be construed as spoken in respect of them, and upon that intent. But the opinion of the whole Court was to the contrary, and that the said latter words should be taken and construed in abstracto by themselves, as in gross, and not as dependant upon the former words, and afterwards judgment was given that the plaintiff should recover.

MICH. 26 ELIZ. IN THE COMMON PLEAS.

CCLXXIX. HUNGERFORD AND WATTS CASE.

Words.

Hungerford brought an action upon the case against Watts, for that the defendant had said, that the plaintiff had caused the defendant to be arrested with forged writs. It was objected, that the words were not actionable; for it might be that the writs were forged by strangers without the privity of the plaintiff, and that the plaintiff not knowing them to be forged procured the arrest. But the opinion of the Court was, that the words were actionable; for the word (caused) extends as well to the forgery as to the arrest, and so amounts to the slander of forgery.

[182] CCLXXX. MICH. 19 ELIZ. IN THE COMMON PLEAS.

Costs.

In an action upon an escape the plaintiff is nonsuited: it was holden that the defendant should not have costs. Note, the words of the statute upon an action upon the statute of 23 H. 8. for any offence or tort personal to be supposed to be done immediately to the plaintiff. Notwithstanding this action is quodam modo, an action upon the statute 1. by equity of the statute of West. 2. cap. 11. which giveth it expresly against the warden of the Fleet: yet properly it is not an action upon

the statute, for in the declaration in such an action no mention is made of the statute, which see in the Book of Entries, 169, 171. and also here is not supposed any immediate personal offence or wrong to the plaintiff: and an action upon the case it is not, for then the writ ought to make mention of the escape, and that it doth not here, and yet at the common law, before the statute of Westm. 2. an action upon the case lay for an escape, and so by Dyer, Manwood, and Mounson, costs are not given in this case. And by Dyer upon nonsuit in an action upon the statute of 8 H. 6. the defendant shall not have costs, for it is not a personal wrong; for the writ is quod disseisivit, which is a real wrong.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CCLXXXI. HOLLINGSHED AND KINGS CASE.

Hollingshed brought debt against King, and declared, that King was bound to him in a recognisance in 200l. before the Mayor and Aldermen of London in interiori camera of Guildhall in London: upon which recognizance the said Hollingshed before brought a scire facias before the said mayor, &c. in exteriori camera, and there had judgment to recover; upon which recovery he had brought this action; and upon the declaration the defendant did demur in law, because that the plaintiff in the setting forth of the recognizance had not alledged, that the Mayor of London had authority by prescription or grant to take recognizances, and if he had not, then is the recognizance taken coram non Judice, and so void; and as to the statute of Westm. 2. cap. 45. the same cannot extend to recognizances taken in London, which see by the words, de his quæ recordata sunt coram cancellario Domini Regis & ejus justiciariis, qui recordum habent & in rotulis eorum irrotulantur, &c. and also at the time of the making of that statute, the City of London had not any sheriffs **[183]** but only bayliffs: and the statute ordains, that upon recognizance process shall go to the sheriffs, &c. therefore not to them. But the whole Court was clear to the contrary; for we well know, that they of London have a Court of Record, and every Court of Record hath authority incident to it to take recognizances for all things which do concern the jurisdiction of that Court, and which arise by reason of the matters there depending. Another matter was objected, for that the recognizance was taken in interiori camera, but the Court was holden in exteriori camera, therefore it was not well taken. But as to that Anderson Chief Justice said, Admit that the recognizance was not well taken, yet because that in a scire facias sued upon it, the defendant shall not take any advantage, he shall be now bound by that admittance: as if one sues a scire facias, as upon a recognizance; whereas in truth there is not any such recognizance, and the party pleads admitting such record, and thereupon judgment is given against him, the same is not void, but voidable. And Fleetwood Recorder of London, alledged many cases to prove the Courts of the King ought to take notice, that those of London have a Court of Record; for if a quo warranto issueth to the justices in eyre, it doth not belong to them of London to claim their liberties; for all the Kings Courts have notice of them: and at the last, after many motions, the better opinion of the Court was, that the plaintiff should recover; Periam aliquantum hæsitavit: and it was said by Anderson, and in a manner agreed by them all, that if dependant this demurrer here, the judgment in London upon the scire facias is reversed, yet the Court here shall proceed, and take no notice of the reversal.

CCLXXXII. MICH. 20 ELIZ. IN THE COMMON PLEAS.

Demises.

A man seized of a barn in which the tythes of certain lands have used to be inned, let the same by these words, Demise and to farm-let the barn, with all tythes belonging to the same; it was holden, that by that demise the tythes did not pass, but tythes which had usually been demised with the barn, passed by such words, as by the

demise of an house, cum omnibus terris eidem pertinent', all the lands pass which have used to be demised with the said house; for the demising usually of the tythes with the barn makes the tythes belonging to the barn, but not the inning.

[184] MICH. 30 ELIZ. IN THE COMMON PLEAS.

CCLXXXIII. HALTONS CASE.

Recognisance. Inrollment. Chancery. Attornment.

A recognizance was acknowledged before J. S. who was one of the Masters of the Chancery, and before the same was inrolled, the conusee dyed; the point was, whether at the request of the executors of the conusee it might now be inrolled: it was the opinion of all the justices, that upon the request aforesaid it might be inrolled, like as it was of a conusance of a fine taken before a Judge, which may be removed out of his hands by a certiorari, although it be not a record before that it be certified, in the speaking of that case. It was made a question, whether the Court of Chancery might help a man who purchased lands for valuable consideration, where there wanted the words (heirs) in the deed of purchase, or not; but the point was not resolved. But in that case it was agreed by all the justices, that after a fine is levied of land, that the Chancery may compel the tenant of the land to attorn: and so where an annuity or rent is granted to one for life or in fee, and the deed is executed, sealed, and delivered, but no seisin is given to the party of the rent or annuity; the Court of Chancery may decree a seisin of the rent to be given and the rent to be paid to the grantee, and that was said to have been often times decreed in the said Court of Chancery.

CCLXXXIV. MICH. 30 ELIZ. IN THE COMMON PLEAS.

Intrusion. Trespass.

Note, by Anderson Chief Justice, if one intrude upon the possession of the King, and another man entreth upon him, that he shall not have an action of trespass for that entry, for that he who is to have and maintain trespass, ought to have a possession: but in such case he hath not a possession, for every intruder shall answer to the King for his whole time, and every intrusion supposeth the possession to be in the King, which all the other justices agreed, except Periam, who doubted of it. And Rhodes Justice said, and vouched 19 E. 4. to be that he cannot in such case say in an action of trespass. Quare clausum suum fregit.

[185] CCLXXXV. MICH. 29 ELIZ. IN THE COMMON PLEAS.

Remainder. Mortgage.

Note, it was holden by Popham Chief Justice, and so said by him to have been resolved upon a special verdict in the county of Somerset, 20 Eliz. that where a lease was made unto husband and wife for their lives, the remainder to the heirs of the survivor of them, that the same was a good remainder notwithstanding the incertainty, and that in that case, after the death of the wife, he should have judgment to recover the land. But if a man be possessed of a term for 20 years in the right of his wife, and he maketh a lease thereof for 10, rendring rent to him, his executors and assigns, and dyeth, that in such case, though the wife surviveth, yet he shall not have the rent, because that she cometh in paramount the lease: but if a man be possessed of a term in the right of his wife, and mortgageth for payment of a certain sum of money at a day certain, and before the day the wife dyeth, and the husband payeth the money at the day, and then dyeth; whether his executors, or the administrators of the wife, should have the term, was not then resolved: ideo quare that case.

TRIN. 32 ELIZ. IN THE EXCHEQUER.

CCLXXXVI. BARTASE AND HINDS CASE.

Note, Manwood Chief Baron gave it for a general rule for all counsellors at law, that they did not advise any collectors of subsidies or fifteens, to exhibit bills in the Exchequer Chamber for the non-payment of subsidies, &c. for such bills should not be allowed hereafter, because they had remedy by distress: also it was holden, that if any be assessed for the fifteen which he ought to pay, or if two towns are to pay together, and the one town be taxed more than it ought to be, or had been accustomed, those which are grieved by such sesment may have a commission out of the Exchequer, which is called ad æqualiter taxand'; and that was put in ure in a case between Bartase and Hind, where one of them was lord of the town of Little Marloe, and the other of Hedford: and it was also holden, that fifteens are to be levied of goods and chattels properly, and one township sometimes is richer than another, and therefore it is not reason that they pay their fifteen always according to the same proportion; but by Clark Baron, where the custom hath been that the fifteen should be taxed according to the quantity of acres, there the rate and purport shall be always one, whosoever holds the land, and as to the commission ad æqualiter taxand', Manwood and Fan-**[186]**-shaw said, that they could shew above twenty presidents of it.

MICH. 17 & 18 ELIZ. IN THE KINGS BENCH.

CCLXXXVII. BARNARD AND TUSSERS CASE.

Debt.

Barnard recovered in a scire facias upon a recognizance against Tusser, and afterwards brought an action of debt upon the same recovery, and it was adjudged maintainable, notwithstanding that it was objected, that the judgment in such scire facias is not to recover debt, but to have execution of the judgment. And by Wray Chief Justice, If in a scire facias to have execution of an annuity the plaintiff hath judgment, upon such judgment he shall have an action of debt.

MICH. 17 & 18 ELIZ. IN THE KINGS BENCH.

CCLXXXVIII. THE EARL OF ARUNDEL AND BRADSTOCKS CASE.

The case was, the Earl of Arundel let lands to Bradstock for years, upon condition that the lessee should not do any act by which his goods and chattels might be forfeited: Bradstock committed felony, and before any attainder he obtained his charter of pardon: it was holden in this case, that the earl might lawfully enter; but if the words of the condition had been, Whereby the goods ought to be forfeited, then it had been otherwise; for before attainder they ought not to be forfeited.

MICH. 17 & 18 ELIZ. IN THE KINGS BENCH.

CCLXXXIX. TAYLORS CASE.

Outlawry. How avoided by Plea in Person.

Taylor was outlawed in debt, and a supersedeas of record was delivered to the sheriff before the awarding of the exigent: it was holden that the party should avoid

the same by plea; then it was moved, if the plea should be pleaded by attorney, or in person: to which it was said by Manwood, that where matter in fait is pleaded in avoidance of an outlawry, it ought to be pleaded in person, but matter of record by attorney. And Ford Prothonotary said, It was so agreed in Sir Thomas Chamberlains case in 7 Eliz. and so it was adjudged in this case.

[187] CCXC. MICH. 17 AND 18 ELIZ. IN THE KINGS BENCH.

The case was, The Prior of Norwich made a lease for life by indenture, by which the lessee covenanted to find victuals to the cellerer at all times when the cellerer came thither to hold court; the priory was dissolved, and the possessions given to the dean and chapter newly erected: it was holden in this case, that the lessee should perform that covenant to him who supplyed the office of cellerer, scil. the steward: and it was also holden, that the lessee should have an action of covenant against the assignee of his lessor, or his lessee, at his election.

CCXCI. MICH. 19 & 20 ELIZ. IN THE KINGS BENCH.

Joyntenants. Grants.

A. B. & C. three joyntenants give their lands to D. in tail, the remainder to A. in tail: it was the opinion of Mead, that the remainder is void: Manwood and Harper, A. and B. joyntenants, A. makes a lease for life of his moiety to C. and grants the reversion to B. the same is good, quod Curia concessit. A. and B. joyntenants of a term, A. grants his moiety to his companion, the same is good without question, if it be by deed; but if it be by word, quære.

HIL. 20 ELIZ.

CCXCII. HILLS CASE.

Hill. 20 Eliz. Rot. 371. Giles Hill seized of a close of pasture called Pitmonde, and of Broome Acre, two other closes in his demesne as of fee; and so seized the said Giles, and Agatha his wife, and Robert their son, and B. his wife, by indenture leased the same Broome Acre, and the said other two closes to W. Hutchin and B. and his wife for 90 years, si quis eorum tam diu vixerit reddendo inde annuatim prædicto egidio, & uxori ejus, & hæredibus ipsius egidij, viz. pro Broome Acre 3s. 4d. & pro una clausura 10s. & pro altera 20s. ad quatuor anni terminos, with clause of re-entry, if any part or parcel of the said rent be behind, &c. Giles and Agatha dyed: the son sold the reversion of Broome Acre 12 Febr. 12 Eliz. by deed indented, rendring rent to Smith and Heale; the rent of Broome Acree is behind, Smith and Heale enter, and lease the same to Reynolds for three years, who being ejected, brings ejectione firmæ and judgment was given for him, for that they are several reservations, and several conditions: and a difference was taken between this and Winters case; for in Winters case **[188]** the rent reserved originally is entire; but in this case the rent is originally several; and also in Winters case the condition was, that if any part of the rent be behind, that the lessor should re-enter into the whole. Note that the rent reserved for Broome Acre was 3s. 4d. and the condition was, si contingat prædict' reddit', ou ascun parcel de ceo to be behind in part, or in all, by one month after any feast, &c. in quo solvi debuit, quod tunc bene licebit præfat' egidio, &c. in omnia & singula præmissa superius specificat' re-entrare; et nomine, that pro 10 denariis pro Broome Acre pro uno quarterio anni aretro existent, the vendees of the reversion did enter.

CCXCIII. Mich. 19 Eliz. In the Common Pleas.

Leases.

Note by Dyer and Manwood Justices, A. leaseth to B. for years, the remainder to the right heirs of the said B. and makes livery accordingly, that the said remainder is void, because that there is not any person in esse who can take presently by the livery, and every livery ought to have its operation presently: but where a lease is made to B. for life, the remainder to his right heirs, that he hath a fee executed, and it shall not be in abeyance; and judgment was given accordingly.

CCXCIV. Hil. 23 Eliz. In the Common Pleas.

The case was, A man made a lease of a garden, containing three roods of land, the lessee is ousted, and he brought ejectione firmæ, and declared, that he was ejected of three roods of land: and by Rhodes Serjeant, The declaration shall not be intended that the plaintiff was ejected out of the garden of which the lease was made, which Dyer granted; for gardinum is a thing which ought to be demanded by the same name in all præcipes: and this action of ejectione firmæ is higher than an action of trespass; and the plaintiff if he recover shall be put into possession by it. Mead and Windham held the contrary; and they agreed, that in all real actions a garden shall be demanded by the name of gardinum. But this action of ejectione firmæ is in the nature of trespass, and it is in the election of the party to declare, as he doth, or for to declare of the ejectment of a garden: for a garden may at one time be used for a garden, and at another time for plough-land: but they conceived the better course to be, and the better order of pleading to have been, if the plaintiff had declared, that he was ejected of a garden containing three roods of land, as in the lease it is specified, vide 22 E. 4. 13. Assise of a garden, vide Cook 11 Part, Savells case. Ejectione firmæ of a close vocat' Leedes, containing three roods, a rule that such action lyeth not of a close, although it hath a certain name, but it **[189]** ought to be of so many acres, and of what nature every acre is.

CCXCV. Mich. 19 Eliz. In the Common Pleas.

An action of debt was brought by an administrator, who declared, that the administration was committed unto him by the Archbishop of Canterbury: it was holden, that in such case he needed not to declare ratione prærogativæ suæ; or that the intestate had bona notabilia in divers diocesses; for if the intestate had not goods in divers diocesses, the same shall come and be shewed on the other side; and then the plaintiff shall shew the same in certain, and to that purpose divers presidents were shewed to the Court by Sandbege and Best, principal Clerks of the Court; and the same was also affirmed by the Prothonotaries of the Court of Common Pleas.

CCXCVI. Mich. 19 Eliz. In the Kings Bench.

In an action upon the case, the plaintiff declared upon trover and conversion to his use; it was pleaded by Plowden, that the defendant before the action brought, had lawfully sold the goods, whereof, &c. and he demanded judgment of the action: as if one hath goods by trover, and bails them over before any action brought against him, detinue doth not lye against him, which Wray Chief Justice concessit, as to the detinue: but where such a person, who hath goods by trover, bails them quibusdam ignotis, such an action will lye against him.

CCXCVII. MICH. 19 ELIZ. IN THE COMMON PLEAS.

Retorn of the Sheriff.

In a writ of dower the demandant recovered by default, and the sheriff took an enquest de officio, by which it was found that the husband did not dye seized prout eis constare poterit; and that inquisition is retorned by the sheriff, and filed: it was moved by Mead, that the office and inquisition was not good, for the office ought to have expresly found, that the husband dyed seized, or not, and not ambiguously as it doth here, prout eis constare poterit, and therefore by the award of the Court, the retorn was taken off the file because it was insufficient, and a writ de novo awarded.

[190] CCXCVIII.

A. is bound to B. upon condition to stand to the arbitrement of certain persons, who award that B. shall make a release to A. of all actions, debts, duties, and demands at the request of A. and afterwards A. comes to B. and requires him to make him a release; who said to him, that he was unlearned, and that he would go to one to make it, and the next day after the request he seals and delivers it to A. who accepts of it: it was holden by Windham and Mead, that notwithstanding that acceptance, the obligation was forfeited; for they said, that presently after request, he ought to have done it in the speediest manner that might be. Vide acc' 15 E. 4. 31. Vide also Wottons case, 16 Eliz. Dyer 338.

MICH. 26 ELIZ. IN THE COMMON PLEAS.

CCXCIX. THE DEAN AND CHAPTER OF CHRIST CHURCH AND PAROTTS CASE.

Grants of the King.

Note in the Common Pleas in a case between the Dean and Chapter of Christ Church in Oxford and Parott; it was holden by the justices, that if the King grants lands unto a corporation by another name than that which they were named before, yet the land shall pass, and the letters patents shall be to them as a new incorporation, &c.

MICH. 19 ELIZ. IN THE COMMON PLEAS.

CCC. BEECHERS CASE.

Jurors.

Beecher being a gentleman of the Middle-Temple, was retorned in an attaint, and before the retorn of the pannel, he became a minister of the church; and now at the day of the retorn he appeared, and prayed to be discharged according to the priviledge of those of the ministry: but the Court would not allow of his prayer, because that at the time of the pannel made he was a lay-man: wherefore he was sworn one of the jury.

[191] Hil. 19 Eliz. In the Kings Bench.

CCCI. Vernon and Sir Thomas Staveleys Case.

Discontinuance.

Tenant in tail made a lease for the life of the lessee according to the statute of 32 H. 8. and by Wray and Gawdy Justices, the same was not a discontinuance: but if tenant in tail levyeth a fine which bindeth his issue by the statute of 4 H. 7. 32 H. 8. that same is a discontinuance. Look upon the Statute of Leases, and of Fines; the words in the former are, scil. Such fines shall be good and effectual in the law; but in the other, scil. Such fines shall be a bar against the conusor and his heirs. And if tenant in tail after such a fine dyeth without issue, the donor cannot enter, but is put to his formedon: and as to the principal case, Dyer agreed in opinion with Wray and Gawdy.

Trin. 28 Eliz. Rot. 1027.

CCCII. Milborne and the Inhabitants of Dunmowes Case.

Upon Statute of Hue and Cry.

Milborne brought an action upon the Statute of Winchester against the inhabitants within the hundred of Dunmow in the county of Essex: it was found by special verdict, that the plaintiff was robbed the 23 of April, inter horam secundam & matutinam tempore nocturno, & ante lucem ejusdem diei; and the opinion of the Court was clear, that the plaintiff should be barred, for the said statute provides for ordinary travel, as in the case of Archpole, who came to his inn after sun-set, and ante noctem in tempore diurno, which is an usual time for travellers to come to their inn; but the law doth not receive any in protection of this statute, which travel in extraordinary hours; for it is the folly of the traveller to take his journey so out of season; and the inhabitants are not bound to leave their houses, and attend the high-ways tempore nocturno: and another reason was alledged by the justices, because that the said statute appoints watch to be kept in the time of night à Festo Assensiones usq; Festum Sancti Mich. and this robbery was done the 23 of April, so out of the said time: and afterwards judgment was given against the plaintiff.

[192] CCCIII. Hil. 29 Eliz. In the Common Pleas.

Devises.

Serjeant Fenner demanded the opinion of the Court upon this case. A. devised lands to his wife for life, and afterwards to B. his son, and his heirs, when he should come to the age of 24 years, and if his wife dyed before that his said son should attain to the said age of 24 years, that then J. S. should have the said lands until the said age of the said son: A. dyed, J. S. dyed, the wife dyed, the son being within the age of 24 years; if the executors of J. S. should have the lands after the death of J. S. until the said age of the son, was the question. Anderson and Periam conceived that he should not; for this interest limited by the will to J. S. was but a possibility, which was never vested in him, and therefore could not by any means come to his executors. Rhodes and Windham doubted of it. And Fenner put the case 12 E. 2. Fitz. Condition 9. where land is mortgaged to J. S. upon payment of money to the said J. S. or his heirs, such a day, and before the said day J. S. by his will deviseth, that if the mortgagor pay the money, that then A. B. shall have them, that this devise of that possibility is good, which case all the justices denied. And Windham put the case between Welden

and Elkington, 20 Eliz. Plowd. 519. where lessee for years devised his term to his wife for so many of the years of the said term as she should live; and if she dyed within the term, that then his son Francis should have the residue of the years not incurred, Francis dyed intestate, the wife dyed within the term the administrator of Francis had the residue of the term, and yet nothing was in Francis the intestate but a possibility. A lease was made to one Hayward, his wife, and one of his children, habendum to Hayward for 99 years if he so long live, and if he dye within the said term, that then the said wife should have the said term for so many of the years as should be to come at the time of the death of her husband, and if she dyed also within the said term, that then the child, party to the demise, should have the same for so many of the years of the said term as should be not expired at the time of the death of the wife. And the case of Cicell was cited Dyer 8 Eliz. 253. A lease was made to William Cecill pro termino 41 annorum si tam diu vixerit: et si obierit infra prædictum terminum, extunc Eliz. uxor prædict. Will. Cicell habebit, & tenebit omnia & singula præmissa pro residuo termini prædict. incompleti, si tam diu vixerit: et si prædict. Eliz. obierit infra terminum prædict. Tunc Willielmus Cicell the son, &c. shall have and hold it pro residuo termini prædict completi. And it was holden by Catlin and Dyer, that these remainders were void, for the term is determinable upon the death of William Cecill the father, and the residue of the **[193]** said term cannot remain: and by the Lord Anderson, the remainders of the term limited ut supra are utterly void; for every remainder ought to be certain, but here is no certainty; for it may be that the first possessioner of the term may live longer, so as he in the remainder cannot know what he shall have. And such was also the opinion of Rhodes. And he put the case between Gravenor and Parker, 3 & 4 Phil. & Ma. Dyer 150. A lease was made to A. for life by indenture, et provisum fuit by the same indenture, that if the lessee dyed within the term of sixty years then next ensuing, that then his executors should have in right of the lessee so many of the years as should amount to the number of sixty years, to be accounted from the date of the indenture; and it was holden, that that secondary interest to the executors was void, and that the words concerning the same did sound in covenant.

CCCIV. Trin. 31 Eliz. In the Common Pleas.

Executors Action.

The case was, A. made B. and C. his executors, they took upon them the charge of the administration, and afterwards B. dyed; and now an action of debt was brought against the surviving executor, and the executor of the other executor, and the writ was abated, because against the surviving executor it ought only to be brought.

Pasc. 30 Eliz. In the Common Pleas.

CCCV. Smith and Babbs Case.

Action upon the Case. Stopping of Water.

Smith brought an action upon the case against Babb for stopping of water incessanter decurrent. by his land, by which his land was drowned, and his grass rotted: exception was taken to it, because it is not alledged; that the water had so run time out of mind. Gawdy Justice, If the water hath run there but for one year, if the defendant hath diverted it, so as he hath drowned the plaintiffs land, the action will lye well enough.

TRIN. 26 ELIZ. IN THE COMMON PLEAS.

CCCVI. BASIL JOHNSONS CASE.

Priviledge of a Clerk in Court.

Basil Johnson one of the clerks of the Chancery, was impleaded in the Common Pleas by bill of priviledge, by an attorney of the said Court, and now Basil came into Court, and shewed that he is one of the clerks ut supra, and prayed **[194]** his priviledge; but the whole Court was against it, because the plaintiff is as well priviledged in this Court as the defendant is in the Chancery, and was first interessed in his priviledge by the bringing of his writ, but the defendant was not entituled to his priviledge before the arrest; and afterwards by the award of the Court, the said Basil was ousted of his priviledge.

32 ELIZ. IN THE COMMON PLEAS.

CCCVII. COLLIER AND COLLIERS CASE.

Prohibition.

Between Collier and Collier the case was, that the plaintiff was sued for incontinence in the Spiritual Court, and there they would have him answer upon his oath if he ever had carnal knowledge of such a woman; upon which he prayed a prohibition: vide inde F. N. B. 41. a. Register 36. Et nemo tenetur seipsum prodere: but the Court would advise of it.

32 ELIZ. IN THE COMMON PLEAS.

CCCVIII. MOUNTNEY AND ANDREWS CASE.

Execution.

In a scire facias by Mountney against Andrews of Grays-Inn, upon a judgment in debt, the defendant pleaded, that heretofore a fieri facias, at the suit of the now plaintiff, issued to the Sheriff of Leicester, by force of which the said sheriff took divers sheep of the defendants, and that as yet he doth detain and keep them. It was holden by the whole Court to be a good plea, although he did not say, that the writ was retorned; for the execution is lawful notwithstanding that, and the plaintiff hath his remedy against the sheriff.

HIL. 29 ELIZ. IN THE COMMON PLEAS.

CCCIX. DAWBNEY AND GORES CASE.

Between Dawbney plaintiff and Gore and Gon defendants, in a writ of disceit, in arrest of judgment it was moved, that two are accountable to one, and the one of them accounts without the other, that that is not any account, and then no account can be assigned in that. As to that, it was said by Popham Attorney General, that notwithstanding that one be not compellable to account without his companion, and by way of action of account, the one shall not account without the other, **[195]** unless the process be determined against him, and then he who appeareth hath accounted and the other against whom the process is determined, hath purchased his charter of pardon, the account made by his companion shall bind him. Vide inde 41 E. 3. 13. Yet if one of the accomptants will account willingly, the same is a good account: and in account, if one confesseth, and the other pleadeth in bar, the confession of the one shall bind the other; and such was the opinion of the Court. Another matter was

moved in this case, because that one Tedcastell and Swinnerton, being accountable to the said Gores and Dawbney, they have accounted to Dawbney only, and he alone hath accepted of the account, and that is not any account, therefore no desceit, but the action of account doth remain. To which it was answered by Popham, that the same was a good account, being accepted by Dawbney, and should bind the Gores; for an account is a personal thing, as an obligation, which may be released by one of the obligees. Vide 14 E. 4. 2. Where one was accountable to two, and the one of them did assign auditors, before whom the accountant is found in arrearages, and thereupon both of them brought debt upon account, and well: and so none of the exceptions were allowed by the Court.

MICH. 33 ELIZ. IN THE COMMON PLEAS.

CCCX. TRIVILIANS CASE.

Devises. Tenances. Attorneys make Livery.

Tho. Trivilian tenant in tail of White Acre, Black Acre, and Green Acre, leased White Acre for years to B. and Black Acre to C. and afterwards made a feoffment of all three acres to F. and others by deed, in which deed was comprised a letter of attorney, in which he ordained Harris, and three others, his attorneys, joyntly and severally to enter in the premises, and every part thereof in the name of the whole, and possession in his name to receive, and afterwards to make livery, &c. with other ordinary and usual words; and it was expressed in the said deed of feoffment, that the feoffment should be to the intent to perform his last will: and afterwards one of the said attorneys entred into the land demised for life, and expelled the tenant for life, and made livery and seisin to the feoffees accordingly; and afterwards the said Harris, another of the attorneys, scil. one of the joynt lessees, being one of the three attorneys, made livery of the land demised for years; and after the feoffor in the time of Queen Eliz. by his last will devised, that the feoffees should be seized of the land, rents and reversion, until of the issues and profits thereof certain sums of mony should be paid to his younger sons, and dyed. And exception **[196]** was taken to the pleading, because it is not specially shewn, that the land devised was holden in socage. And that was holden a sufficient exception: and the Court was of opinion, that the opinion of Dyer, Whiddon, and Bendloes in 16 Eliz. was not law; for by the common law no land was devisable, but by custom, which ought to be pleaded where title is made by devise. And now by the statute all lands holden in socage are devisable, and but two parts of the land holden by knight service; and therefore he who would make title to himself by a devise, ought to shew the tenure of it, and so it was lately adjudged in the Kings Bench in Thompsons case. And by Anderson and Periam, This feoffment was well executed for the manner of it, for the letter of attorney is conjunctim & divisim ad intrandum in omnia & singula præmissa; and upon these words one attorney may make livery in one parcel of the land, and the other attorney in the other parcel, and in this case, if one of the said attorneys make livery in one part only, without medling with the residue by himself, or by any other, the same shall pass; for it is not necessary that all pass, or nothing at all.

7 ELIZ. DYER 79.

CCCXI. THE DUTCHESS OF SUFFOLKS CASE.

Adrian Stokes and the Lady Francisca Dutchess of Suffolk his wife, brought a quare impedit against the Bishop of Exeter and others: the bishop pleaded, and demanded judgment of the writ, because he said, It appeareth by the writ, quod prædicta Francisca uxor præfati Adriani, nominatur in dicto brevi Domina Francisca Ducissa Suffolk, ubi per legem terræ eadem Francisca by her marriage betwixt the aforesaid Adrian, and her the said Frances, had lost her name of dignity, and ought

to be named Francisca uxor præfati Adriani: wherefore, and because the said Frances is named Lady Dutchess of Suffolk in the said writ, therefore he demanded judgment of the writ. And afterwards the plaintiffs did discontinue their suit, and durst not proceed. Vide the case 7 E. 6. Dyer 79.

[197] MICH. 4 & 5 PHIL. & MARY.

CCCXII. THE QUEEN, DUE, AND KIRBYS CASE.

The King and Queen brought a writ of disceit against Due and Kirby, and declared, that Colley was seized of certain lands in fee, and holden of the King and Queen as of their manor of Westbury, which manor is ancient demesne, and so seized, levied a fine to the said Due for conusans de droit &c. Due rendred unto Colley for life, the remainder over to Kirby in fee; Colley dyed, Kirby entred as in his remainder: Kirby pleaded, that the land is frank-fee, &c. upon which they are at issue; which issue depending, not tryed, Due dyed: it was moved that the writ should abate. But it was allowed; for this action is but trespass in its nature for to punish the said disceit: and Due had nothing in the land, but is named only because he was party to the disceit. And no land is to be recovered, but only the fine reversed.

PASC. 26 ELIZ. IN THE KINGS BENCH.

CCCXIII. RUSSELS CASE.

Execution.

Russel was condemned in an action of debt, and after the year and day the plaintiff sued a capias ad satisfaciend' against him, and he was taken by force of it, and committed to the marshal as in execution: it was holden by the Court, that the same was a void execution, and not only avoidable by error, and therefore the defendant was discharged, for it is not at any execution; and the plaintiff may have a scire facias when he will.

PASC. 26 ELIZ. IN THE KINGS BENCH.

CCCXIV. WROTH AND CAPELLS CASE.

Between Wroth and Capell the case was, that A. was indicted upon the statute of 8 H. 6. and exception was taken to the indictment, because there were no words of freehold in it, or to prove that the party grieved had any freehold, whereof he might be disseised: but because the words of the indictment were expulit & disseisivit, which could not be true, **[198]** if the party expelled and disseised had not freehold, therefore the exception was not allowed, &c. Another exception was taken to the indictment, for that the words were in unum tenementum intravit, and this word tenementum is too general, and an incertain word; and therefore for that cause the party was discharged. But the indictment was further in unum tenementum, & 10 acras terræ eidem pertinent. and as to those acres he was put to answer.
3 Leon. 102.

CCCXV. PASC. 26 ELIZ. IN THE COMMON PLEAS.

Execution.

Note, it was agreed by the Court, and affirmed by the clarks, that if an action of debt be brought upon an obligation against two upon one joynt præcipe, and the plaintiff hath judgment to recover, that one joynt execution ought to be sued against

them both; but if the suit were by original and several præcipe's, execution might be sued forth against any of them.

MICH. 8 & 9 ELIZ. IN THE COMMON PLEAS.

CCCXVI. BELFIELD AND ROUS'S CASE.

In dower (by Sibill Belfield, who was the wife of Anthony Rous) against Thomas Rous, they were at issue, upon detinue of charters, and it was found for the demandant; and it was further found, that the husband of the demandant, of whose seisin she demanded dower, dyed having issue Charles Rous, quodque idem Carolus & dict' Sibill perceperunt & receperunt per spacium sex annorum proxime post mortem dict' Anthonij the issues and profits of the said lands, whereof the demandant now demands dower; and that the said Charles afterwards dyed without issue, after whose death the said Thomas Rous entred, &c. And judgment was given for the demandant, and to recover damages after the death of her husband.

CCCXVII. PASC. 7 ELIZ. IN THE COMMON PLEAS.

Uses.

Before the Statute of Uses a feoffment is made to the use of a man sole, and a woman sole, and their heirs, and afterwards they inter-marry, and afterwards the Statute of Uses came: it was the opinion of the justices, that they should hold the land in such sort as they held the use, scil. by several and divided moieties; for by the said statute the possession shall be executed to the use, in such nature, condition, and quality as it was before.

[199] MICH. 28 & 29 ELIZ. IN THE KINGS BENCH.

CCCXVIII. SIR GERVAISE CLYFTONS CASE.

Quo Warranto.

A quo warranto was brought against Sir Gervaise Clyfton, and shewed, that the said Sir Gervaise was seised of a manor and a messuage, within which he claimed to have a court with view of frank-pledge, and other liberties, and that without any grant or authority, usurpavit libertates prædictas: that the defendant pleaded quod non usurpavit libertates prædictas infra messuagium prædict' modo & forma; and thereupon it was demurred in law, for it was said, that the defendant ought to have said Non usurpavit libertates prædictas, nec eorum aliquam, for he ought to answer singulum; and also he ought to have pleaded as well to the manor as to the messuage, for if the defendant hath holden court within any place of the manor, it is sufficient. And the case 33 H. 8. Br. Travers sans ceo 367. was cited, an information was in the Exchequer, that the defendant had bought wools of A. B. contrary to the statute, the defendant pleaded, that he had not bought of A. B. and the plea was not allowed, for he ought to have said, that he had not bought modo & forma, for if he had bought of A. B. or J. S. the same is not any matter, nor traversable, which Cook denied to be law: and he conceived also that the information upon the quo warranto is not sufficient; for by the same the defendant is charged to hold a court, and it is not shewed what court, and it may be it was a court of pypowders, turn, &c. And vide 10 E. 4. 15, 16. a quo warranto contains two things, 1. claim, 2. usurpation. And here the defendant hath answered but to the usurpation, and it hath said nothing as to the claim: and it hath been holden here, heretofore, that he ought to make answer to both. And it hath been holden in a reading upon the Statute de Quo Warranto, which is supposed to be Frowicks reading, that a quo warranto doth not

lye of such liberties which do not lye in claim, as goods of felons, &c. which lyeth only in point of charter.

3 Leon. 184.

CCCXIX. Temps Roign Eliz.

The Prior of Bath leased his manor of A. to C. for life, rendring rent, and afterwards the priory was dissolved, the King leased the whole manor, cum pertinenciis, to Sir Walter D. kt. Dyer, The matter depends upon this point, if the demesne be severed from the services during the life of the lessee: and he conceived, that the lord cannot hold a court, if such a power be not reserved to him upon the lease. Weston, The ma-**[200]**-nor is in suspence during the lease, for a reversion upon an estate for life, and services in possession cannot be united to make a manor, but contrary if but parcel had been leased, quod Curia concessit. Welch, The demesnes are severed from the services for ever, as if they had been granted in fee; but here having regard to the lessor, the demesnes and services are united and made one manor; but as to the lessee, and all others, the services are in gross; and of that opinion was also Dyer. And he said, If a bishop leaseth his demesnes of his manor for life, and dyeth, the reversion shall be in his successor, and was in himself for his life in the right of his church: and if husband and wife seized of a manor in the right of his wife, lease the demesnes of the said manor for life, yet he hath the reversion in the right of his wife, and in such case it doth remain a manor; but if the husband sole had made the lease, he had gained the reversion to him, and so severed it from the manor.

CCCXX. Temps Roign Eliz.

Devises.

A. devised that his wife should take the profits of his lands, until his daughter should come to the full age of 25 years, and if the daughter dyed within the age of 18 years, then his wife should have the land for her life, the remainder over to J. S. The daughter became of the age of 18 years, and dyed before she came of the age of 20 years; and Dyer held clearly, that the remainder was gone; for the daughter accomplished, and survived the age of 18 years: and he said that the case late depending in the Kings Bench was this, The husband devised the profits of his lands to his wife for 25 years, and that then his son should have it in tail to him, and to the heirs of his body, &c. now before the 25 years expired he hath fee, and if he hath issue, then his estate is changed into tail: but by Carus he hath both estates, scil. fee-tail, and fee-expectant.

CCCXXI. Temps Roign Eliz.

Surrenders.

A woman tenant in tail made a lease not warranted by the statute, took a husband, had issue and dyed; the husband being tenant by the courtesie surrendred to the issue: it was holden that he should not avoid the lease during the life of the tenant by the courtesie: but yet some held, that the surrender ought to be by deed, as a lease to A. for life, the remainder to B. for life, the remainder to C. in fee; if B. surrenders to C. it must be by deed.

[201] CCCXXII. Temps Roign Eliz.

Extent. Condition suspended.

The case was this, A. leaseth lands to B. for years, rendring rent, with clause of re-entry; and afterwards debt is recovered against him: it was holden, that now the moiety of the rent and the reversion was extendable by elegit, and upon such extent, the condition is suspended during the extent, as well in the lessor, as in the party who hath the extent.

Temps Roign Eliz.

CCCXXIII. Mitchell and Nordens Case. Procedendo upon Aid-Prayer in Dower.

Elizabeth', &c. dilectis Jacobo Dyer, &c. monstravit nobis Elizabeth' Mitchell, quæ fuit uxor, &c. Quod cum ipsa prosecuta fuit coram vobis & sociis vestris, &c. Breve nostrum de dote unde nihil habet versus Thomam Norden &c. Et prædictus Thomas venit, & dixit, quod vir prædictæ Elizabethæ was seized, and leased to him for life with warranty; and for that cause he vouched to warranty Tristriam' Mitchell filium & hæredem dict' Richardi infra ætatem existen', & in custodia eo quod dictus Richardus die quo obiit, &c. Et hoc paratus est verificare. Unde non intendit quod vos præfati justiciarii nostri nobis inde inconsultis ulterius procedere velletis: et petiit auxilium de nobis, & habuit: et super hoc dies datus est tam præfatæ Eliz. quam dict. Tho. Norden à die Pasc. &c. Et dictum fuit præfatæ Eliz. Quod sequatur penes vos, quarum quidem allegatione prætextu vos in placito prædict. ulterius procedere distulistis, & adhuc differtis in ipsius Eliz. dispendium & gravamen: et super hoc, eadem Eliz. venit hic coram nobis in Cancellaria nostra; et petit breve nostrum de procedendo, inde in hac parte vobis dirigend': super quo quæsita fuit in eadem Curia Cancellariæ nostræ à Gilberto Gerrard, Attornato nostro generali, qui pro nobis in hac parte sequitur si quid dicere scivit, aut potuit, per quod dict' Tristriamus infra ætatem, & in custodia nostra existen' ut præfatur, ad warrantiam obligetur aut obligari debeat, aut si idem Gilbertus aliquid pro nobis habeat aut dicere scivit quare breve nostrum de procedendo præfatæ Eliz. in ea parte minime concederetur. Qui quidem Gilbertus adtunc, & ibidem dixit, quod præfat' Tho. Norden non informavit prædict. Gilbertum de aliquo, per quod prædict. Tristriamus in custodia nostra existen' ullo modo obligetur ad warrantizand', & eidem nihil dixit aut dicere scivit & potuit quia prædict. breve de procedendo eidem Eliz. in ea parte concederetur: nos inde nolentes eidem Eliz. justiciam ulterius differre in hac parte: vobis mandamus, quod **[202]** si coram vobis in placito prædict. taliter sit processum & allegat', tunc in placito illo, & in redditione Judicii in eodem placito cum ea celeritate quam de jure & secundum legem & consuetudinem hujus Regni nostri Angliæ poteritis procedatis, & partibus prædict. plenam & celerem, &c. dicta allegatione non obstante. Teste me ipsa, &c. Et super hoc eadem Eliz. petit Judicium & seisinam suam versus prædict. Thomam Norden de tertia parte tenementorum prædict. cum pertinentiis. Super quo visis, &c. consideratum est, &c. Quod prædict. Elizabetha recuperet seisinam suam versus præfatum Thomam Norden de tertia parte tenementor' prædictor'. Et quod idem Thomas expectet si prædict' Tristriamus tenementa prædict. unde &c. ei warrantizari debeat pro recompensatione valentiæ tertiæ partis prædict' versus eundem Tristriamum ratione warrant' illius habend' durant' minore ætate sua, et donec manus dict' Dominæ Reginæ à possessione terræ ipsius Tristriami amoveantur.

Virtute brevis istius mihi direct' ultimo die, &c. habere feci infranominat' Eliz. plenariam seisinam de tertia parte messuagii, viz. de una aula parcell' messuagij prædict. ac de una camera sive conclave in messuagio prædict. existent', necnon de uno solario, ac de una parcell' ambulatorij vocat' a Gallery, alia parcell' dict' messuagii necnon de tertia parte unius molendini, viz. de integro molendino prædict', per quemlibet tertium mensem quolibet anno durante vita, &c. occupand', & gaudend', &c.

CCCXXIV. Hil. 25 Eliz. In the Kings Bench.

Traverse.

In an action upon the case, the plaintiff declared upon certain corn which came to the hands of the defendant, and that he converted it, and supposed the coming to be to his hands in London. The defendant said, that he was seized of certain lands in R. in Berks, and that the plaintiff did thereof him disseise, and sowed the lands, and before severance he himself re-entred, and took away the corn, as was lawful for him to do absque hoc, that any corn came to his hands in London; and by the opinion of the whole Court, the traverse was holden to be good.

Hil. 25 Eliz. In the Common Pleas.

CCCXXV. Wingate and Sands Case.

Ejectione firmæ by Wingate against Sands: it was moved upon evidence, that a fine was levied, and in one term three proclamations were made, and before that the fourth proclamation was made, the term was adjourned, so as the fourth proclamation could not be made the said term: it was agreed **[203]** by the whole Court, that by that adjournment the fourth proclamation was not executed, but should be supplyed the next term, in which the fifth proclamation was to be made.

Trin. 29 Eliz. In the Star-Chamber.

CCCXXVI. The Lord Cromwell and Townsends Case.

Hen. Lord Cromwell exhibited a bill in the Star-Chamber against Roger Townsend Esq; for that the said Townsend in an action between James Tavernor plaintiff, and Ja. Cromwell, firmor of the said Lord Cromwell defendant in trespass, in the favour or unlawful maintenance of the said Tavernor, did procure a partial jury to be retorned. And upon the hearing of the cause, the matter given in evidence was, that the said Tavernor was a copyholder of the said Lord Cromwell, and that the said lord, pretending that the said Tavernor had forfeited copyhold, caused the said Ja. Cromwell to make an entry in the right of the said lord upon the said Tavernor, upon which entry Tavernor brought an action of trespass against the said Ja. Cromwell, in which action the parties were at issue upon the forfeiture; and before any venire facias issued, Tavernor hearing that one Steward, who was bayliff of the liberty under the Earl of Arundel, and who ought to have made the pannel, &c. was purposed to have made the said pannel not duly, viz. to have retorned in the same great gentlemen of the country, who were lords of manors in favour of the said Lord Cromwell; that he went to the said Roger Townsend, who was then one of the principal servants and agents of the said earl, and shewed unto him, that if those great persons and lords of manors be returned for the trial of the said issue, peradventure they would not so easily appear for the expedition of the said parties as gentlemen of an under-condition; and also many of them being lords of manors, and having customary tenants, and therefore not indifferent to try that issue; and prayed his order to the said Steward for the making of an indifferent pannel: upon which said conference with the said Steward for the making of an indifferent pannel, and shewing unto him that in doing and making of the same there was not convenient, nor any equal course to retorn knights, esquires, or lords, but rather such sufficient persons for the greater expedition of justice, and indifference of tryal: and afterwards the said Tavernor exhibited a petition, shewing all the special matter, and prayed him to give order for the making of an indifferent pannel for the trial of that cause; which petition was delivered to the earl by the said Townsend, in the name of the said Tavernor; upon which the said earl referred **[204]** the said matter, and the

ordering of the same to three of his chiefest agents and counsellors, viz. Dicksey, Townsend, and Chrell, and delivered to them the book of the freeholdry within the said liberty, who according to their commission made a pannel, which was retorned, and the jury passed with the said James Cromwell in the right of the said lord: and if that intermedling of Townsend with the matter, ut supra, &c. especially his conference with the bayliff, be maintenance or not, was the question: and by Anderson and Wray it was said for law, that because the said Townsend was in a manner a servant to the said earl, who had the retorn of the writs, and one of his principal counsellors and agents, and hearing ex insinuatione of the said Tavernor the misdemeanour of the bayliff of his lord, could not do better than admonish the said bayliff of his duty, for it concerned the honour of his master, and also his inheritance in the said liberty: but if the said Townsend had been a meer stranger to the said earl, so as no such privity had been betwixt them, the same had been clearly maintenance in Townsend, as it was lately adjudged in that Court in the case of one Gifford, where the parties being at issue, and a venire facias to the sheriff to retorn a jury, a stranger wrote to one of the jurors, who was retorned in the pannel, praying him to appear at the day, and to do in that cause according to his conscience, and the same was adjudged maintenance. And afterwards upon full hearing of the cause, the said Townsend by the sentence of the Court was acquitted of any maintenance, with great allowance and approbation of many lords of the counsel there present, Bromley Cancellario tantum exclamante.

CCCXXVII. Mich. 15 & 16 Eliz. In the Common Pleas.

In a writ of partition the defendant prayed in aid, the plaintiff counterpleaded the aid, upon which issue was joyned, and found for the plaintiff: it was the opinion of the Court that it was peremptory for the defendant. And the plaintiff shall have the partition, scil. quod fiat partitio, and the reason thereof is for the delay of the plaintiff, and for the vexation of the country who are to try it; otherwise it had been if it had been adjudged against the defendant upon a demurrer.

CCCXXVIII. Mich. 21 Eliz. In the Kings Bench.

In a formedon of a manor, the tenant pleaded joynt-tenancy by fine with J. S. The demandant averred the tenant sole tenant as the writ supposed, and upon that issue was joyned, and found for the demandant: upon which a writ of error was brought; and error assigned in this, that whereas **[205]** upon joyntenancy pleaded by fine, the writ ought to abate without any averment by the demandant against it; the averment hath been received against the law: and by Southcote at the common law, if the tenant plead joyntenancy by deed, the writ should abate without any averment, but that was remedied by the statute of 34 E. 1. but joyntenancy by fine doth remain as it was by the common law; for he hath punishment enough in that, because by that plea, if it be false, he hath by way of conclusion given away the moiety of the land in demand to him with whom he hath pleaded joyntenancy: and the law doth not intend that he will so slightly depart with his land for the abatement of a writ: else in a præcipe quod reddat the tenant confesseth himself to be villain to a stranger, the writ shall abate, without any averment of frank-estate; for the law intends that the tenant will not enthrawl himself without cause. Wray to the same intent: But the demandant may confess and avoid the fine, as to say, that he who levied the fine was his disseisor, upon whom he hath before entred, &c. And if tenant in fee-simple be impleaded, and he saith, he is tenant for life, the remainder over to A. in fee, and prayeth in aid of A. the demandant shall not take averment, that the tenant the day of the writ brought was seized in fee. Note, that in this fine joyntenancy was pleaded but for parcel; and it was holden by Wray and Southcote, that the whole writ should abate, as in a writ against many, the misnosmer of the one shall abate the whole writ against all the defendants; and so where the demandant enters into parcel of the land in demand, if the land in demand be one entire thing,

it shall abate the writ in all. In this case the demandant ought to have in his writ a foreprise of the land, parcel of the land in demand, whereof the joynt-tenancy by fine is pleaded; for this dismembring of the manor, and destruction of the land whereof the joyntenancy is pleaded, is peravail and beneath the gift whereof the formedon is conceived; and therefore in respect of the title of the demandant, it remains in right parcel of the manor, and therefore it ought to be demanded accordingly with a foreprise: but if A. gives to B. a manor, except 13 acres in tail, there if after upon any discontinuance the issue in tail is to have a formedon, in such case there needs not any foreprise, for the said 10 acres were never severed from the manor upon the gift. But if land in demand be several as 20 acres but two, this foreprise is not good, vide temps E. 1. Fitz. Br. 866. Præcipe unam bovat' terræ; except a selion, and the writ was abated, for every demand ought to be certain, but a selion is a parcel of land uncertain as to the quantity, in some places it is an acre, in some more, and in some less. Another point was, that because that the tenant hath admitted and accepted this **[206]** averment, scil. sole tenant as the writ supposeth; if the Court notwithstanding the admittance of the tenant ought without exception of the party ex officio abate the writ: and Wray conceived that it might, for it is a positive law: as if a woman bring an appeal of murder upon the death of her brother, and the defendant doth admit it without challenge or exception, yet the Court shall abate the appeal, 10 E. 4. 7. And vide the principal case there, non ideo puniatur dominus: and if an action be brought against an hostler upon the common custom of the realm, and in the writ he is not named (common hostler) and the defendant doth accept of such a writ without any exception unto it, yet the Court shall abate the writ ex officio, vide 38 H. 6. 30.

CCCXXIX. Mich. 21 Eliz. In the Kings Bench.

Note this case: A. makes a feoffment in fee to B. and binds himself only to warranty, without more: B. is impleaded, and voucheth A. who enters into the warranty, and loseth, so as judgment is given against B. and also to recover in value against A. who before execution dyeth: it was the opinion of the Court, that B. should have execution in value against the heir of A.

CCCXXX. Mich. 21 Eliz. In the Common Pleas.

A. seized of lands in the right of his wife for the term of the life of the wife, made a feoffment in fee to the use of his said wife for her life: in that case the wife is remitted, and it is not like Townsends case, Plowd Com. 111. for in that case the entry of the wife was not congeable, for she was tenant in tail, which estate was discontinued by the feoffment of her husband. Periam Justice cited Sidenhams case. Baron seized in the right of his wife for the term of the life of the wife. They both surrendred, and took back the land to them and a third person: and it was holden that the wife was not presently remitted; but after the death of her husband she might disagree.

CCCXXXI. Mich. 21 Eliz. In the Common Pleas.

A. B. and C. three brothers: A. hath issue and dyeth, the middle brother purchaseth land, and deviseth the same to his son in tail, and if he die without issue, that the land shall remain to the King, and lineage of the father, sc. of the middle brother, and if the son of the eldest son or the youngest brother should have the land, was the question; and it was the opinion of the Lord Dyer, that the son of the eldest brother should have it.

[207] CCCXXXII. MICH. 21 ELIZ. IN THE COMMON PLEAS.

A lease for life was made to B. the remainder to C. and D. in tail: it was holden that in this case C. and D. cannot disagree to that remainder without matter of record, for they are tenants in common; but if the remainder had been limited to them in fee, so as they took joyntly, it had been otherwise, for then by the disagreement of the one, the other shall take the whole land.

MICH. 32 ELIZ. IN THE KINGS BENCH.

CCCXXXIII. WAITE AND COOPERS CASE.

In ejectione firmæ between Waite and Cooper: it was found by verdict, that Cranmer, late Archbishop of Canterbury, was seized of the manor and borough of Southwark in the right of his bishoprick, and that the prior of Morton was seized of the house in which the ejectment is supposed, and held the same of the said archbishop as of his said manor and borough; after which, 30 H. 8. the said archbishop gave to the King the said manor and borough, with confirmation of the dean and chapter; and that the same year the said prior surrendred, by which the said King was seized, as well of the said manor and borough, as of the said house, and afterwards the King by his letters patents gave the said house, and other lands in Middlesex and Essex to Curson and Pope in fee, tenend' in libero burgagio per fidelitatem tantum, & non in capite, pro omnibus serviciis & demandis: and afterwards King Edw. 6. gave the said manor and borough to the Mayor and Commonalty of London: Curson and Pope covey the said house to Welsh in fee, who dyed without heir: all the question was, what tenure is here reserved upon the words and grant made by King Hen. 8. to Curson and Pope. It was said, it could not be a tenure in burgage, because here is not any rent reserved, which see by Littleton 162, 163, 164. And the Lord Anderson at the first very strongly insisted upon that. Another matter was, because here is reserved for all the lands and tenements but one tenure; so that if the Court should adjudge the tenure reserved to be burgage, then lands at the common law out of boroughs should be holden in burgage: also a tenure in burgage cannot be created without these words, ut de burgagio: and to that purpose Shute Justice agreed, vide Br. Tenures 94.

[208] MICH. 29 ELIZ. IN THE KINGS BENCH.

CCCXXXIV. FULLERS CASE.

Note, it is holden by the whole Court in Fullers case, that if one give 300l. to another to have an annuity of 50l. assured to him for 100 years, if he, his wife, and four of his children so long shall live, that this is not within the Statute of Usury: so if there had not been any condition; but care is to be taken that there be no communication of borrowing of any money before.

TRIN. 30 ELIZ. IN THE KINGS BENCH.

CCCXXXV. GOORE AND WINKFIELDS CASE.

Debt upon an obligation by Goore against Winkfield, the obligation was written in this form; Know all by these presents, that I H. Winkfield am bound to William Goore in the sum of, &c. for the payment of which sum I give full power and authority to the said Goore to keep the said sum upon the profits of the bayliwick of Swinstall from year to year, until the same be paid: to which the defendant pleaded, that the plaintiff had levied parcel of the said sum &c. and did not shew how much, and therefore the pleading was holden not good. And it was clearly agreed by the

whole Court, that the plaintiff was at liberty either to bring his action upon the said obligation, or to levy the debt according to the clause aforesaid.
3 Leon. 223.

PASC. 26 ELIZ. IN THE KINGS BENCH.

CCCXXXVI. POWLEY AND SIERS CASE.

Powley brought debt against Sier executor of the will of one A. The defendant demanded judgment of the writ: for he said, that one B. was executor of the said A. and that the said B. constituted the said defendant his executor, so as the writ ought to have been brought against the defendant as executor of an executor, and not as immediate executor of the said A. The plaintiff replyed, that the said B. before any probate of the will, or any administration, dyed, and so maintained his writ, upon which the defendant demurred. Wray was for the writ, for although here be not any probate of the [209] will of A. or any other administration; yet when B. makes his will, and the defendant his executor, it is an acceptation in law of the administration and execution of the first will. Gawdy and Ayliff Justices, that the writ was not good. Vide 23 Eliz. Dyer 372.

MICH. 19 ELIZ. IN THE KINGS BENCH.

CCCXXXVII. TAYLORS CASE.

Taylor was outlawed in debt, where a supersedeas upon record was delivered to the sheriff before the award of the exigent. It was holden that the party should avoid the same by plea: then it was moved, if the plea should be pleaded by attorney, or in person. To which it was said by the justices, that where matter in fact is pleaded in avoiding of an outlawry, he ought to plead it in person; but matter of record by attorney, and so Ford Prothonotary said it was agreed in the case of Sir Thomas Chamberlain, 7 Eliz. and so it ought to be in the principal case here.

CCCXXXVIII. MICH. 18 ELIZ. IN THE KINGS BENCH.

Note, it was agreed for law in the Kings Bench, if lessee for years grant all his estate and interest to A. rendring rent by indenture, and for default of payment a re-entry. And the grantor demandeth the rent, and A. demands an acquittance, but the lessee for years refuseth; in such case A. may refuse to pay such rent, for the rent is to be paid in this nature without an acquittance; but contrary if lessee for years had leased parcel of his estate, rendring rent with clause of re-entry, &c.

CCCXXXIX. MICH. 18 ELIZ. IN THE KINGS BENCH.

The King seized of a manor to which an advowson is appendant, a stranger presented, and his clerk in by 6 months: it was holden, that in such case the grantee may present, for the advowson was always appendant, and the inheritance thereof passed to the grantee for it was not made dis-appendant by the usurpation, as in the case of a common person; for the King cannot be put out of possession. But the patentee shall not have quare impedit of the first disturbance, for that presentment did not pass to him, being a thing in action without mention thereof in his grant. And if the patentee brings a quare impedit of a second avoidance, he shall make his presentment by the presentment of the King, not making men-[210]-tion of the usurpation: yet if a bishop present for lops in the case of a common person, he ought to make mention of it; for that is a title to the patron.

CCCXL. Trin. 28 Eliz. In the Kings Bench Adjudged.

Note, in the case of one Manning it was adjudged, that where an infant executor sold the goods of his testator for a lesser price than they were worth, and afterwards brought an action of detinue against the vendee, upon that detinue in retardatione executionis testamenti, that the said sale was good, and should bind the executor notwithstanding his nonage.

28 Eliz. In the Chancery.

CCCXLI. The Lord Awdleys Case.

The Lord Awdley, 12 H. 7. enfeoffed Hoddy and others of certain lands in the county of Somerset, and afterwards by indenture reciting the said feoffment, and the date of it; and also that it was to the intent that his feoffees should perform his will as followeth in effect, viz. My will is, that my said feoffees shall stand seized to the use, that the said Hoddy shall receive of the profits of the lands 100l. which he had sent to the said Lord Awdley; and also stand seized to pay all his debts upon bills signed with his hand; and after the debts paid, that the said feoffees shall make estate of the said lands unto him the said Lord Awdley and Jone his wife, and to the heirs of their two bodies, with divers remainders over. The said lord had issue by the said Jone, and also had issue by a former wife a daughter, the feoffees never made any estate to the said lord and his wife: and by the opinion of divers justices and sages of the laws, that upon that matter no use was changed; for it is not any last will, but an intent. And although that the feoffees shall be seized to the use of the feoffor and his heirs, because that no consideration was, by which they should be seized to their own uses, yet the same cannot make any use unto the said lord and his wife in tail without containing an estate, for the wife is a stranger to the land: and also it cannot be a will, for the estate mentioned in the said writing, ought to have been made to the said lord and his wife, who cannot take the same by his will. This matter depended in the Chancery: and the advice of the justices being there required, they delivered their opinions, that by the said writing no use was changed nor any estate vested in the said lord and his wife: and a decree was there made accordingly, until proof be made that such an estate was made.

[211] CCCXLII. Mich. 26 Eliz. In the Kings Bench.

The case was in the Kings Bench, in debt: it was found by special verdict, that the testator, being possessed of divers goods in London, where he dyed; and also at the time of his death, the Queen being indebted unto him in the sum of 4l. 10s. she then residing at Whitehall; the archbishop as metropolitan, granted licence of administration to the Queen; and the Bishop of London afterwards granted licence of administration to J. S. The Court sent to the civilians to appear in Court, and to deliver their opinions in this case. And thereupon Lloyd, Doctor of Law, appeared and argued to this effect, viz. that in ancient times in such cases, the several Ordinaries committed several administrations for the goods in their diocess respective: in which case, the mischief was very great, for the creditor was driven to bring several actions of the administrators of the several Ordinaries: vide H. 7. 13 R. 2. Administrators 21. But afterwards upon a decree, upon a composition in such cases, the metropolitan committed the administration: he further argued, that debts cannot be said bona notabilia, for they cannot be said within or without any county or diocess, and are things transitory; and therefore called æs alienum: and he said, that the administration granted by the archbishop was void, for as archbishop he had not to intermeddle within the diocess of another, but as legatus papæ: and in the time of Hen. 2. Becket Archbishop of Canterbury was stiled legatus natus, but now that power legantine is determined, and therefore the authority to commit licences of administration in

another diocess, but in case of bona notabilia is determined: and he said, that by the civil law, if a man deviseth all his goods in such a county, by that debts do not pass; and yet by especial words a man may devise his debts. Awbrey Doctor argued to the contrary; and he confessed that in ancient times every Ordinary in such cases committed licences of administration: but he denied that the prerogative which is now practised in such cases by the metropolitan was given upon any composition, but that it began by prescription: if a man in his journey dyed in another diocess, notwithstanding that he had out with him but his necessary and ordinary apparel, in such case the metropolitan committed the administration; and he said, that as he conceived, debts are bona notabilia, & secundum fictionem legis, they are local and he said, to make bona notabilia it is sufficient if the intestate have 3l. in one diocess, and 2l. in another diocess: but he said, that posito, that bona notabilia are not in the case; yet the administration granted by the metropolitan is not void until it be revoked: for although that the metropoli-**[212]**-tan on the right of his bishoprick, hath not to intermeddle in another diocess; yet in this case, because the Archbishop of Canterbury is a patriarch: (for in Christendom there are four great patriarchs, and eight lesser patriarchs, whereof the Archbishop of Canterbury is one), and by reason thereof he hath general jurisdiction through all England, Ireland, &c. But now by the statute, his authority is restrained. For he cannot cite any other out of other diocess by any process: but notwithstanding, he may do many great acts by himself, or his chancellor in every diocese; and he argued very much upon the prerogative of the Archbishop of Canterbury. The justices did not then deliver any opinion in this case. Quære, if letters of administration of the goods of a common person be committed to the Queen, if good. The case was adjourned. Vide Cook 5 part, Ucre and Jeffreys case, and Cook 8 part, in Sir John Needhams case for the resolution of this case.

Jones Rep. 225.

CCCXLIII. Pasc. 17 Eliz. In the Common Pleas.

A man made a lease for life, and afterwards made a lease to another for years. The Ordinary committed licences of administration to A. the tenant for life, and A. joyned in the purchase of the fee-simple of the land demised. It was holden by the justices, that the fee was executed for a moiety; for the remainder for years was not any impediment unto the execution thereof. Manwood conceived that the term was not extinct; for it is not properly a term, but as an interest of a term, which cannot be surrendred. Mounson, He hath the term in auter droit, viz. as administrator, therefore it cannot be extinct. Dyer, If an executor hath a term, and purchaseth the fee-simple, the term is determined. A woman, tenant for years, taketh a husband, who purchaseth the fee, the term there is extinct. Manwood, True there, for the husband doth an act which destroyeth the term, viz. the purchase: but if a woman, being a termor, marrieth with him in the reversion, the term continueth; for here is no act of the husband, but the act of the law. Dyer was of opinion, that the tenant for life, and the administrators should be tenants in common of the fee. The case was adjourned.

CCCXLIV. Mich. 20 Eliz. In the Common Pleas.

The case was, the husband is seized in the right of his wife of certain customary lands in fee. He and his wife by licence of the lord makes a lease for years by indenture rendring rent, have issue two daughters, the husband **[213]** dyeth, the wife takes another husband, and they have issue a son and a daughter, the husband and wife dye, the son is admitted to the reversion, and dyes without issue: and by Manwood, the said reversion shall descend to all the daughters, notwithstanding the half blood; for the estate for years, which is by indenture, by licence of the lord, is a demise or lease according to the order of the common law and according to the nature of the demise, the possession shall be adjudged, which possession cannot be

said the possession of the copyholder, for his possession is customary, and the other is contrary; and therefore the possession of the one, shall not be the possession of the other, and so no possessio fratris in this case: but if there had been a guardian by the custom, or this lease had been made by surrender, then the sister of the half blood should not inherit: and by Mead, the case of the guardian hath been so adjudged. Mounson to the same intent. And if a copyhold descend to the son, he is not a copyholder before admittance, but he may take the profits of the lands, and punish a trespasser.

CCCXLV. MICH. 15 ELIZ. IN THE COMMON PLEAS.

The case was, A man seized of lands in fee, devised that his wife should take the profits of his lands until Mary his daughter and heir should come to the age of 16 years, and if the said Mary shall dye, that J. S. should be his heir. Manwood, The daughter after she hath attained the age of 16 years, shall have the land in tail; for devises ought to be construed according to the intent of the devisor, as near as it may be collected, but no intent shall be taken against all reason and certainty. It is certain that the daughter shall not have the fee-simple, for the same should have descended to her without any devise; and these words (if she dyed) cannot be intended a condition, for it is certain that she shall dye: but if the words had been, before the age of 16 years, that after her death J. S. should be his heir, in such case it had been a condition. And when it is said, that J. S. should be his heir, it shall be intended his collateral heir, so as the estate tail remains in the daughter. Mounson and Harper contrary. And that she should have but for life: and by Mounson, if J. S. had been a stranger to the devisee, she should take nothing. And this case was put by Barham, Serjeant, A man devised 100l. to his youngest daughter, 100l. to his middle daughter, and 100l. to his eldest daughter, and that all these sums should be levied out of the profits of his lands: and it was the better opinion of the Court, that the youngest daughter should be first paid, and then the middle, and then the eldest daughter, and that was one Coniers case.

[214] MICH. 16 ELIZ. IN THE COMMON PLEAS.

CCCXLVI. THE ARCHBISHOP OF YORKS CASE.

The case was, the King granted to the Archbishop of York the toll of corn sold in the market of Rippon; and afterwards the King granted to the Mayor and citizens of York to be discharged of toll through the whole realm; and afterward the archbishop exchanged his manor of Ripon with the King for another manor: it was moved if now the citizens of York should be discharged of toll for the grant to the archbishop was eigne to the grant to the citizens of York, to be discharged of toll in Rippon. Dyer conceived that they should not be discharged, for the King had no right; and when the King grants over the manor of Rippon, the grantee shall have the toll notwithstanding the grant made to the citizens, for the grant made to them was void, as to discharge them of toll at Rippon; for the grant to the citizens shall not take effect after the exchange, for the grant was void ab initio: but if the grant of the King to the archbishop had been but for life, then the grant afterwards made to the citizens should have taken effect after the estate for life determined: and the better opinion of the Court was, that toll should be paid.

3 Leon. 159.

MICH. 29 ELIZ. IN THE EXCHEQUER.

CCCXLVII. THE BISHOP OF LONDONS CASE.

The case was, The King lord, mesne and tenant, the mesnalty is holden in chief, and the tenancy by service, the mesnalty escheats by attainder, now if the tenancy shall be holden in chief. Manwood, It hath been holden, that no tenure in capite

may be, if not by the making of the King: and he said, that if before the Statute of West. 3. the tenant of the King had made a feoffment to hold of him, so that now there is lord, mesne, and tenant, and afterwards the mesnalty comes to the King by attainder, and if by the said mesnalty to the Crown, the seigniory paramount be extinct, then the tenancy is not holden in chief; but if the mesnalty be drowned in the seignory, it is otherwise. Some held, that there was a difference where the mesnalty comes to the seigniory, and where the seigniory comes to the mesnalty. Quære.

[215] TRIN. 26 ELIZ. IN THE KINGS BENCH.

CCCXLVIII. BURGESS AND FOSTERS CASE.

In ejectione firmæ the case was, that the Dean and Chapter of Ely were seized of the manor of Sutton, whereof the place &c. is parcel demised and demisable by copy according to the custom: and that the said dean and chapter by their deed granted the stewardship of the said manor to one Adams, to execute the said office per se vel legitimum suum deputat' eis acceptabilem: after which the said Adams made a letter of deputation to one Mariot ad capiend' unam sursam redditionem of one John Whettesley and Ann his wife, & examinand' Ann' prædict. ea intentione, that the said John and Ann should take back an estate thereof for their lives, the remainder to one John Buck in fee. (Note the surrender ought to be de duobus messuagiis.) Mariot, Two several surrenders of the said husband and wife of the said two messuages, and took an estate for their lives, the remainder over to the said John Buck in fee, upon condition to pay certain moneys, &c. It was moved, that the surrender is void, and without warrant; for the warrant was ad capiend' unam sursam redditionem, and here are two several surrenders, and so the warrant is not pursued and then the surrender is void. Another matter was, because the remainder to John Buck by the words of the letter of deputation should be absolute, and without condition, and now in the execution of it is conditional, so as the conditional estate is not warranted by the deputation. But the court was clear of opinion to the contrary in both the points, that the proceedings here are sufficient, and well warranted by the deputation. Another matter was objected, because the surrender and regrant is entred into the roll of a court dated to be holden 2 Maij, and the letter of deputation bears date the 3 of June after; but as to that the Court was clear, that the mis-entry of the date of the Court should not prejudice the party, for that entry is not any matter of record, but only an escroll; and if the parties had been at issue upon the time of the surrender made, or of the court holden, the same should not be tryed by the rolls of the manor, but by the country: and the party shall give in evidence to the truth of the matter, and shall not be bound by the rolls; and according to this resolution judgment was given.

[216] TRIN. 31 ELIZ. IN THE COMMON PLEAS.

CCCXLIX. LONG AND HEMMINGS CASE.

Giles Long brought a quare impedit against the Bishop of Gloucester, Hemmings and Hadnell, Hemmings pleaded, that one Tho. Long seized of the manor of F. to which the advowson was appendant, by his deed granted the advowson unto him 17 Eliz. The incumbent pleaded the same plea; to which the plaintiff replicando said, that before the said grant, viz. 6 Eliz. the said Tho. Long granted to him the said manor, &c. and upon issue joyned, the jury found this special matter, that the said feoffment was by word, and livery and seisin was made; and afterwards the said Tho. Long granted the said advowson to the defendant; and afterwards attornment was had; and if without attornment the advowson passed with the manor, was the question. Shuttleworth argued, that the advowson passed as appendant to the demesns, for an advowson shall be more properly appendant to the demesns than to

the services, for the services may be determined many ways, so cannot the demesns; for if the services be determined by escheat, &c. yet the advowson remains appendant to the demesns, and an advowson may be appendant to an acre parcel of the manor, but not to the services; and so an advowson may well pass without deed, as upon a feoffment of a manor the services pass without deed. And if a man seized of a manor with an advowson appendant, makes a feoffment of one acre parcel thereof, with the advowson, the advowson is appendant to that acre, 33 H. 6. 5. although it be not by deed. Vide contra Temps E. 1. Faits & Feoffments 115. 17 E. 3. 4. It ought to be by deed, 43 E. 3. 24. Walmsley argued to the contrary. The verdict is, that Tho. Long give not the manor but the capital messuage of F. and all other lands and tenements of the same, which words (of the same) have relation to the messuage, and therefore neither the manor of F. nor the advowson pass: and admit that all the demesns pass, yet the advowson cannot pass as appendant, for that advowson shall pass as appendant to the whole manor, and not to such, or such part of it. And by Littleton, 7 E. 4. 27. if a man holds of me three acres by 12d. and I grant the services of the third acre, the same is void; so here, there is no advowson appendant to the demesns: and he said, that in this case the advowson is appendant to the services; and although services are inheritances incorporeal, yet an advowson may be appendant to them, as one office may be appendant to another office, and one advowson to another advowson, 33 H. 8. Dyer 48. A **[217]** man seized of a manor, to which an advowson is appendant, enfeoffeth one by deed of one acre, parcel thereof; and also by the same deed grants the advowson, the advowson shall pass as in gross, for they are several grants, although but one deed. Another matter was, that Thomas Long enfeoffed, and here the jury have found, that Thomas Long gave in tail, &c. And he conceived that the plaintiff upon that verdict should have judgment: as in waste, the plaintiff assigns the waste in cutting down of 20 oaks, and upon not guilty, it was found that he cut down but 10, the plaintiff shall have judgment upon that verdict. The case was adjourned.

CCCL. Trin. 19 Eliz. In the Kings Bench.

The case was, Lessee for life of another bargains and sells by deed indented and enrolled, and afterwards levies a fine to the conusee, sur conusans de droit come ceo, &c. It was holden by the whole Court, that it was a forfeiture of his estate; for when the bargainee, being now tenant for the life of another, accepts a fine of a stranger sur conusans de droit, &c. that he admit the fee in him by matter of record, otherwise it is of a fine sur release. And by Manwood, If lessee for life be disseised, and levies a fine to the disseisor, sur conusans de droit, &c. the lessor shall re-enter. Quod Dyer negavit, because that the lessor at the time of the fine levied, had not any thing in the reversion, but only a right. Manwood put this case, Land is given to A. and B. and to the heirs of B. they are disseized by two, A. releaseth to one of the disseisors, now they are joyntenants but for a moiety, and the estate in the other moiety is changed into an estate for life.

Trin. 31 Eliz. In the Common Pleas.

CCCLI. The Queen and the Bishop of Norwich's Case.

In a quare impedit, the case was, that the title to present to the church was devolved to the Queen by lapse; the patron himself presented, and his clerk was inducted, and afterwards deprived. It was the opinion of the whole Court, that if the deprivation was without any covin, that the title of the Queen by lapse was gone.

[218] TRIN. 29 ELIZ. IN THE COMMON PLEAS.

CCCLII. ASHPOOL AND THE INHABITANTS OF EVERINGHAMS CASE.

In an action upon the Statute of Winchester of Huy and Cry, by Ashpool against the inhabitants of the hundred of Everingham: it was argued by Serjeant Shuttleworth for the hundred, and he insisted upon this, that the robbery for which the suit was brought, was committed in the night: and vide Stamford 33 & 38. If a man be robbed in the day, and the thief escape, and be not taken, the town or hundred shall answer for it: as if he should have said, if the robbery was not done in the day, the town or hundred should not answer for it: and by 11 H. 7. 5. the lord cannot distrain in the night for rent arrear, for the tenant is not bound to tender his rent in the night time. And although there are no express words in the Statute of Winchester, that huy and cry shall be made by the party robbed, yet in reason it is to be presumed that the same was intended by the statute. Vide that by these words in the statute it may be implyed, viz. that no pain as yet hath been appointed for their concealments and lachess, which (lachess) imports, that none ought to be charged in such case, but here there was a defalt, and no defalt can be where there was not notice, and all the course is, hutesiam & clamorem fecit, & notitiam inhabitantibus dedit; and also this word (concealment) amounts to as much, for none can be said to conceal that whereof he had no notice. And vide Stamford 35, 36. if the felon escape, the hundred shall answer to the party robbed, who hath made huy and cry: but the whole Court was clear, that huy and cry, or notice to the inhabitants, was not requisite by the statute; for as it was said by the Lord Anderson, it might be that the party robbed was bound, so as he could not give notice, or make huy and cry, or it may be he was killed by the thieves; and b. 28 E. 3. 11. Fresh suit is to be made from town to town, and from country to country, and that fresh suit is to be made by the inhabitants of the hundred, and not by the party robbed, for no mention is made of such fresh suit: and that will more clearly appear, if we take to the common law before the Statute of Winchester; for before the said statute, the law was, that every town and city should be guarded by the inhabitants, &c. so that if any suspected persons did resort to such town or city, he should be stayed until the next sessions; in which case he should have deliverance according as he could acquit himself: and if any town or city failed therein, and then a robbery had been done, the county should answer for it; for at their [219] own peril they were bound to guard the country: but there was some difference betwixt robberies committed in the day time, and robberies done in the night, which see 3 E. 3. so Corone 293. where a man killed another in the day, and the felon was not taken, but escaped in the night, and the town was amerced for the same, because there the adventurers came in the day time, and the felon was not taken. And as to that which is found by the verdict, that the robbery was done post occasum solis, & per lucem diurnam, the opinion of all the Justices was, that with such a robbery the hundred should be charged, for that at such time of the day travellers are commonly drawing to their lodgings. And afterwards judgment was given for the plaintiff.

PASC. 29 ELIZ. IN THE KINGS BENCH.

CCCLIII. NEALS CASE.

In a false imprisonment by Neal against the Mayor, Sheriffs, and Commonalty of the City of Norwich: the writ was directed to the coroners of the said city; and exception was taken to the writ, because it was not directed to the sheriff of the same city, but to the coroners: but the exception was disallowed by the Court, for the sheriff was part of the corporation. And also it hath been adjudged, that a sheriff cannot summon himself: the writ was holden good.

CCCLIV.

Note that in this case Francis Bunney being but tenant for life, enfeoffed one T. upon whom the said D. entred for a forfeiture.

John Grendon brought trespass for breaking of his close against Thomas Albany: and upon the pleading, the case was, that Francis Bunney was seized, and 1 Maij 20 Eliz. by deed indented enfeoffed M. H. to the use of the said Francis Bunny for the term of his life, the remainder to D. in tail, the remainder to E. in tail, the remainder over to F. in fee: in which deed of feoffment there was a proviso, that if it should happen one P. P. to dye without issue male of his body, that then it should be lawful for the said Francis Bunney at all times, during his life, by his deed indented, to be sealed and delivered in the presence of three credible witnesses, to alter, change, diminish or amplifie any use or uses limited by the said deed, or any use or uses thereof to any person or persons, and to limit after the death of the said Francis to begin: after which the said Francis Bunney 1 Aprilis, 23 Eliz. by his deed indented, did renounce, relinquish, and surrender to the said M. H. D. E. & F. all such liberty, power, and authority of revocation, which he had after the death of the said P. P. with-**[220]**-out issue, &c. and further did remise, release, and quit-claim to them the said condition, promise, covenant, and agreement aforesaid, and all his said power, liberty, and authority, and further granted to them and their heirs, that at all times then after, the said power, liberty, and authority should cease, and to all intents and purposes should be void. After which P. P. dyed without issue, 1 Maij 23 Eliz. after which 20 Maij 24 Eliz. the said Francis Bunney by indenture between him and the said D. sealed and delivered as abovesaid, altered the former uses, and covenanted and agreed with the said D. that from thenceforth the said M. H. and his heirs should be seized to the use of the plaintiff and his heirs. It was argued by Altham, that by that feoffment made by the said Francis Bunney to the said F. the liberty and power aforesaid was not extinct or lost, for the liberty and power was not then a thing in esse, because then P. P. was alive; and also the liberty is collateral to the land whereof the feoffment is made. 39 H. 6. 43. The son and heir apparent disseiseth his father, and hereof enfeoffeth a stranger, the father dyeth, now against his own livery the son doth not enter; but if the father dyeth, then the son shall enter; which proveth that the livery is not so violent as to destroy a future right, but that afterwards it may be well revived à fortiori, in our case where the thing pretended to be extinct is meerly collateral. 34 E. 3. Fitz. Garr. 69. In assize of common, the release of the father with warranty of the land, is no bar, because it is of another thing. 15 H. 7. 11. Cestuy que use declares by his will, that his feoffees shall sell his lands, and dyeth, the feoffees make a feoffment to the same use, yet they may sell, so as against their livery, the authority to sell remains to them. And he cited Brents case, Dyer 340. where a future use is limited to his wife that shall be, shall not be prevented by a fine or feoffment. And vide the Statute of Fraudulent Conveyances 27 Eliz. where a conveyance is made with clause of revocation, if afterwards the party makes such a conveyance, bargain, sell, or grant the said lands for money, or other good consideration paid or given, (the first conveyance not being revoked) that then such former conveyance against the last purchasors shall be void. Another matter was, admitting that the said power and liberty be not extinct by the said feoffment, if by the said indenture or renunciation, relinquishment, release, &c. it be destroyed: and he said, that a thing in esse could not be released. Litt. 105. & 4 H. 7. 10. A lease for years to begin at a day to come cannot be released before that it come in esse. 11 H. 6. 29. Br. Damages 138. In detinue, the defendant would have confessed the action, if the plaintiff would have released the damages, and the plaintiff would have so done, but could not before judgment; for before judgment the plaintiff had not interest in the damages, but **[221]** he was intituled to them by the judgment; so lands in ancient demesne are recovered at the common law, and execution had accordingly, and afterwards the lord reverseth the judgment, the tenant notwithstanding that release may enter, for his title which accrued to him by the reversal, was not in esse at the time of the release. And it was adjudged 23 Eliz. that where

lessee for years devised his term to his wife, if she should so long live, and if she dyed within the said term, that then the residue of his term should go unto his daughter, who then should be unpreferred, and dyed, the daughter released to her mother all her right in the said land, the mother dyed within the term, that that release did not bind the daughter, for that at the time of the release she had not any title. Cook contrary: and he said, that by the feoffment the said power and title was extinct; and he well agreed the case cited before of 15 H. 7. for in such case the vendee of the feoffees shall be in by the devise, and not by the feoffees. 9 H. 7. 1. The husband makes a discontinuance of the land of his wife, and takes back an estate to him and his wife, by which his wife is remitted, they have issue, the wife dyeth, the husband shall not be tenant by the courtesie, for he hath extinguished his future right by the livery. 12 Ass. ultimo. A præcipe brought against A. who loseth the land by erronious judgment, and after execution had, enters upon the demandant, and makes a feoffment, his writ of error is gone. 38 E. 3. 16. In a scire facias to execute a fine, the plaintiff recovers, and makes a feoffment in fee, and afterwards the tenant in the scire facias by writ of error, reverseth the judgment in the scire facias, now the plaintiff in the scire facias shall not have a new scire facias. 34 H. 6. 44. A recovery against B. by false oath, and after execution had, B. enters, and makes a feoffment to a stranger, who enfeoffs him who recovers, it is a good bar in an attaint. 27 H. 8. 29. The feoffees to an use are disseised, the disseisor enfeoffeth cestuy que use, who enfeoffs a stranger, now by that feoffment his right to the use is extinct: and as to the release, the same is not properly a release, but rather a defeasance to determine the power and authority aforesaid, as if A. enfeoffeth B. with warranty, and afterwards B. covenants with A. that the said warranty shall be void, that covenant shall enure, to defeat and determin the warranty: and afterwards in the principal case, judgment was given against the plaintiff. See more of this case in Cook 1. part.

[222] TRIN. 29 ELIZ. IN THE KINGS BENCH.

CCCLV. OWEN AND MORGANS CASE.

George Owen brought a scire facias against Morgan, to have execution of a fine levied 8 Eliz. by which fine the land was given to the conusee and his heirs, and the conusee rendred the same to husband and wife, (note that the husband was the conusor,) the remainder in fee to the now demandant; (and note that the writ of covenant was between the conusee plaintiff, and the husband deforceant, without naming of the wife) and afterwards, the husband suffered a common recovery, without naming of the wife: the husband and wife dyes without issue, and now Owen, to whom the remainder in fee was limited by the fine, brought the scire facias, in bar of which the recovery was pleaded: it was argued by Serjeant Shuttleworth, that the recovery had against the husband only, was a good bar, and should bind the remainder; and he said, that the wife ought not to be named in, or party to the recovery, for nothing accrued to her by the fine, because she was not party to the writ of covenant, nor party to the conusance, and none can take by the render, who was not party to the writ of covenant, and to the conusance. Vide 30 H. 8. Fines 108. None can take the first estate by the fine, but those who are named in the writ of covenant, &c. but every stranger may take by remainder. Vide 3 E. 3. Br. Fines 114. 6 E. 2. Fines 117. 7 E. 3. Scire Facias 136. It is said by Horton, if such a fine is accepted, it is good. The case was adjourned.

Ante 26. & 93.

CCCLVI.

A. seized of a manor, to which two parts of the advowson were appendant presents, and afterwards aliens the mannor with the appurtenances; the alienee presents, and purchaseth the third part of the advowson, and presents again one A. who was chaplain to the Duke of Rutland, and had a dispensation from the Pope 1 Eliz. before

the statute was repealed, and was instituted and inducted, and afterwards accepted of a plurality, viz. another benefice, and dyed 11 Eliz. The Queen presented for lapse, and her clerk was instituted and inducted; the said lord of the manor dyed seized inter alia, and that manor was allotted to the wife of D. for her part; and he brought a quare impedit, it was moved if D. should not joyn in the quare impedit with him who had the third part, and by Walmsley he is not to joyn in it. 22 E. 4. by Brian, If an advowson des-[223]-cends to four coparceners, and they make partition to present by turns, and the third doth present when the second ought, for that time the presentment is gone, but when it comes to his turn again, he shall present; which proves that they are as several tenants, and therefore ought not to joyn, &c. It was adjourned.

TEMPS ROIGN ELIZ. IN THE KINGS BENCH.

CCCLVII. THE PRESIDENT OF CORPUS CHRISTI COLLEDGE CASE.

Note, it was holden by Cholmley Serjeant, Plowden, and many others, in the case of the President of Corpus Christi Colledge in Oxford, that if the said master or president of any such colledge, by his will deviseth any land to his colledge, and dyeth, such devise is void: for at the time when the devise should take effect, the colledge is without a head, and so not capable of such devise; for it was then an imperfect body: and so it was holden by the justices upon good advice taken thereof.

CCCLVIII. TEMPS ROIGN ELIZ. IN THE KINGS BENCH.

In a warrantia chartæ, the defendant said that the plaintiff had not any thing in parcel of the land the day of the writ brought: if in a præcipe quod reddat the tenant aliens, and afterwards vouches, the vouchee is not bound to enter into the warranty: but here in this case it may be, that at the time that the plaintiff requested the defendant to warrant, he was tenant of the land, in which case the warranty is attached, and then if ever the land be recovered against him, he shall have this writ; and of this opinion was Brown Justice: for the land which the defendant had at the time of the request, is bound by the request, but if he alieneth after the request, he shall not have the warranty.

CCCLIX. MICH. 9 ELIZ. IN THE KINGS BENCH.

A man seized of a manor, in which there are divers copyholds, and the custom there is, that if any copyholder leaseth his land above the term of one year, that he shall forfeit his copyhold. A copyholder committed such a forfeiture, and afterwards the lord leased the manor for years, and the lessee entred for the forfeiture; and Weston said that his entry was not lawful; for although that the heir may enter for a condition broken in the time of his ancestor, because he is privy in blood; yet the lessee or feoffee cannot do so, for he is a stran-[224]-ger, such a one of whom an estranger shall not take advantage. Dyer, If this forfeiture be preserved by homage, and enrolled in the Court rolls, the lessee may well afterwards enter; for by the forfeiture the copyhold estate is void and determined, as if a lease for years be made, rendring rent upon condition to cease if the rent be not paid, here presently, by the not payment, the interest of the term is determined, and of that the grantee of the reversion shall have advantage.

CCCLX. MICH. 10 ELIZ. IN THE COMMON PLEAS.

An action upon the case was brought for stopping of a way: the plaintiff declared that the Duke of Suffolk was seized of a house in D. and let the same to the plaintiff for life, and that the said Duke, and all those whose estate, &c. have used time out of

mind, &c. to have a way over the land of the defendant to the park of D. to carry and recarry wood necessary for the said house, from the said park to the same house; and further declared, that the defendant obstupavit the way. It was moved by Carus, that upon that matter no action upon the case lay, because the freehold of the house is in the plaintiff, and also the freehold of the land, over which, &c. is in the defendant: but if the plaintiff, or the defendant, had but an estate for years, then an action upon the case would lye, and not an assize, and it is not material, if the plaintiff had but an estate for years in the park quod fuit concessum per totam Curiam: it was also holden, that this word obstupavit is sufficient without any more, without shewing any special matter of the stopping, as the erecting of any gate, hedge, ditch, &c. for obstupavit implyes a nusance continued, and not a personal disturbance, as forestalling, or saying to the plaintiff upon the land where, &c. that he should not go over, or use the said way, for in such case, upon such a disturbance, an action upon the case lyeth: but as to a local and real disturbance, the word obstupavit amounts to obstruxit: and although in the declaration is set down the day and year of the stopping, yet it shall not be intended that it continued but the same day; for the words of the declaration are further, by which he was disturbed of his way, and yet is, and so the continuance of the disturbance is alledged; and of that opinion was the whole Court. Leonard Prothonotary, He hath declared of a prescription, habere viam tam pedestrem, quam equestrem, pro omnibus & omnimodis carriagiis, and upon that prescription he cannot have a cart-way, for every prescription est stricti juris. Dyer, That is well observed, and I confess that the law is so; and therefore it is good to prescribe habere viam pro omnibus carriagiis, without speaking either of a horse, or a foot-way.

[225] CCCLXI.

A. enfeoffed B. to the intent that B. should convey the said land to such person as A. should sell it. A. sold it to C. to whom B. refused to convey the land; and thereupon he brought an action upon the case against B. And by Wray Chief Justice, and Gawdy Justice, here is a good consideration, for here is a trust, and that which is a good consideration in the Chancery, is in this case sufficient. Shute Justice was of a contrary opinion. And afterwards judgment was given for the plaintiff.

MICH. 29 ELIZ. IN THE COMMON PLEAS.

CCCLXII. SIR RICHARD LEWKNORS CASE.

Sir Richard Lewknor seized of Wallingford Park, made a lease thereof for years, and dyed; the lessee granted over his term to another, excepting the wood; the term expired, and an action of waste was brought against the second lessee by the coparceners, and the husband of the third coparcener, being tenant by the courtesie. Shuttlewood and Snag Serjeants, did argue, that the action would not lye in the form it was brought; and the first exception which was taken by them was, because the action was general, viz. quod fecit vastum in terris, quas Sir Roger Lewknor, pater prædict' of the plaintiff cujus hæredes ipsæ sunt præfat' defendent. demisit; and the count was, that the reversion was entailed by Parliament unto the heirs of the body of Sir Richard Lewknor, and so they conceived that the writ ought to have been special, cujus hæredes de corpore, ipsæ sunt: for they said, that although there is not any such writ in the register, yet in novo casu, novum est apponendum remedium: and therefore they compared the case to the case in Fitz. N. B. 57. viz. If land be given to husband and wife, and to the heirs of the body of the wife, and the wife hath issue and dyeth, and the husband committeth waste, the writ in that case, and the like, shall be special, and shall make special recital of the estate. And so is the case 26 H. 8. 6. where cestuy que use makes a lease, and the lessee commits waste; there the action was brought by the feoffees, containing the special matter, and it was good, although there was not any such writ in the register cujus hæredes de corpore, and we are not to devise a new form in such case, but it is sufficient to shew the specia

matter to the Court. And the words of the writ are true, for they are heirs to Sir Roger Lewknor; and the count is sufficient, pursuant and agreeing to their writ; for they are heirs, although they [226] are not special heirs of the body, and so the Court was of opinion, that the writ was good notwithstanding that exception. And Anderson and Periam Justices, said, that the case is not to be compared to the case in Fitz. Nat. Brevium 57. for there he cannot shew by whose demise the tenant holdeth if he doth not shew the special conveyance, viz. that the land was given to the husband and wife, and to the heirs of the body of the wife. Nor is it like to the case of 26 H. 8. for the same cause for always the demise of the tenant ought to be specially shewed, and certainly, which it cannot be in these two cases, but by the disclosing of the title also to the reversion. Another exception was taken, because that the writ doth suppose quod tenuerunt, which, as they conceived, is to be meant, that tenuerunt joyntly; whereas in truth they were tenants in common. Walmsley contrary, because there is not any other form of writ, for there is not any writ which doth contain two tenuerunts, and the words of the writ are true, quod tenuerunt, although tenuerunt in common; but although they were not true, yet because there is no other form of writ, it is good enough: as Littleton, If a lease be made for half a year, and the lessee doth waste, yet the writ shall suppose quod tenuit ad terminum annorum, and the count shall be special: 40 E. 3. 41 E. 3. 18. If the lessee doth commit waste and granteth over his term, the writ shall be brought against the grantor, and shall suppose, quod tenet, and yet in truth, he doth not hold the land, and the writ shall not contain two tenets, and such also was the opinion of the Court. The third exception was, because that the writ was brought by the two coparceners, and the heir of the third coparcener, without naming of tenant by the courtesie: and thereupon Snag cited the case of 4 E. 3. that where a lease is made for life, the remainder for life, and the tenant for life doth waste, he in the reversion cannot have an action of waste during the life of him in the remainder: so in the like case, the heir of the third coparcener cannot have waste, because there is a mean estate for life in the tenant by the courtesie. And to prove that the tenant by the courtesie ought to joyn in the writ, he cited the case of 3 E. 3. which he had seen in the book at large, where the reversion of a tenant in dower was granted to the husband, and to the heirs of the husband, and the tenant in dower did waste, and they did joyn in the action of waste, and holden good: and so is 17 E. 3. 37. & F. N. B. 59. & 22 H. 6. 25. Walmsley contrary; for here in our case, there is nothing to be recovered by the tenant by the courtesie, for he cannot recover damages, because the disinherisin is not to him, and the term is expired, and therefore no place wasted is to be recovered, and therefore it is not like to the books which have been vouched; for in all those the tenant was in posses-[227]-sion, and the place wasted was to be recovered, which ought to go to both, according to their estates in reversion, but so it is not here; for in as much as the term is expired, the land is in the tenant by courtesie, and so he hath no cause to complain; and such also was the opinion of the whole Court, that the writ was good notwithstanding the said exception. Then concerning the principal matter in law which was whether the writ was well brought against the second lessee, or whether it ought to have been brought against the first lessee: it was argued by Shuttleworth, that it ought to have been brought against the first lessee; for when he granted over his term, excepting the trees, the exception was good, ergo, &c. For when the land upon which the trees are growing is leased out to another, the trees pass with the lease as well as the land, and the profit of them is in the lessee during the term, and therefore when he grants his term, he may well except the trees as well as the lessor might have done. And that is proved by the Statute of Marlbridge, for before that statute the lessee was not punishable for cutting down the trees, and that statute doth not alter the property of the trees, but only that the lessee should render damages if he cut them down, &c. Also the words of the writ of waste proveth the same, which are, viz. in terris, domibus, &c. sibi dimissis. And the lessee might have cut them down for reparation, and for firewood, if there were not sufficient underwood, which he could not have done, if the trees had not been excepted: and in 23 H. 8. Br. it is holden, that the excepting of the trees, is the excepting of the soil. And so is 46 E. 3. 22. where one made a lease excepting the woods, and afterwards the lessee did

cut them down, and the lessor brought an action of trespass, quare vi & armis clausum fregit, &c. and it was good, notwithstanding exception was taken to it: and it is holden 12 E. 4. 8. by Fairfax & Littleton, that if the lessee cut the trees, that the lessor cannot carry them away, but he is put to his action of waste. Fenner and Walmsley Serjeants contrary: and they conceived that the lessee hath but a special property in the trees, viz. for fire-boot, plough-boot, house-boot, &c. and if he pass over the lands unto another, that he cannot reserve to himself that special property in the trees, no more than he who hath common appendant, can grant the principal, excepting and reserving the common; or grant the land excepting and reserving the common; or grant the land, excepting the foldage. The grand property of the trees doth remain in the lessor, and it is proved by 10 H. 7. 30. & 27 H. 8. 13. if tenant for life, and he in the reversion joyn in a lease, and the lessee doth waste they shall joyn in an action of waste, and the tenant for life shall recover the free-hold, and the first lessor the damages, which proves that the property of the trees is in **[228]** him: as to that, that he was dispunishable at the common law, that was the folly of the lessor; and although it was so at the common law, yet it is otherwise at this day; for when the statute says, that the lessor shall recover damages for the waste, that the property of the trees is in him. As the Statute of Merton, cap. 4. enacts, that if the lessor do approve part of the waste having sufficient for the commoners, and they notwithstanding that bring an assize, they shall be barred in that case, and the lord may have an action of trespass against them if they break the hedges, by force of that statute, as it hath been adjudged; for the intent of the statute was to settle the inheritance of the land approved without interruption of the commoners, and so in this case: but note, that by the Statute of Marlbridge, the lessor shall recover damages for the houses, &c. which are wasted &c. and yet a man cannot infer thereupon, that therefore the lessee hath no interest nor property in them; and such interest hath he in the trees notwithstanding the words of the statute, which is contrary to the meaning, as it seems; and therefore quære, if there be any difference betwixt them and what shall be meant by this word (property.) But the damages are given by the statute in respect of the property which the lessor is to have in reversion after the lease determined. Anderson Chief Justice, The lessor hath no greater property in the trees, than the commoner hath in the soil. Walmsley 2 H. 7. 14. & 10 H. 7. 2. The lessor may give leave to the lessee to cut the trees, and the same shall be a good plea in an action of waste, and the reason of both the books is, because the property of them is in the lessor. And to this purpose the difference is taken in 2. H. 7. betwixt gravel and trees. 42 E. 3. If a prior licence the lessee to cut trees, the same shall discharge him in a writ of waste brought by the successor; but if the lessee cutteth down the trees, and then the prior doth release unto him, the same shall not bar the successor, and so is 21 H. 6. And he cited Culpeppers case 2 Eliz. and 44 E. 3. Statham, and 40 Ass. 22. to prove that the lessor shall have the windfalls. If a stranger cutteth down trees, and the lessee bringeth an action of trespass, he shall recover but only to his loss, viz. for lopping and topping. As to that which was said, that if the lessee cut down trees, that the lessor cannot take them away, that is true, for that there is a contract of the law, that if the lessee doth cut them down, that he shall have the trees, and the lessor have treble damages for them. Also he said, that the trees are no part of the thing demised, but are as servants, and shall be for reparations. As if one hath a piscary in the land of another man, the land adjoyning is as it were a servant, viz. to dry the nets. So if one hath conduit pipes lying in the land of another, he may dig the land to mend the **[229]** pipes, and yet he hath no interest nor freehold. To that which was said, that by the excepting of the trees upon the land, the land upon which they stood is excepted; it is true, as a servant to the trees for their nourishment, but not otherwise: for if the lessor selleth the trees, he afterwards shall not meddle with the land, but it will be wholly in the lessor, quia sublata causa, tollitur effectus; and if the lessee tyeth a horse upon the land where the trees stood, the lessor may distrain the same for his rent, and avow as upon land within his distress and fee, and holden of him: and he said that the lessor might grant the trees, but so cannot the lessee; and therefore he said that the property is in the lessor, and not in the lessee; and if the lessor granteth them, they pass without attornment, but contrary if the lessor had but a

reversion in them; and if the lessor cutteth them down, the rent shall not be apportioned, and therefore they are no part of the thing demised. For 16 E. 7. & Temps E. 1. Fitz. Waste, in two or three places it is holden, that if the waste be done sparsim in a close or ground the lessor shall recover the whole; then admit that the trees are cut down, if the exception shall be good, how shall the thing wasted be recovered, and against whom: quod nota. Anderson Chief Justice, did conceive that the exception was void, and that the action was well brought; and he said, it was a knavish and a foolish demise, and if it should be good, many mischiefs would follow, which he would not remember. Windham was of the same opinion; and he said that the lessor might have accepted them, and so take from the lessee his fire-boot, plough-boot, &c. which shall go with the land. Periam Justice agreed, that as to such a special property, none can have it but such a one who hath the land, and therefore the exception of the wood by the lessee was void: but as to the other things, perhaps, if they were apple-trees, or other fruit-trees, the exception had been good: also although the trees were not let directly, yet they are after a sort, by a mean annexed to the land. And if the action were brought against him who made the exception, he cannot plead that they were let unto him, and therefore he doubted of the exception. Rhodes Justice also said, that he doubted of the exception; and he said, that the book of 44 E. 3. is, that the lessee should have the windfalls; and did not much regard the opinion of Statham. But Anderson was of opinion that the lessor should have the windfalls. Note, the case was not at this time adjudged, but adjourned.

Ante 162.

[230] CCCLXIII. Hil. 29 Eliz. In the Common Pleas.

A copyholder with licence of the lord made a lease for years, and afterwards he surrendred the reversion, with the rent, to the use of a stranger, who was admitted accordingly. It was moved, if here there needed any attornment, either to settle the reversion, or to create a privity. It was the opinion of Rhodes and Windham Justices, that the surrender and admittance, (ut supra) are in the nature of an attornment, or at the least do supply the want of it.

Mich. 29 Eliz. In the Common Pleas.

CCCLXIV. Bell and Langleys Case.

In trespass, the case was thus, that A. was lord of a manor, of which B. held Black Acre by copy of court-roll in fee according to the custom: A. made a feoffment of the said Black Acre to a stranger; B. dyed. The point was, if now the customary interest be determined against the heir of B. For it was moved, because that the feoffee had not any court, the heir of B. could not be admitted, nor the death of his ancestor presented, because but one copyholder: but all the Court held the contrary, and that the copy should bind the feoffee, and the ceremony of admittance was not necessary; for otherwise every copyholder in England might be defeated by the sole act of the lord, viz. his feoffment. But the lord by his own act, which shall be accounted his folly, hath lost his advantages, viz. fines, heriots, and such other casualties.

Mich. 29 Eliz. In the Common Pleas.

CCCLXV. Boxe and Mounslowes Case.

Thomas Boxe brought an action upon the case against John Mounslowe, that the defendant slandred him, in saying, that the said Thomas Boxe is a perjured knave, and that he would prove the said Thomas Boxe had forsworn himself in the Exchequer,

&c. and supposed the said words to be spoken in London 4 Feb. 28 Eliz. Et prædict' Johannes Mounslowe per Johannem Lutrich Attornatum suum venit & defendit vim & injuriam quando, &c. Et dicit quod prædict' Tho. Boxe actionem suam versus eum habere non debet; quia dicit quod prædict, Thomas Boxe being one of the collectors of the subsidies, before the speaking of the said words, viz. 27 & 28 Eliz. in Curia Scacca-**[231]**-rij apud Westm', did exhibit a bill against the said John Mounslowe, containing, that the said John being assessed in ten pounds in goods, the said Thomas Boxe came to him, and demanded of him sixteen shillings eight pence, which the said John Mounslowe did refuse to pay; and that demand and refusal was supposed to be in London in Breadstreet; et pro verificatione præmissorum adtunc & ibid' sacramentum corporale per barones præfat' Thomæ Boxe præstitit: the said Thomax Boxe swore the said bill in substance was true, ubi revera, the said John Mounslowe did not refuse: per quod the said John Mounslowe, postea, viz. prædict. tempore quo, &c. dixit de præfat' Thoma Boxe prædict. verba, &c. prout ei bene licuit: the plaintiff replyed, that the defendant spake the words de injuria sua propria absque causa per præfat. Johannem Mounslowe superius allegata: et hoc petit quod inquiratur per Curiam, & prædict. defendens similiter. And a venire facias was awarded to the Sheriffs of London, and it was found for the plaintiff, and damages 400l. And now it was moved in arrest of judgment, that there was no good trial, nor the issue well joyned, for the issue doth consist upon 2 points triable in several counties, viz. the oath which was in the Exchequer, and that ought to have been tryed in Middlesex; and the matter which he affirmed by the oath viz. the demand, and the refusal to pay the subsidy, and that was alledged to be in London, and is there to be tried; and the issue, viz. de injuria sua propria goeth to both, for the ubi revera will not amend the case, as Periam Justice said; and both are material: for the defendant ought to prove that the plaintiff made such oath, and also that the substance and matter of the oath was not true, for otherwise the plaintiff cannot be proved perjured. And therefore the counties here, (if they might) should have joyned in the tryal: and the opinion of the Court was against the plaintiff; for Anderson and Windham said, that if this issue could have been tryed by any one of the counties without the other, it should most properly and naturally have been tried in Middlesex, where the oath was made, for the perjury, if any were, was in the Exchequer: but they said, the issue here was ill joyned, because it did arise upon two points triable in several counties, which could not joyn; whereas the plaintiff might have taken issue upon one of them well enough, for each of them did go to the whole, and if any of them were found for the plaintiff, that he had sufficient cause to recover. Gawdy moved that it should be helped by the Statute of Jeofails, which speaks of mis-joyning of issues. Anderson, The issue here is not mis-joyned; for if the counties could joyn, the issue were good, but because that the counties cannot joyn, it cannot be well tryed; but the issue it self is well enough. Windham and Rhodes were of the same opinion; but Periam doubted it. Anderson said, that **[232]** if an issue tryable in one Court, be tryed in another, and judgment given upon it, it is error. And afterwards Lutrich the Attorney said, that it was awarded that they should re-plead; nota, quod mirum: for first, the statute of 32 H. 8. cap. 30. speaks of mis-joyning of process, and not mis-joyning of issues; and admit that this case is not within any of those clauses, each of them being considered by it self, yet I conceive it is contained within the substance and effect of them, being considered together. Also I conceive, it is within the meaning of both statutes, viz. 32 H. 8. cap. 30. & 18. Eliz. cap. 14. for I conceive, the meaning of both statutes was to waste delays, circuits of actions and molestations, and that the party might have his judgment notwithstanding any defect, if it were so, that notwithstanding that defect, sufficient title and cause did appear to the Court. And here the plaintiff hath sufficient cause to recover, if any of the points of the issue be found for him: for if it be found that the matter and substance of the oath be found true, which (might be tryed well enough by those in London) the plaintiff had cause to recover: wherefore I conceive that the verdict in London is good enough and effectual: and note, that Rhodes said that he was of counsel in such a case in the Kings Bench, betwixt Nevi and Dent.

CCCLXVI. Mich. 19 Eliz. In the Common Pleas.

The case was, A. granted B. a rent-charge out of his lands to commence when J. S. dyes without issue of his body; J. S. dyes having issue, and the issue dyeth without issue; Dyer said, that the grant shall not take effect, for J. S. at the time of his death had issue, and therefore the grant shall not then commence, and if he dyeth, then not at all by Manwood. And Dyer and Manwood said, if the words had been to begin when J. S. is dead without issue of his body, then such a grant should take effect, when the issue of J. S. dyes without issue, &c. And they said, that if the donee in tail hath issue, which dyeth without issue, the formedon in reverter shall suppose that the donee himself dyed with issue, for there is an interest. And there is a difference betwixt an interest and a limitation: for if I give lands to A. and B. for the term of their lives, if either of them dyeth, the survivor shall hold the whole: but if I give lands to A. for the lives of B. and C. now if B. or C. dyeth, the whole estate is determined, because it is but a limitation, and B. and C. have not any interest.

3 Leon. 103.

[233] CCCLXVII. Temps Roign Eliz. In the Common Pleas.

The prior of Bath let his manor of A. to C. for life, rendrint rent; and after the priory dissolved, the King let the whole manor, with the appurtenances to J. S. Dyer, The matter depends upon this point; if the demesns be severed from the services during the life of the lessee. And he conceived that the lord could not hold a court if such power were not reserved upon the lease: contrary if but parcel had been leased, quod fuit concessum. Welch, The demesns are severed from the services for ever, as if they had been granted in fee; but here, having regard to the lessor, the demesns and services are united, and make one manor: but as unto the lessee, and all others, the services are in gross: and such also was the opinion of Dyer: and he said, that if a bishop leases the demesns of his manor for life, and dyeth, the reversion shall be in his successor, and was in him in his life time in the right of his church; and if husband and wife, seized of a manor in the right of the wife, let the demesns of the said manor for life, yet he hath the reversion in the right of his wife, and in such case it remains a manor; but if the husband alone had let it, he had gained the reversion to him, and severed it from the manor.

CCCLXVIII. Trin. 33 Eliz. In the Common Pleas.

The case was, A man 30 Eliz. made A feoffment in fee to the use of himself for life, and after to the use of his first son, and his heirs: the father and the feoffees before issue, for mony, by deed gave, granted, and enfeoffed J. S. and his heirs, who had no notice of the use: the tenant for life had issue, and dyed, the issue entred. Glanvill, The use limited to the first son is destroyed; for without regress of the feoffees it cannot rise, and it is gone by the livery. Vide Plow. Com. 347. And also he put the case of the Earl of Kent, who by the release of the surviving feoffees, a dormant use was destroyed, and could not afterwards be revived. Harris, The use might rise without the entry of the feoffees; and he put a difference betwixt an use created before the statute, and created after; for in the first case they ought to enter, and if they be disabled by any Act, as in the case of Gascoign and the Earl of Kent, it shall never rise; but in the latter case all the authority and confidence is by the statute taken out of the feoffees, and the use contingent shall rise without aid of the feoffees, by the operation of the law; for the land is bound to the uses, and charged with them; as upon a recovery in a warrantia chartæ, the land of the defendant is charged pro loco & tempore; and [234] according to the common experience in conveyances for payment of the Kings debts, as in the case of Bowden and Dennis, the debtor of the King made a feoffment in fee unto the use of himself and his heirs until he should make a default of payment of such a sum to the Queen at such a day, and for default to the use of the

Queen and her heirs. Cooper, There needs no entry of the feoffees; and he put the difference before put by Harris, between an use created before, and an use created after the statute; and now the feoffees have not any power to revive or destroy such uses, but are only as instruments to convey the uses, for the use is created upon the livery, and is transferred by the statute, if the person to whom the use is limited be capable thereof at the time of the limitation; and he put the case of feoffments to uses, 30 H. 8. and there is a great difference betwixt uses limited before and after the statute: for they have not such a seisin whereof they may make a feoffment. And he put the case of Cheny and Oxenbridge; Cheny let to Oxenbridge for 60 years, and afterwards enfeoffed Oxenbridge to the use of Cheny himself and his wife, for their lives, with divers remainders over; and it was adjudged in the Court of Wards, that by that feoffment the term was not extinct: and he put the case of the Lord Paget, adjudged in the Kings Bench; a feoffment was made to the use of the feoffor for life, the remainder to him whom the feoffor should name at his death in fee; the feoffor and the feoffees for good consideration levy a fine to a stranger and afterwards the feoffor names one and dyes, the party named by the feoffor shall have the land notwithstanding the fine. Beaumont, The contingent use here is utterly destroyed; and it appears by the preamble of the Act of 27 H. 8. that the makers of the said Act did not favour uses, but their intent was utterly to root out uses; and if contingent uses, which are not, nor can be executed by the statute, should stand in force, the mischief would be, that no purchasor would be secured of his purchase, but should always be in danger of a new born use, not before known. And he grounded his further argument upon the reason of Manwood and Dyer, where a man makes a feoffment in fee to the use of himself and his wife that shall be and afterwards he and his feoffees, and those in remainder make a feoffment to divers new feoffees, and unto new uses, and afterwards takes another wife and dyes; it seemed to the said 2 justices that by that feoffment ut supra the contingent use was destroyed; for when the estate which the feoffees accepted of is taken away, which is the root and foundation of the uses, which are the branches and body of the said tree, it necessarily follows that they also be taken away. And forasmuch as the feoffees by their livery are barred to enter for to recontinue the estate which should yield the said uses, they also are gone and extinguished. Yelver-**[235]**-ton conceived that notwithstanding the feoffment, that the use did rise in its due time according to the limitation of it. Quære, the case was not resolved but adjourned.

3 Leon. 252.

CCCLXIX. Trin. 33 Eliz. In the Common Pleas.

In a replevin, the defendant avowed for damage feasant, the plaintiff in bar of the avowry shewed, that he is inhabitant of such a town, and shewed, that every inhabitant in every messuage in the said town had used to have common in the place where, &c. Glanvill, The prescription is not good for want of capacity in the party who pretends interest, for it is not certain, but applyed to a multitude; and he put divers cases to prove the same, as 22 H. 6. 21 H. 7. 1. Mariæ, Dyer 100. The King grants a rent probis hominibus de Islington, the same is void, for they are not capable. Harris, The prescription is good; and he agreed that a confused multitude could not prescribe in matter of interest, but in an easement or discharge, as in a way to the church, and that by reason of the custom of the land, and not in their person. Vide 7 E. 4. 26. Where it is pleaded, that all the inhabitants within such a town have used to have common there, and for a township to have a way to the church, and by Danby it is good; and Littleton said it ought to be pleaded by way of usage: and 18 E. 4. 3. All the inhabitants of such a town, time out of mind, have used to have common, &c. Where a difference was taken, where the prescription is in the person, and where in the land. 15 E. 4. 29. Cooper, Inhabitants of a town may well prescribe, and he vouched Bracton 222, 223. Quando acquiritur ex longo usu sive constitutione cum pacifica possessione continua, & non interrupta ex scientia negligentia & patientia dominorum, et etiam omitti potest per negligentiam: and he vouched Britton 144. Common is obtained by long sufferance, and also may be lost by long negligence, &c. The case was adjourned.

CCCLXX. MICH. 5 JAC. IN THE COMMON PLEAS.

Tenant for life of a rent acknowledgeth a statute, and releaseth to the terr-tenant, the statute is forfeited: it was holden by Cook, and two other of the justices in Communi Banco, that the rent as to the conusee was in esse.

CCCLXXI.

It was holden by Yelverton in his reading, that if a man makes a lease for two years, and confirms the estate of the lessee for 20 years, it is a good confirmation for 20 years, because that all is but a chattel.

[236] CCCLXXII.

If 2 joyntenants are for life, and the one grants his estate for the life of his companion, it was holden to be a forfeiture; for first it is a severance of the joynture, and then a lease for the use of another.

CCCLXXIII. MICH. 5 JAC. IN THE COMMON PLEAS.

Two men were joyntly bound in an obligation, the one is principal, the other is suerty, the principal dyed, the surety took administration, and the principal having forfeited his obligation, the surety made an agreement with the creditor, and took upon him by bond to discharge the debt; in debt brought by another creditor of the intestate, upon fully administred pleaded by the administrator, it was a question, if upon shewing of the obligation, and that he had satisfied it, and contended it in his proper debt he should be relieved upon that plea. It was adjudged he should not, because by the joyning with the principal, the debt became his own debt.

CCCLXXIV.

If land be given to A. and B. for the life of C. the remainder to the right heirs of A. or B. who shall survive: it was holden, that if A. do release to B. that the remainder was destroyed. And if land be given to one in tail, and if J. S. comes to Westminster such a day, the remainder to J. S. in fee, if the estate-tail descends to two coparceners who make partition; now if J. S. come to Westminster, the fee shall not accrue, because the particular estate is not in the same plight as it was before.

CCCLXXV. MICH. 5 JAC. IN THE COMMON PLEAS.

It was resolved, that a copyholder was not within the Statute of Wills.

CCCLXXVI. MICH. 5 JAC. IN THE COMMON PLEAS.

A man makes a feoffment with warranty; if the feoffee brings a warrantia chartæ against the heir, who pleads riens per discent at the time of the voucher, and it is found for the tenant: it was holden, that the plaintiff should never after have execution of lands which after descend, for that it is peremptory for the demandant.

[237] CCCLXXVII. MICH. 5 JAC. ADJUDGE ACC'.

The Queen hath the Isle of Garnsey, and cognisance of pleas within it, for her joynture: a man within Garnsey being disturbed to present to a church which is void, brings a quare impedit in Communi Banco; it was holden in this case, that Garnsey is an island where our law runneth not; but it is otherwise of the Isle of Man, &c. and it was said, that if the King grants cognisance of pleas, a man shall not have cognisance of quare impedit, assise, redisseisin, &c.

CCCLXXVIII. MICH. 5 JAC. IN THE COMMON PLEAS.

Note, It was resolved by the justices, that if a parson takes a benefice above the value of 8l. with a dispensation, and afterwards takes a 3l. benefice, that the first benefice is void by the statute of 21 H. 8. cap. 13.

CCCLXXIX. 44 ELIZ. IN THE KINGS BENCH.

Note, It was said that it was adjudged 44 Eliz. in Banco Regis, that if lessee for life granteth his interest to his lessor, that the same shall not enure as a surrender, because there wants words of surrender, but shall enure by way of grant only.

CCCLXXX. HIL. 5 JAC. IN THE KINGS BENCH BY COOK.

It was holden by Cook Chief Justice, if a man seized in fee deviseth, that after the death of his son without issue, that J. S. shall have his lands, that in that case the son hath an estate in fee determinable, and that the remainder is good.
1 Roll. 844. Syderf. 445.

MICH. 5 JAC. IN THE KINGS BENCH.

CCCLXXXI. BALLS CASE.

A copyholder pleaded, that the custom of the manor was, that every copyholder for life might appoint in the presence of two others, that such a man should have his copyhold after his death without any surrender to his use, and that the two tenants should assess for his fine what sum they pleased, so as it was not lesser than had used to be paid, where the lord would assess a reasonable fine; and it was adjudged that it was a good custom.

[238] PASC. 6 JAC. IN THE COMMON PLEAS.

CCCLXXXII. GLASCOCKS CASE.

A copyholder alledges the custom to be, that all the tenants within such a manor in Essex, had used to cut down trees to repair their copyhold and freehold tenements within the manor, and also to sell their trees at their pleasure: and adjudged a good custom.

MICH. 1 JAC. IN THE COMMON PLEAS. ROT. 854.

CCCLXXXIII. SAPLAND AND RIDLERS CASE.

It was adjudged after long argument, that where the custom of a copyhold manor was to admit for life, and in remainder for life at any time when there is but one copyholder for life in possession: and during the minority of the heir within the age of 14 years, his guardian in soccage in his own name admits a copyholder in remainder for life; that it was a good admittance according to the custom; and he was dominus pro tempore well enough as to that purpose; although it was objected by Walmsley, that the guardian is but a servant, and not dominus; but because it was agreed that he had a lawful interest, the admittance was good: and so it was adjudged.

PASC. 3 JAC. IN THE COMMON PLEAS.

CCCLXXXIV. DUKE AND SMITHS CASE.

It was agreed, that if he in the reversion suffereth a common recovery to uses, his heir cannot plead that his father had not any thing at the time of the recovery, for he is estopped to say that his father was not tenant to the præcipe, and therefore it is a good recovery against him by way of estoppel.

CCCLXXXV. MICH. 6 JAC. IN THE KINGS BENCH.

In a writ of error brought upon a judgment given in Communi Banco in an ejectione firmæ upon a lease of a running water, it was agreed by the Court, that no livery could be made of running water, because it is fugitive; but otherwise it is of water in a standing pool, for that is certain and peramount; and of that livery ought to be with a dish of part of the water.

[239] CCCLXXXVI. DUNCOMBS CASE. IN THE COMMON PLEAS.

The grantee of a rent-charge for life acknowledgeth a statute, and afterwards he released to the terr-tenant; it was the opinion of Cook Chief Justice in Communi Banco, that the rent after the release should be put in execution upon the statute.

CCCLXXXVII. THE OPINION OF POPHAM CHIEF JUSTICE. IN THE KINGS BENCH.

It was the opinion of Popham Chief Justice, that if a man covenant to stand seized to the use of himself for life, the remainder to the use of his executors, that in that case the executors shall take to the use of their testator: but if a man covenant upon good consideration to stand seized to the use of the executors of a stranger, that the word (executors) is a word of purchase, and they shall take to their own use.

CCCLXXXVIII. MICH. 7 JAC. IN THE COMMON PLEAS.

Cook Chief Justice put this case, If the custom of a manor is, that every tenant at his death shall pay his best beast for a heriot, if a feme sole, who is tenant for life of this manor, taketh a husband, and afterwards dyeth, if the lord shall have a heriot: Dodderidge the Kings Serjeant said that he should not, because that the wife had not goods.

MICH. 7 JAC. IN THE COMMON PLEAS.

CCCLXXXIX. WARDS CASE.

An information was against Ward and his wife, for his wives not coming to the church, upon the statute of 28 & 35 Eliz. It was said by Cook Chief Justice, that the husband is chargeable for the recusancy of his wife, and he said there needed no conviction; but before an information the husband shall not be chargeable for his wife, but where he is named with the wife; and he said, that the King had a fee-simple in their lands, for he hath it to him and his heirs and successors until conformity, with satisfaction of the arrearages. Vide statut. 28 Eliz. Rastal. Tit. Corone.

[240] MICH. 3 JAC. IN THE COMMON PLEAS.

CCCXC. WHEELERS CASE.

A copyhold custom is, that a woman shall have a free bench, quam diu se bene gesserit, and live chast; and she is incontinent, of which the lord hath not notice, and the lord admits her tenant: it was holden it should bind the lord, although he had not notice of the incontinency.

MICH. 5 JAC. IN THE STAR-CHAMBER.

CCCXCI. EDWARDS AND WATTONS CASE.

Note for law in the Star-Chamber, if a man write a scandalous letter unto another, and put his name to it, if the party who writ it, publisheth the same either before or after the delivery, an action upon the case lyeth against him at the common law: but if the party who writes it doth not publish it, yet he may be sued for the same in the Star-Chamber: and it was said in this case, that he who receives books which are written against the religion established in the kingdom, and shews them to others, with comments of them, he runs into a præmunire by the statute of 4 Eliz.

CCCXCII.

The case was, A. made a lease of White Acre to B. upon condition he should do no waste, in which there was a fish-pond stored with carps, pikes, and their fry; C. destroys all the fish, B. being upon the land, for which A. enters; 1. If the destruction of all the fish, and their fry, be waste within the Statute of Gloucester: it was said that it was, for they are parcel of the inheritance, as are deer within a park enclosed: but it was adjudged 29 Eliz. in Communi Banco in Moyle and Ewers case, that where a lease of a manor was, in which was a warren of conies, and the lessee destroyed the conies, that it was not waste, for they were feræ naturæ, and the land bettered by them; and such was the opinion of Walmsley Justice, although the conies were in a warren paled and enclosed with a wall; but the destroying of doves in a dove-house is waste. And it was adjudged in Sir Francis Palmers case, 9 Jac. in B. R. that although the cutting of underwood was not waste, yet the eradicating of it was waste: the other matter was, if the destruction of the fish by a stranger, the lessee being upon **[241]** the land were waste; it was said it was waste, for qui non vetat peccare cum possit jubet: and it was said, that if a man commit waste, or suffer another to do it, he did incur the penalty in the statute. But in this case it was said, that a condition to defeat an estate should be taken strictly: as if a custom be, that if a copyholder for waste done shall forfeit his estate, if a stranger doth the waste it is no forfeiture, for three things in law shall be taken strictly, conditions, customs, penal laws. As if the custom be, that an infant at the age of 15 may make a feoffment, he

cannot make it by attorney. And it was adjudged 1 Jac. in Communi Banco in Woodleys case. So the statute of 5 E. 6. a penal law is, that a man shall not buy any victual to sell the same again: yet it was adjudged, that where a man buys meal, and makes the same into starch, and sells it, he may well justifie the sale thereof, and it is out of the statute, because it is not the same thing.

Rolls. tit. Waste.

PASC. 8 JAC. IN THE KINGS BENCH.

CCCXCIII. WARDS CASE.

It was adjudged in this Court, that if a mill be set upon posts, that no waste lyeth for it, and that a copyhold might be of a mill, as it was adjudged in Green and Harris's case. Also it was said, that there is a real and personal forfeiture of copyhold lands; real is not necessary to be found by the homages, as was resolved in Brocks case; but otherwise it is of a personal forfeiture: and Hil. 8 Jac. a woman copyholder built a new house upon the land, and it was agreed to be a forfeiture.

PASC. 8 JAC. IN THE COMMON PLEAS.

CCCXCIV. BROWN AND TUCKERS CASE.

If a man have estovers to such a house, and he enlargeth his house, or buildeth more houses or chimneys, the estovers remain to all the houses and chimneys which were there before, and not to those added or new builded, as it was adjudged.

4 Co. 84.

[242] PASC. 8 JAC. IN THE COMMON PLEAS.

CCCXCV. RATCLIFFE AND CHAPLINS CASE.

In an ejectione firmæ between Ratcliffe and Chaplin upon not guilty pleaded, it was given in evidence, that time out of mind a custom had been used, and that proved by witnesses, that the eldest heir, be it male or female, should inherit the land; and that it appeared in the court rolls of the said manor, of which the land in question was parcel; two presidents to prove that the eldest sister ought to inherit, and that the youngest sister should have nothing in the land; the one president was 8 Eliz. and the other 18 Eliz. In the other side in disaffirmance of the custom, it was given in evidence, divers court-rolls 6 H. 4. and especially one president, that both sisters should inherit as coparceners did by the common law; notwithstanding which, the jury found for the custom in regard they upon their own knowledge knew the usage of the country, and that in divers places it had been so used in the hundred within which this manor was. But in this case it was agreed by the Court, that if the custom had been that the eldest sister only should inherit, yet by that custom the eldest aunt, or the eldest neece should not inherit the land: and so it is in the case of borough English, where the custom is, that the youngest son shall have the land, it doth not give it to the youngest uncle, for customs shall be taken strictly: and Foster Justice said, that so it was adjudged in one Totnams case: and in the argument of this case, it was said by Cook Chief Justice, that there are two pillars of custom, one the common usage; the other, that it be time out of mind; and therefore upon the evidence given to the jury, the Court enforced the parties which maintained the custom to shew presidents in the court rolls to prove the usage, and he said, that without such proof, and that it had been put in ure, although it had been deemed and reported to have been the true custom; yet the Court could not give credit to the promise by witnesses.

1 Roll. 623.

[243] PASC. 8 JAC. IN THE COMMON PLEAS.

CCCXCVI. ARDEN AND GOADS CASE.

In an action of trespass upon the case for divers goods, the declaration was of trover and conversion of them to the defendants use: upon not guilty pleaded, they were at issue, and there an inventory of the goods was given in evidence to the jury, as the goods were apprised by upholsterers: and in this evidence another point did arise. These goods were taken in execution, and delivered to the defendant by the sheriff; and afterwards the owner of the goods against whom the execution was awarded, made a deed of gift of them to the plaintiff by these words, scil. he granted all those goods which were late put in execution. Cook Chief Justice said, that quacunque via data, that deed could not entitle the plaintiff to the goods, for it is a dilemma; for posito, that the goods were put in execution, then they did not pass; and admit that they were not put in execution, he did not grant but only those goods which were in execution, and so there is an opposition; and afterward judgment was given for the defendant.

PASC. 8 JAC. IN THE COMMON PLEAS.

CCCXCVII. THE EARL OF RUTLAND AND SPENCERS CASE.

The case was, The late Queen Elizabeth granted to the Earl of Rutland the office of parkership and constable of, &c. Habendum from the time of his full age for life, and also by the same patent she granted him the stewardship of a manor, habend' prædict' officia pro termino vitæ per deputatum suum vel deputatos suos, &c. eidem officio pertinent' in tam amplis modo & forma, &c. Volentes quod subditi nostri sint auxiliantes & assistentes to him: and after that one as steward to that court came and made proclamations, and also did the deputy of the Earl of Rutland: and thereupon the Earl of Rutland brought an action upon the case against the other: in this case three points were moved by Nicholls Serjeant, 1. If a stewardship granted by the King might be exercised by a deputy without such authority given him in his patent: and he took a difference between an office of trust and other offices, as in 28 H. 8. of a carver, &c. and 11 E. 4. 1. the office of the Chancellor of the Exchequer, and such offices cannot without special authority be assigned over, 39 H. 6. 34. Of the office of marshal per se vel sufficient' deputatum, &c. Nevills case in **[244]** the Commentaries. Offices of trust which are inheritances may be executed by deputy. 8 Eliz. Dy. 248. A steward may be retained by word; and he said, there is a difference between a deputy and an assignee; for an assignee can forfeit but his own estate, but a deputy shall forfeit the estate of his master, and therefore if a steward grant his office for life who hath the office in fee, the grantee shall forfeit no more than his estate for life, 2 E. 6. Br. If the under steward make admittances, it is good, and yet he is but a deputy; but if it be out of court, then it ought to be by a special custom, vide 2 Eliz. Dyer. The office of chyrographer granted for life, and exercisable by a deputy: and he said, that in these letters patents the intent shall be taken beneficially for the subject, and that for the honour of the King, if the King be not deceived in his grant. Vide 6 E. 6. Dyer 77. Dodderidge to the contrary; and he took a difference between offices of trust granted for life, and those which are granted in fee, for he who hath it but for life cannot assign them over; for the grantor did not intend that another person should have the office, unless express mention were made in the grant of assignees: but when the office is granted in fee, there is no such confidence put in the person of the grantee, for his heir shall have it, who is a person not known to the grantor. But in all cases the grantee is elected for his skill: I agree 10 E. 4. 10. he may make a deputy by special words, but then that deputy by those words cannot make a deputy: that a steward is an officer of trust, is proved, for he enters plaints in the court, and surrenders, and although he hath not a judicial place, yet he hath a ministerial place, and the lord and tenants repose their trusts in

him: and it is also an office of skill. Vide 21 E. 4. 20. that the office of the keeper of a park, steward, &c. cannot be assigned without special words of assignees. And as to the case which was put by Nicholls, 8 Eliz. that one may make a steward by word, and therefore an assignee for life by word, it is a non sequitur: and he said that for another cause in the patent it self, no deputy in this case could be made; for although the words are habendum & gaudendum, &c. offic' prædict' per deputatum suum, sive deputatos suos, the same had been good if there had been no habendum before: there was an habendum before in the patent: but here are three several habendums, which are as three several grants, and the defect of the one shall not be supplyed by the other. 22 H. 6. 11. 2. Assises are maintainable for two offices, although they be by one and the self same grant: and those words (volentes, &c.) in the patent, are nothing to the purpose, for the grant it self is determinable by the body of the grant, and the clause de assistantes shall not supply that. Vide 20 H. 6. 1. Land given to two & hæredibus, with warranty, hæredibus suis. Vide 13 E. 3. Grants 63. Throgmorton and Tracies case, Plow. **[245]** Com. 18 H. 8. Br. Lovels case; and so in our case; the clause of assistantes makes nothing to the matter; for reddendo singula singulis it extends to no more than passed, and was granted before in the body of the grant. The second point which Dodderidge argued was, if there was a sufficient disturbance: and he held that there was not, and therefore the finding of the jury not good: and the jury hath not found the vi & armis; and he said, that when the writ is vi & armis, there ought to be some violence, and taking of something, and some actual thing is to be done. Vide F. B. 86 & 92. 43 E. 3. 20. 8 R. 2. Title Office. 48 E. 3. 25. 16 E. 4. 11. & 2 E. 3. 40. But in this case there is but a threatning at the most, but no force is used; and there the writ is ill, and there is no sufficient disturbance to maintain this action. The case was adjourned.

8 Co. 55.

Trin. 11 Jac. In the Common Pleas.

CCCXCVIII. Cookes Case.

In a writ of intrusit maritagio non satisfacto, it was found for the plaintiff, but no damages were assessed by the jury, and the value of the marriage was found to 50l. and now the question was, if the same might be supplyed by a writ of enquiry of damages, and prima facie the Court seemed to be of opinion it could not; for where a man may have an attaint, there no damages shall be assessed by the Court, if they be not found by jury: and the Court would advise of it; but afterwards the same term it was adjudged, that no writ of enquiry should issue forth; but a venire facias de novo was granted. Vide 44 E. 3. Thorp. acc'.

CCCXCIX.

Mountague Serjeant demanded of the justices their opinions in a case upon the Statute of 3 Jacobi of Recusants, in the behalf of the University of Oxford: the case was, If a recusant convict, to avoid the said statute, grants his patronage for years to one of his friends in trust, if the grant was void, or not within the said statute. The justices refused to deliver their opinions in this case; for they said, that this point might judicially come in question before themselves, and such they said was the answer of Hussey in 1 H. 7. in Humphrey Staffords case: when King Hen. 7. came in Banco, and demanded a question of them; but yet tacite they seemed to agree, that such a lease of the patronage was void by the said statute; and they said, that they would not have the university to be discouraged in the case, which implyed their opinions to be **[246]** accordingly: and 21 H. 7. was vouched, that the patronage was only matter of favour, and not valuable. And in this case Cook said, quod apertus hæreticus melior est, quam fictus Catholicus.

TRIN. 11 JAC. IN THE COMMON PLEAS.

CCCC. GRUBHAMS CASE.

The case was this, Grubham made a lease to one by deed-poll, habendum to him and his wife, and to his daughter successive sicut scribuntur & nominantur in ordine, and afterwards dyed, his wife dyed, and if it was a good remainder to the daughter, was the question. Harris Serjeant, It was void, and not a good remainder for the incertainty. Et vide Cook 1 part, Corbets case. In all contracts and bargains there ought to be certainty: and therefore in 22 H. 6. if a feoffment be made to two, & hæredibus, it is void, although it be with warranty to them and their heirs. Vide 9 H. 6. 35. Where renunciavit totam communiam, doth not amount to a release, because it is not shewed to whom he released: and so in 29 Eliz. in Banco Regis, in Windsmore and Halbards case, where an indenture was to one habendum to him and his wife, and a third person, and it was holden that it was void by way of remainder to any of them. But the Court was of opinion in the principal case, that the daughter had a good estate in remainder, and that the case did not differ from the case in the Lord Dyer; where a lease was made by indenture to one, habendum to him, and to another sicut nominat. in charta, and that those words made the grant certain enough; and so in this case, sicut scribuntur & nominantur in ordine, shall be sicut scribuntur & nominantur in eadem charta; but they agreed, that a lease made to three, habendum successive, was not good for the incertainty.

HIL. 9 JAC. IN THE KINGS BENCH.

CCCCI. PRICE AND ATMORES CASE.

In an ejectione firmæ it was agreed by the justices, where a man possessed of a term for 60 years, by his will made his wife his executrix, and devised all his term and interest to her, and if she dyed before the term ended, that the same should remain to his son and the heirs males of his body the **[247]** son dyed, the executrix entred, and claimed as legatee, and assigned the term over, the executor of the son entred, that his entry was not lawful, for the son had but a possibility, and no interest; for by the devise of the whole term, the whole interest was in the wife, and when it was in her, it could not remain over; otherwise if the land had been granted to her for life, and if she dyed, that it should remain as before: and note, that 25 Eliz. it was adjudged in Communi Banco, that such a possibility could not be released: and 29 Eliz. in Hammingtons case, that it could not be granted.

TRIN. 11 JAC. IN THE COMMON PLEAS.

CCCCII. THE BISHOP OF EXETER AND SIR HENRY WALLOPS CASE.

Note in this case it was adjudged, that the King by a special proviso in the Statute of 21 H. 8. of Plurality, might give to any of his chaplains as many benefices as he pleased. But otherwise it is of a common person, for they are stinted by the statute.

MICH. 12 JAC. IN THE KINGS BENCH.

CCCCIII. GLOVER AND ARCHERS CASE.

The case was, Tenant for life made a lease for 21 years, rendring rent at Mich. and the Annunciation, or within 13 weeks of any of the said feasts: after Mich. and before the 13 weeks past, the lessor dyed; and the plaintiff his executor brought debt for the rent: it was adjudged by Cook and the other justices, that the action did not lye

for the rent; for the rent being to be paid at Mich. or within 13 weeks after, the lessee hath election to pay it at any of the days, and before the last day it is not due, and when the lessor dyeth before that day, his executors have not any right to the rent, but after the death of the lessor, having but an estate for life, the rent is gone: but, if the lessor had had a fee-simple in the land, and had dyed before the last day, the heir should have had the rent, as incident to the reversion: but if the lessor had survived both days, the rent had been a thing vested in him, and his executors should have had it; but if the rent had been reserved at Mich. and if it be behind by 13 weeks, that then it should be lawful for the lessor to enter; if the lessor survive Mich. his executors shall have debt for the rent, for then the rent is due, and the 13 weeks are but a dispensation of the entry of the lessor until that time: and in this case **[248]** as well as where the rent is reserved at two days in the disjunctive, it is sufficient that the rent be demanded at the latter day, without demanding of it at the first day.

10 Co. 127, 128. 2 Cro. 127. & 309. ib.

Mich. 10 Jac. In the Common Pleas.

CCCCIV. Sir Baptist Hix and Fleetwood and Gotts Case.

The case was, Fleetwood and Gotts bargained and sold Weston Park, being 300 acres of land, to Sir Baptist Hix for 11l. for every acre which did amount to 2530l. and in the premises of the indenture of bargain and sale, it was agreed by the parties, that the said park being wood-land should be measured by a pole of 18 foot and a half: and further it was covenanted, that Fleetwood and Gotts should appoint one surveyor, and Hix another, who should measure the said park: and if it by the measure should exceed the number of acres mentioned in the indenture, that then Hix should add to them according to the proportion of 11l. for every acre, and if it wanted of the measure, then the said Fleetwood and Gotts should repay to Hix the surplusage of that mony, according to the proportion of 11l. the acre: and upon the indenture Hix brought covenant, and assigned a breach, because upon measure it wanted 70 acres; and the defendants did demur upon the declaration, because the plaintiff had not therein shewed by what measure it was measured; for they said by Shirley, that although it was agreed in the first part of the indenture, that the measure should be by a pole of 18 foot and a half, yet when they come to the covenants, there they do not speak of any measure; for which cause it shall be taken for such a measure as the statute speaks of, scil. a measure of 16 foot and a half the pole; and by such measure there wants not any part of the acres. Dodderidge contr. And he put this ground, that if certainty once appeareth in a deed, and afterwards in the same deed it is spoken indifferently, reference shall be unto the certainty which appeareth: and therefore if by an indenture lands be given to a man, & hæredibus masculis, and afterwards in the same deed it appears, it is hæredibus de corpore suo: it shall be an estate-tail, because the first words were indefinite, and the last certain, by which it appeared that he passed but an estate in tail: and 4 E. 4. 9. b. the words of a declaration was, noverint universi per præsentes nos J. S. teneri, &c. W. B. in 20l. solvendum eidem J. S. It was holden by the Court, the same did not make the obligation void, because it appeared by the first part of the obligation, that he should be bound to the plaintiff; and therefore the intent being so, the plaintiff might declare of a solvendum to himself: and the **[249]** words (J. S.) should be surplusage: and 22 E. 3. 4. the abbot of Selby granted quandam annuam pencionem to B. ad rogatum J. E. illam scilicet quam idem J. E. habuit ad terminum vitæ suæ, et solvendam quousque (sibi) de beneficio competo provisum fuerit; it was holden by the Court in a writ of annuity brought, that the word (sibi) should have reference to B. the grantee, and not to J. E. And Cook said, that the original contract did leave the measure in this case; and for that he vouched Kedwellys case in Plowd. Comment. A lease rendring rent at Mich. at D. and if it be behind for a month after demand, that the lessor shall re-enter; it shall be demanded at the first place.

Roll. tit. Condition.

TRIN. 12 JAC. IN THE STAR-CHAMBER.

CCCCV. SIR RICHARD EGERTONS CASE.

In this case the wife of Sir John Townsend being sentenced in 1000l. and in execution in the Fleet for the costs of the plaintiff; these points were resolved by the Court: 1. If a man be sentenced in the Star-Chamber to pay a fine, and to imprisonment, and the delinquet renders his body to prison, that notwithstanding the body continues in prison, the King shall be satisfied the fine out of the profits of the delinquents lands. 2. If a feme covert be sentenced there, and she renders her body to prison, and there abides, that the lands of her husband shall be sequestred, and the profits thereof for the fine of his wife. And that now upon the Statute of Recusancy the lands of the husband for the recusancy of his wife, if he do not render her to prison and discharge the same. 3. If a man be sentenced in the Star-Chamber to pay a fine, and to have imprisonment, and he yield himself to prison, that before his fine be also paid, he shall not proceed in any action at the common law against the party in the same suit.

PASC. 12 JAC. IN THE COMMON PLEAS.

CCCCVI. CRANE AND PARKINS CASE.

In trespass, the defendant pleaded that the land in which was parcel of the manor of Broughton Astley demisable by custom, and shewed, that the custom of the manor was, that if any tenant for life dyed, that the lord for three years fine ought to grant the same to his heir, and pleaded a grant of the manor to the Lord Grey of Grooby: and also pleaded **[250]** another custom of the said manor, that if any tenant for life of the said manor had a wife, and dyed, that the wife shall have in the land her widows estate: and that after the death of the wife, that the son, for a fine of three years paid to the lord, should have it for his life, and that the defendant claimed as son, according to that custom. The plaintiff made title as lessee for years to the Lord Gray of the manor, and traverseth that there was not any such custom, that the son for a fine of three years paid should have the land for his life. Hutton said, that the traverse was good; for if there was not any such custom, that the son should have it so for life, then ex consequence sequitur, that there is not any such custom, that the son should have it after the death of the wife, or her surrender, and therefore he needed not to traverse the last custom alledged. But the whole Court was against him, and ruled, that the traverse was not good; for he ought to have traversed the last custom because there are several customs, and the one is immediately to him, the other not; and the defendant claimed by the second custom, and therefore the Court awarded, that he should amend his plea.

PASC. 12 JAC. IN THE COMMON PLEAS.

CCCCVII. SIR HENRY ROLLS AND OSBORNS CASE.

Sir Henry Rolls brought a writ of warrantia chartæ against Sir Robert Osborn and Katharine his wife, and shewed, that the defendant ought to warrant him a messuage, 40 acres of land, 700 acres of pasture in Kelmarsh, and shewed, that Sir Robert Osborn and his wife levied a fine to him and his heirs of a manor, and of the lands aforesaid, with warranty to him and his heirs; and further shewed, that a writ of entre sur disseisin was brought against him of the said messuage, 40 acres of land, 700 acres of pasture, and that he had demanded the warranty of the defendant, or that he would minister to him a plea, which the defendant hath refused to do, to his damage of 1000l. the defendant confessed the fine and warranty, as aforesaid; but further pleaded, that in the same term that the fine was levied, a writ of entry was brought against Sir Henry Rolls, in which writ he vouched to warranty the said

defendant, who alone entred into the warranty, and vouched over the common vouchee, and so a recovery was had accordingly: and averred, that the said recovery was to the use of Sir Henry Rolls for his life, and if there was a marriage between him and A. S. within 4 years, and then to the use of the said A. S. for her joynture, with divers re-**[251]**-mainders over; and averred the life of Sir H. Rolls: upon which the plaintiff did demur in law. Shirley Serjeant argued for the plaintiff, that the warranty was not destroyed, but that the plaintiff might well maintain his warrantia chartæ: and for the same he vouched 22 H. 6. 22. Cliffords case; that there ought to be an alteration of the estate to which the warranty is annexed, and here is no alteration of the estate; for although the recovery was had the said term, and a voucher upon it, yet because the uses did not take effect presently, but were contingent uses, he remained tenant in fee-simple as he was before; and so the first warranty remained, and was not destroyed. Montague Serjeant contrary; And that the warrantia chartæ was gone, and that for four causes: 1. He who comes to an estate in the post shall not have a warrantia chartæ, but Sir Hen. Rolls cometh to the estate in the post, ergo, he shall not have warrantia chartæ. And for that vide 29 Ass. 34. Lord by escheat shall not have warrantia chartæ. 22 Ass. 57. The lord of a villain shall not have a warrantia chartæ. 21 H. 6. Disseisor shall not have warrantia chartæ: and so 19 H. 6. 25. 10 H. 7. 10. Tenant by the courtesie shall not have the writ, because all these come to the lands in the post: but see Cook 3. part, Lincoln Colledge case, they may have peradventure benefit of a rent or of a condition, but not of a warranty, 27 E. 3. Garr' Statham acc'. 2. Every warranty ought to have the same estate continuing to which the warranty is annexed; but Sir Hen. Rolls had not the same estate continuing, ergo, he shall not have the warranty, because the fine was to him and his heirs with warranty; but this recovery (which was but a further assurance) was but to the use of himself for life, with divers remainders over, so as the first estate is altered: and 42 E. 3. 2. 40 E. 3. 14. it is a good plea in a warrantia chartæ that the demandant is not tenant. And 41 Eliz. in Bointon & Chesters case, it was adjudged in this Court, that if a man makes a feoffment with warranty, who enfeoffs the first feoffor, upon condition that that warranty remains, he shall vouch by reason of the first warranty; but if upon that feoffment he had limited any new use, there because the estate was altered, the voucher was gone. Vide F. N. B. 135. 19 E. 3. T. Voucher 122. 48 E. 3. 18. acc'. And it was resolved 34 Eliz. in Banco Regis in Kempe & Henninghams case, that in such case he should not have several warrantia charta's. And therefore because in the principal case he hath once vouched upon this recovery, and upon that the estate is altered, he cannot now have warrantia chartæ. 3. Every warranty is a covenant real, which consists in privity, and therefore destroy the privity, and the warranty is gone. But now in this case the first privity is destroyed, therefore the warranty is gone. And therefore 11 H. 4. 8. if two joyntenants be with warranty, and one of them maketh a feoffment in fee, **[252]** the warranty is destroyed, because the first privity is destroyed, 21 H. 6. 51. acc'. But vide 19 E. 3. Statham Garr' 31. If two joyntenants are with warranty, and the one releases to the feoffor, there the warranty remains, because the privity remains, vide 2 H. 6. 7. Cook 1 part, Chudleighs case 125. acc'. And see M. 31 Eliz. in this Court. King and Watts case: Land is given to husband and wife, and to the heirs of the body of the husband and wife, the husband levies a fine, and dyes without issue, the wife is impleaded, and adjudged that she could not have aid, nor warrantia chartæ, because the estate was bound by the fine, the husband being tenant in special tail. 4. No warranty can have but one recompence, and if there be recompence given, the warranty is gone and extinct: but here is a recompence made by the voucher in this recovery, therefore the warranty is extinct. 34 Ass. pl. 15. 23 E. 3. garr' 77. acc'. and 15 E. 4. 13. 12 E. 4. 12. If he will not take advantage of the warranty when he may, he shall never have it after, vide F. N. B. 134. acc': and 36 Eliz. it was adjudged in Owens case, that if tenant in tail bargains and sells his lands, and suffers a recovery, and afterwards inrolls the deed, that that recovery is a good bar to the estate tail, because there is a supposition of recompence: and so he prayed judgment for the defendants. It was adjourned. Vide this case now resolved in the Lord Hoberts Reports.

Hob. Rep. 20. More Rep. 859. 2 Brownl. 169.

The REPORTS of that late Reverend and Learned Judge, THOMAS OWEN, Esquire, one of the Justices of the Common Pleas. Wherein are many choice CASES, most of them throughly ARGUED by the Learned Serjeants, and after ARGUED and RESOLVED by the grave Judges of those times. With many Cases wherein the differences in the Year-books are reconciled and explained. 1650.

[1] TERMINO PASCH. ANNO 26 ELIZ.

LEONARD AGAINST STEPHENS. ROTULO 1702.

Leonard Chief Prothonotary, brought an action of trespasse against Stephens; who justified, &c. for that Sir Christopher Heyden knight, was seised in fee, and enfeoffed the defendant, and gave colour to the plaintiff; the plaintiff replied, that true it was that Sir Christopher Heyden was so seised, but he being so seised, died seised of the premisses, and that after his death, they did discend to his son and heire, who entred and was seised, and being so seised did enfeoff the plaintiff: without that, that the said Sir Christopher Heyden did enfeoff the defendant, whereupon issue was joyned, and the jury gave an especiall verdict to this effect.

That the said Christopher Heyden was seised as aforesaid, and made a lease for years to the defendant by deed, containing these words, dedi & concessi & confirmavi to the defendant and his heires, with a letter of attorney to make livery.

The question was, whether this was a feoffment, or but a confirmation. Walmsley Serjeant, It is but confirmation being by deed, and hath the word confirmation. Anderson, By that reason he in the reversion cannot enfeoff his lessee for years by deed as he may without deed: but I conceive, that it is at the liberty and choice of the [2] lessee either to take it as a feoffment or a confirmation. Walmsley, As soon as the lessee hath accepted the deed, by that he hath declared his meaning to have it as a confirmation. Anderson, And when the lessee doth accept the livery, doth not that shew his expresse meaning to take it by the livery, and shall the livery signifie nothing?

And in Bracebridges case, where the tenant in tail made a bargain and sale, and made livery, and the deed was inrolled within the six months: this was adjudged to be a discontinuance, and yet the bargain and sale makes no discontinuance, which little differs from the case in question. Walmsley, If tenant in tail be disseised, and it is agreed between the disseisor and the disseisee, that the disseisee shall make a deed to the disseisor, who makes a deed accordingly, it is not in the election of the disseisor to take this as a feoffment. Anderson, The cases differed, for the disseisee hath no power to make a feoffment. And adjudged by the Court that it was a good feoffment, vide 17 Ass. 20. 22 H. 6. 43.

Scire Facias by the Queen against Allen.

The case was, A man recovers damages in an action on the case, and he assignes parcell of his debt to the Queen before execution, and the Queen thereupon brought a scire facias. Manwood Chief Baron, and all the Court held cleerly, that parcell, or a moyety of this debt could not be assigned over to the Queen. See 22 H. 6. 47. where parcell of a debt upon an obligation was attached by a forren attachment.

Beverley against The Arch-bishop of Canterbury.

Quare Impedit.

Thomas Beverley brought a quare impedit against John Arch-bishop of Canterbury, and Gabriel Cornwall, the case was, that the Queen being intituled to an advowson by lapse because that the incumbent had two benefices, each of them being of the value of eight pounds per annum, whereby the first by the statute of 21 H. 8. became void, and after the said incumbent died, and divers others were presented by the patrons, who died also, whereby the church becomes void againe. If the Queen may now take her turn to present, in regard she took not her turn when the first lapse happened immediately at the first avoidance, was the question. And after long and serious debate, all the justices of the Common Pleas did resolve.

That the Queen shall not now have her presentment, but the patron, because the Queen hath such presentment by lapse as the Bishop had, and no other, and could present but to the present avoidance then void: and although nullum tempus occurrit Regi, yet we must distinguish it thus, for where the King is limited to a time certaine, or to that which in its self is transitory, there the King must do it within the time limited, or in that time where in the thing to be done hath essence or consistence, or while it remaineth, for otherwise he shall never do it, for if the grantee of the next avoidance, or lessee per auter vie be at-[3]-taint, here the King must take his interest and advantage during the time, viz. during the life of cestui que vie, or within the years of the next avoidance, or otherwise he shall never have it: the same law is where a second presentment is granted to the King, and he does not present, he shall not present after. Shuttleworth, We have an outlawry against the plaintiff, whereupon judgment was staied: but after Hil. 29 Eliz. the Queens Serjeants shewing that the plaintiff was outlawed; it was argued by Walmsley, that that could not now come into debate, for the plaintiff hath no day in Court after judgment, and it is but a surmise that the plaintiff is the same party. Windham, In a debt upon an obligation, the serjeants may pray the debt for the Queen, and yet it is but a surmise.

And the opinion of three justices was (for Anderson was absent) that the writ to the bishop ought to be staied; but in what manner processe should be made if the scire facias shall issue against the plaintiff, they said, they would advise concerning the course: but Periam said, that a scire facias might have issued against the ancient incumbent, and then the Queen shall bring a scire facias again, because she had no presentation. And the scire facias was brought against Beverly. Walmsley, I conceive the Queen shall have no presentation, for although we have acknowledged our presentment, yet before execution we have but a right; as if a disseisee be outlawed he shall not forfeit the profits of his land; also he hath brought a scire facias, and a scire facias lies not but by him that is party or privy. Periam, After that we have this chattell, it is forfeit by outlawry. Anderson, The judgment that he shall recover, shall not remove the incumbent, and then the plaintiff hath but a right; to which Periam and Walmsley agreed: but as to the other point, that the Queen shall not have a scire facias for default of privity, they saw no reason, for in many cases she shall have a scire facias upon a record between strangers: Anderson, If I recover in debt and then I am outlawed, shall the Queen have this debt? Walmsley, If I recover in a quare impedit, and dye, who shall have the presentment my executor or my heire? To which no answer was made: but the Court would take advice for the rarenesse of the case. And it was said to Walmsley

that he might demur in law, if he thought the matter insufficient, to which Walmsley agreed, and did demur, &c.

Annuity to a woman who marries and dies.

An annuity is granted to a woman for life, who after marries, the arrears of the annuity encur, and the wife dies, whereby the annuity is determined. It was adjudged that the husband shall have an action of debt at the common law: for that an annuity is more then a chose in action, and may be granted over. And it was agreed by the Court in this case, that if a man grant an annual rent out of land in which he hath no interest, yet this is a good annuity to charge the person of the grantor in a writ of annuity, 14 H. 4. 29 A. Coke 4th. Rep. 51. A.

[4] BRAGG AGAINST BROOKE.

Second deliverance.

Lucas Bragg brought a writ of second deliverance against Robert Brook, for taking his cattell in a place called East Burlish in the county of Surrey, the case was.

That Sir Thomas Speck was seised of a mannor, containing in it severall copyholds, and the place where, &c. was copyhold. And the said Sir Thomas being so seised, married, and then died, and the wife 5 Edw. 6. demands the third part of the mannor for her dower. Per nomen centum messuagium centum gardinum, tot. acr. terræ, prati, &c. And the wife had judgment to recover; and the sheriff assigned to her part of the demesnes and parcell of the services and of the freeholders and copyholders. And it was resolved clearly that the copyholds did not passe by the assignment; and that she could not grant a copyhold, for when she demanded her dower it was at her election and liberty, to demand either a third part of the mannor, or of the messuages, and when she demanded per nomen messuagiorum, &c. she cannot then have the mannor, nor can a mannor be claimed unlesse by his name of corporation, as Anderson termed it, and not otherwise. And the lands and acres cannot be called mannors, and then the grant of a copyhold by one who hath no mannor cannot be good. And so was the opinion of the Court, and yet the sheriff had assigned to her demesnes and services, and all things which make a mannor. And 29 Ed. 3. 35. if a mannor to which an advowson is appendant be delivered by the sheriff in execution by the name of a mannor, cum pertinentiis, the advowson passeth also; but it is otherwise if it be delivered in extent, by the name of acres, lands, meadow, wood, &c.

WAKEFEILDS CASE, 28 ELIZ. ROTULO 607.

1911: 2 KB: 928

Replevin.

Wakefeild brought a replevin against Cassand, who avowed for damage-feasant: and the plaintiff prescribed that D. is an ancient town, &c. and that all the inhabitants within the said town (except the parson, infants, and some particular houses) have used to have common to their houses, &c. The avowant shewed that the house to which common was claimed, was built within thirty years last past. And whether he shall have common to this new erected house was the question on a demurrer?

Shuttleworth, He shall have this common by prescription, but not of common right. Gawdy, The prescription is against common reason that he should have common time out of mind, &c. to that which hath not been thirty years, and he hath excepted the parson, infants, and such particular houses, and by the same reason may except all, and therefore it is not good. But it was adjudged no good prescription, for if this be a good prescription, then any body may create a new house, so that in long space of time there will be no common for the ancient inhabitants. Periam, By such prescription the lord shall be barred to improve the common, which is against

reason. Anderson, The common is intire, for if H. hath common appendant to three messuages, and enfeoff one of one messuage, another of the second, and [5] another of the third, the common in this case is gone: but all agreed that it is impossible to have a common time out of mind, &c. for a house that is builded within the thirty years.

MICH. 29 AND 30 ELIZ. ROT. 2299.

BISHOP OF LINCOLNS CASE.

Quare Impedit.

The Queen brought a quare impedit against the Bishop of Lincoln, and Thomas Leigh, to present to the church of Chalsenut Saint Giles in the county of Bucks. The case was thus; H. being qualified took two benefices which were above the value of eight pounds, and after took a third benefice above the said value, whereby the first benefice became void, and so remained for two years, whereby title of lapse accrued to the Queen, and (before presentment made by the Queen) the patron did present one A. who being admitted, instituted, and inducted, did refuse to pay 38l. 2s. ob. due to the Queen for the tenths, which matter was certified by the bishop into the Exchequer, whereupon and by force of the statute of the 26 H. 8. the church is ipso facto void; wherefore the bishop the now defendant being patron in right of his bishoprick, did present Thomas Leigh the other defendant, against whom the Queen brought her quare impedit: and it was adjudged by the Court that the quare impedit very well lies; for the recusancy to pay the tenths was his own act, and is a resignation, and by that reason the church is void, and his shall not hinder the Queen of the lapse; but if A. the incumbent who was presented, dies, being presented by usurpation upon the lapse to the Queen, yet afterwards the right patron shall present again: but when A. the incumbent doth resigne and make the church void by his own act, viz. by recusancy, as in this case is done, this may be done by collusion, and by such means the Queen may be deprived of her title by lapse: for if this collusion between the bishop and the incumbent be suffered, then may a stranger present upon the title of the Queen, and presently such recusancy and certificate may be made, by which the church shall become void, and so the Queen deprived of the lapse. Fenner, This lapse is given to the Queen by her prerogative, but on condition that she take it in due time, for such is the nature of the thing lapsed, as is in this case adjudged, viz. that when the Queen hath title to present by lapse, and doth not present, but the patron presents, and after the church becomes void by the death of the incumbent: in this case (adjudged by the Court also) the Queen cannot present; but in this case, the avoidance being by privation and not by death, judgment was entred for the Queen.

[6] TRIN. 19 ELIZ. IN COM. B.

HALES CASE.

Debt on a Bond.

Samuel Hales brought an action of debt on a bond against Edward Bell, and the condition of the bond was, that if the said Bell should pay to the said Hales forty pounds within forty daies next after the return of one Russell into England from the City of Venice beyond the seas, that then the obligation to be void: and the defendant pleaded in bar that the said Russell was not in Venice, upon which the plaintiff demurred: and adjudged by all the justices that it was no good plea; for in such cases where parcell is to be done within the realm, and parcell out of the realm, the tryall shall be within the realm, 7 H. 7. 9.

TRIN. 28 ELIZ. IN COM. BAN.

HAVERINGTONS CASE. 1974.

Debt by an Administrator.

Haverington and his wife as administratrix of one Isabell Oram, brought an action of debt against Rudyand and his wife, executrix to one Laurence Kidnelly, the case appeared to be thus.

Farmer for thirty years did devise to his wife so long as she shall be sole and a widow, the occupation and profits of his terme: and after her widowhood, the residue of the terme in the lease and his interest in it to Reynald his son, the devisor dies, and the wife enters according to the devise: and afterwards he in the reversion by indenture dedit & concessit, vendidit & barganizavit totum illud tenementum suum, to the wife and her heires, and did also covenant to make further assurance, and to discharge the said tenement of all former bargains, sales, rights, joyntures, dowers, mortgages, statute-merchants, and of the staple, intrusions, forfeitures, condemnations, executions, arrearages of rents; and of all other charges (except rents services which shall be hereafter due to the lords paramount) and then the reversioner and his wife levied a fine to the uses aforesaid; and after the devisee takes husband, and thereupon the son enters in the terme. And the administrator of the wife brought an action of debt upon an obligation, for the performance of the covenants of the indenture against the administrator of the reversioner: and judgment for the plaintiff.

And it appeared by the record that these points following were adjudged to be law, although that the latter matter was onely argued.

1. That the wife of the reversioner who had title of dower in the land, is concluded of her right of dower, by the declaration of the uses of the fine by the husband onely, which fine is after levied by them joyntly, because no contradiction of the woman appears that she doth not agree to the uses which the husband solely by his deed of indenture had declared.

2. To devise that the wife shall have the occupation and profits du-[7]-ring her widowhood is a good devise of the land it self, during such time. See Plow. 524. And that no act which she can do in purchasing the inheritance by which the terme is extinct, shall bar the possibility which Reynald the son hath to come, upon the womans marriage.

3. That a lessee for years being in possession may take a feoffment although it be by deed, and may take livery after the delivery of the deed, and shall be deemed to be in by force of the feoffment, as in this case is pleaded, although that the lessee may take the deed by way of confirmation, and then the livery is but surplusage and void.

4. It was resolved, that this possibility which was in Reynald the son to have the residue of the terme upon the inter-marriage, which at the time of the feoffment and of the fine, was but dormant, shall be accounted a former charge and before the covenant, because of the will which was before the covenant, and shall awake, and have relation before the marriage. As if tenant in tail of a rent, purchaseth the land out of which the rent issueth, and makes a feoffment, and covenants that the land at that time is discharged of all former charges, although this charge is not in esse, but is in suspence, as it is said 3 H. 7. 12. yet if the tenant in tail dye, his issue may distrain for this rent, and then is the covenant broke, for now it shall be accounted a former charge before the feoffment.

MICH. 29 AND 30 ELIZ. IN COM. BAN.

BRETTS CASE.

Debt on a Bond.

Brett brought an action of debt on a bond against Averden, and the condition of the bond was to stand to the arbitrement of J. S. who did award that the defendant

should pay ten pounds to Brett, and no time was limited to pay it. The defendant confest the arbitrement but pleaded in bar that the plaintiff hath not required him to pay the money: and the plaintiff hereupon demurred. Adjudged by the Court, that it is no good plea, for the defendant at his perill ought to pay the money, and the plaintiff need not make any request, wherfore judgment was given for the plaintiff.

TRIN. 29 ELIZ. IN COM. BAN.

BUCKNELLS CASE.

Action for Robbery on the Statute of Winchester.

Bucknell was robbed in a hundred within the county of Bucks, and thereupon brought his action upon the Statute of Winchester, because the theeves were not taken: and not guilty being pleaded by the inhabitants, the jury gave this speciall verdict, viz. that he was robbed the same day alleadged in the declaration, but in another place and within another parish then that he hath alledged in the declaration, but that both the parishes were within the said hundred: upon which they prayed the judgment of the Court whether the inhabitants were guilty. Adjudged by the Court for the plaintiff, for it is not materiall in what parish he was robbed, so it were within the same hundred.

[8] HIL. 30 ELIZ. IN COM. BANC. ROT. 904.

SPITTLES CASE.

Replevin.

Spittle brought a replevin against Davis, the case was this.

Turk being seised of land in fee, did devise parcell thereof to his youngest son. Proviso, and it is his intent, that if any of his sons, or any of their issues, shall alien or demise any of the said lands devised, before they shall attain the age of thirty years, that then the other shall have the estate, and does not limit any estate: and then the eldest son made a lease before his age of thirty years, and the youngest son enters, and afterwards, and before the age of thirty years he aliens the land he entred into by reason of the limitation: the elder brother re-enters, and demised to Spittle the plaintiff for three years, who put a horse into the ground, and Davis by the commandment of the younger brother entred and took the horse damage-feasant; and Spittle brought a replevin. And upon the whole matter there was a demurrer: it was resolved.

1. That this is a limitation, and that the estate shall be to such use as by the will is directed untill there be an alienation, and upon alienation the land shall go to the other brother.

2. When the youngest brother hath once entred for the alienation, then is the land discharged of all limitations, for otherwise the land shall go and come to one and the other upon every alienation ad infinitum, wherefore all the Judges agreed, that after the one brother hath entred by reason of the limitation, the land is then for ever discharged of the limitation made by the will: and judgment was given accordingly.

MICHAELLS CASE.

Debt on a Bond.

Thomas Michaell brought an action of debt on a bond against Stockworth and Andrews; the jury gave this speciall verdict: that the said Stockworth and Andrews

did seale a bond and delivered it to the plaintiff as their deed: and after issue joyned, and before the Nisi Prius the seale of Andrews was taken from the bond.

Shuttleworth, The plaintiff shall be barred, for it is one entire deed, and the seale of one is wanting. And admit (in case it goes against us) the judgment be reversed by writ of error, the plaintiff can have no action on such bond: but it was adjudged to be a good bond; and judgment for the plaintiff. See the like case in Dyer, Trin. 36 H. 8. 59. A.

[9] HILLARI 33 ELIZ. IN COM. BAN. ROT. 1315.

RICHMONDS CASE.

Debt for Rent.

Richmond brought an action of debt against Butcher, the case was; A man makes a lease for years, reserving rent to him and his executors and assignes, and during the terme the lessor dies, and his heire, who hath the reversion, brings an action of debt. And it was urged, that the rent was incident to the reversion, and the heire having the reversion shall have the rent also as incident to it, as the case is in the 27 H. 8. 16. If H. makes a lease for years, rendring rent, without saying any more words, the heire shall have this part, because it shall go along with the reversion: so in the fifth of Edw. 4. 4. If two joynt-tenants make a lease for years, rendring rent to one of them, yet the other shall have the rent also, although no mention were made of him; so in the 7 H. 4. 223. By the Court, If I make a feoffment in fee, rendring a rent to me, my heires may distraine: and if I grant over this rent, my assignees in this case may distraine and avow: so in this case an action will lye for the heire, although he be not mentioned. But adjudged to the contrary by the Court; for when H. passeth lands from himself, the law gives him liberty to passe them in such way and manner as he himself will, and this liberty ought to take effect according to the expresse words, for the law will not extend the words further, for the intent shall appeare by the words, and then it cannot be here intended that his will was that his heire shall have the rent, because the words are not sufficient to give it to his heire: and therefore note a diversity when the law makes a tenure, and when the party; for if the law makes a tenure, the heire shall have the rent: but otherwise where the party makes it, unlesse there be expresse words for the heire, as in 10 Edw. 4. 19. by Moile, if H. makes a gift in T. and reserves no rent: yet shall the donee hold of the donor and his heires, as the donor holds over; but if he make a lease for yeares, rendring rent to the lessor, the heire shall not have this rent, for it is a tenure made by the act of the party. So in the Book of Assises 86. If a man lets two acres of land, rendring rent ten shillings for one of them to himself by name, without naming his heires, it is adjudged that the heire shall not have the rent of this acre. And this is resembled to the case of 12 Edw. 2. where a man made a lease for yeares, rendring rent to the lessor and his assignes, here none shal have the rent but the lessor, and it is void by his death, for his assignee cannot be privy to the reservation; and the words of the party shall not in any case be enlarged, unlesse there be great inconvenience to be avoided: and his intent and will is performed if he himself have the rent. And if a man reserve such rent to him and his executors, this word executors is to no purpose, for that the rent cannot be reserved to them, but the rent shall be extinct by his death: and if he reserve the rent to his heire, and not to himself he shall not have it, but his heire, for he shall be estopped to claime it, against his own words and reservation. And if I make a lease for years, rendring rent to me during the terme, if I dye without heire during the terme, the lord by escheat shall not have the rent: which case may be compared to the case of warranty, 6 H. 7. 2. That without mention of the [10] heires, the warranty shall not bind them: but if a rent be reserved to his assignes, and he grants over the reversion, here because the assignes were mentioned in the reservation, and for that now there is a privity, the assignees shall have the rent, for it shall be intended that when he speaks of assignes in the reservation, he prefixeth thereby to whom he will assigne the reservation, wherefore it was

adjudged for the defendant, vide Dyer 2. Eliz. 180, 181. H. bargaines and sells land: proviso, that if the vendor shall pay a hundred pounds to the vendee his heires or assignes, that then the bargaine and sale shall be void: by two justices.

The tendor shall not be made to the executors, because the law will not determine to whom the tendor shall be made, when the parties themselves are expresly agreed.

MICH. 33 AND 34 ELIZ. IN COM. BAN.

GODDARDS CASE.

Confirmation by the Lessor to the Assignee of Tenant for years.

H. makes a lease for years of twenty acres, rendring rent, the lessee grants all his estate in one of the acres to I. S. the lessor confirmes the estate of I. S. Resolved by the Court,

1. That by this confirmation the entire rent is gone in all the other acres, for being an entire contract and by his own act, there cannot be an occupation for part, and an extinguishment for the other part; and in this case there is no difference between a suspension in part, and an extinguishment. If A. makes a lease for yeares of twenty acres, rendring rent, upon condition that if he does not do such a thing, that then the lease shall be void for ten acres: if he performes not the condition, and the lessor enters, the entire rent is gone. And it was resolved that a lease for years was not within the Statute of Quia Emptores Terrarum, for that statute extends to an estate in land of fee-simple. See the report of Serjeant Benlowes in 14 H. 7. A warren did extend into three parishes, and a lease was made for years rendring rent, and after the reversion was granted to another of all the warren in one of the parishes, and the lessee did attorne. The question was, if the lessor should have any part of this rent during the terme, so that the rent may be apportioned or not. And the justices said in this case, that neither the grantor nor the grantee shall have any rent, for the law is, that no contract shall be apportioned.

2. It was resolved, that no lessor shall avow for the arrearages of rent, before the time of confirmation and extinguishment; for H. shall not avow for the rent determined; but he may defend himselfe by way of justification. See where a man may justifie the taking by speciall evidence, 19 H. 6. 41. by all the Court, except Askew.

[11] MICH. 33 AND 34 ELIZ. IN BAN. REG. ROT. 471.

WARDFORDS CASE.

Error.

Haddock brought a writ of error against Wardford upon a judgment given in the Common Pleas; the case was thus: Two coparceners of a house, one of them lets her part to a stranger, and the other lets her part to a stranger also, and then both leases come to the hands of one H. and then one of the coparceners bargaines and sells her reversion to the other coparcener. The lessee commits wast permittendo dictum messuagium cadere, and the grantee of the reversion brought an action of wast. The errors assigned were,

1. That he brought but one action of wast, although of severall demises by severall lessors, whereas he ought to have two actions of wast. Godfrey, He cannot have an action in other manner then his grantor might have before the grant, and when the reversion came to him, it can be in other plight then it was before. Gawdy, There is a diversity when the right is severall, and when the possession is severall; for although the possession be severall, yet if the right be intire, but one action will lye, as appeares F. N. B. fol. 2. Godfrey, There is difference between the writ of right in F. N. B. and this action, for there he was never intituled but onely to the action, but in our case the action was once severall, and is like the case in F. N. B. 60. where it

is said, that a man may have one action of wast, and declare upon divers leases, but that is intended where the leases are made by one person, and he cited the case in 21 H. 7. 39. where it is agreed by all the justices, that if a man hold two acres of one H. by severall services, and dies without heire, the lord shall not have one writ of escheat, but ought to have two writs.

Popham Chief Justice did agree with Gawdy, for although that at first the lessors were intituled to severall actions, yet by matter ex post facto, the actions may be united: and said, that H. might have an action of waste, and declare ex assignatione, and also ex dimissione.

2. Error was assigned, that he had assigned the waste to be committed in the whole house, whereas he had but part of the house, and waste may be brought for part of a house.

3. Error was, because the other coparcener was not joyned with him in the action. But resolved that it was good enough: and the justices made this diversity, viz. when both the parties have an equall estate and inheritance, and when one of them hath but a particular estate, as in the 27 H. 8. 13. Lessee for life, and he in the remainder shall joyne in an action of waste, but where they had equal estate of inheritance, as two coparceners, or two tenants in common, and one makes a lease, and the lessee commits waste, there the writ of waste shall be brought by the lessor only, for it is not like to a personall injury done upon an inheritance; for an action of waste is now in the nature of the realty, although that at the common law (before the Statute of Glocester) there was but a prohibition, yet the statute gives the place wasted, and damages, and therefore it is mixt, wherefore both of them shall not joyne, and the writ saies, to his disheritance that made the lease, vide 22 H. 6. 24. by the Court, and agreeing with this resolution.

[12] 4. Error was, that the waste is a permissive waste, and no such waste lies between coparceners, for each of them are bound to contribution and reparation: but the Court would take no notice of this.

5. Error was in the entring judgment, for judgment was entred by default, whereupon a writ of inquiry of damages issued out of the sheriff, and the sheriff went to the place wasted, which he needed not have done. And the judgment was quod recuparet locum vastatum per visum juratorum, which was nought, for the going to the place was surplusage. But divers presidents were produced to prove that, that was the course: as Hilar. Rot. 501. between the Earl of Bedford and William Smith, upon a demurrer, and a writ of inquiry of damages, and the judgment was, quod recuparet locum vastatum per visum juratorum, and Trin. 31 H. 8. Rot. 142. and the Book of Entries, fol. 620. wherefore judgment was affirmed.

34 Eliz. In Com. Ban.

Gaytons Case.

Resignation of a Benefice.

Robert Gayton parson of the church of Little Eyesingham in the county of Norfolk, did by instrument in writing resign his benefice before Edmund Langdon publick notary, and others, into the hands of the bishop, and the resignation was absolute and voluntary, and to the use of Miles Mosse, and Paul Britback, or either of them: and it was further inferred in the said instrument of resignation, protestatione & sub conditione quod si aliqui eorum non admissi fuerant per assentionẽ Episcop. infra sex menses, quod tunc hæc present. resignatio mea vacua & pro nulla habeatur, & nunc prout tunc, & tunc prout nunc: and cestuy que use, came within the time limited to the bishop, and did offer to resigne to him, which the bishop refused to except, &c.

Crooke for the plaintiff, Forasmuch as the plaintiff may resigne on condition as well as a particular tenant may surrender upon condition: and two parsons may exchange, and if the estate be executed on the one part, and not on the other, that parson whose part was not executed may have his benefice again, as it is adjudged in the 46 Ed. 3. But Coke Solicitor, and Godfrey were on the contrary opinion: for

that the incumbent may not transfer his benefice to another without presentation, as appeares in the recited case of 46 Edw. 3. Also the resignation is not good, and the condition void, because it is against the nature of a resignation which must be absolute, sponte, pure, & simpliciter and is not like to a condition in law, as in the said case of exchange in 46 Edw. 3. for the law doth annex a condition to it, but a collaterall condition cannot be annext by the parties themselves: also this is an act judiciall to which a condition cannot be annext, no more then an Ordinary may admit upon condition, or a judgment be confessed on condition, which are judiciall acts.

But admitting the condition good, yet a new induction ought to be made by the Ordinary, for the church became one time void; and is not like to the case in 2 R. 2. Quare impedit 143. where sentence of deprivation was given, and the sentence presently reversed by appeal, there need no new institution, for that the church was never void. And after in Easter tearm, 36 Eliz. upon argu-**[13]**-ments given in writing by the civillians to the Judges, the judgment was entred, quod querens nihil capiat per billam.

Hiliar. 35 Eliz. In the Kings Bench. Rot. 56.

Carters Case.

Action on the case for words.

William Crow brought an action on the case against Warham Carter for speaking of these words: The said William is forsworn and perjured in swearing at the common place Bar upon the deeds which he then had in his hand.

Harris Serjeant did move in arrest of judgment, for that the words shall be construed according to the common and vulgar sense, viz. that he is forsworne upon the deeds. But the Court was against him: for the vulgar sense is, that men do not use to sweare but upon a book, and the plaintiff had judgment.

Hil. 36 Eliz. In the Kings Bench.

William Bartues Case.

Prohibition.

Woodroffe and Cooke brought a prohibition against Bartue; the case was thus.

The abbot of Langley did let land to one Raston for ninety nine years, who let the same to Woodroff for sixty years, who granted parcell of the said land to Cooke during the whole terme. And Bartue did libell against them both in the Spirituall Court for tythes, and they joyned in a prohibition.

Godfrey, They may not joyne in a prohibition, for by the statute of 34 H. 6. 13. if two men are sued in the Court Christian for slander, battery, &c. which are severall in themselves, there they cannot joyne in a prohibition: but where they be sued for the finding of a lampe, &c. by reason of their land, there they shall joyne; but in this case the tythes are severall. But it was resolved,

1. That their joyning in the prohibition was good enough.

2. That the death of one of them shall not abate the writ of prohibition, because nothing is by them to be recovered, but they are onely to be discharged of tythes.

Pasch. 33 Eliz. In the Kings Bench. Rot. 292.

Haslewoods Case.

Error in Avowry.

The lord of a mannor did avow on the taking of a gelding as an estrey within his mannor, and had judgment to have return and damage to twenty pounds: and here-

upon a writ of error was brought, and adjudged that no damages shall be had in such case: for the a-[14]-vowant cannot recover damages at the common law, and by the statute of the 7 H. 8. and 4. no damages shall be given to the avowant for damage-feasant; but where he avowes for rents, customes, or services, and this is neither rent, custome, or service, for that of common right the estrey belongs to the King, and no common person may have it unlesse by grant, or by prescription, and the statute is to be taken strickly: for the avowant for damage-feasant, or for rent charge should not recover damage by this statute, before the statute of 21 H. 8. 19. where the plaintiff hath remedy, as it is holden in Dyer 141. B. But because divers presidents were shewn out of the Common Pleas from time to time since the making that statute, that damages shall be recovered by the avowant, who avowes for amercements, &c. it was said, that it would be very difficult to controll so many presidents.

Gawdy, No great credit is to be given to such presidents as passe sub silentio, without any exception taken to them. Another error was assigned, because the judgment was to have return averiorum predictorum, whereas there was but one guelding: wherefore judgment was reversed, and the roll markt.

TRIN. 36 ELIZ. IN B. R.

FULGEAMBS CASE.

Trespass against the Constables of Cambridge.

Fulgeambe brought an action of trespasse against the constables of Cambridge; the case was.

The plaintiffs horses estrayed into Cambridgeshire, and were thereupon impounded in Cambridge, and then one A. came with a commission from the Lord Hunsdon Captaine of Barwick, to take horses to ride to Barwick, and the constables delivered to him the plaintiffs horses, and then one of the horses died.

And the opinion of all the justices was, that the action did well lye, for the constables cannot take horses out of the pound to deliver them to any by vertue of such a commission.

TRIN. 36 ELIZ. IN B. R.

TAUNTONS CASE.

Lease on condition.

Coles made a lease to Taunton for ninety nine years, on condition that if he demised it in other manner, then in such manner as he let the same to him, that then it should be lawfull for him to re-enter; the lessee devises it by his will to his youngest son. Resolved, that rigore juris, this is a breach of the condition: for a devise is an alienation, as is holden 31 H. 8 Dyer 6. and although conditions shall be taken strickly, yet not directly against the intent of the parties, and the reasonable disposition of the words; and therefore a devise shall be intended to be within this word, demise; yet it was said, that it was very hard according to equity that the estate should be lost: for he in-[15]-tended by this will to prefer one of his youngest children, and not to break the condition, and thought not it was any breach of the condition, and for this cause some doubt was made of the case, but Hil. 38 Eliz. Judgment was given as aforesaid.

PASCH. 36 ELIZ. IN B. R. ROT. 41.

LEIGHS CASE.

Ejectment.

The Queen being seized of lands as Dutchesse of Lancaster, did make a lease thereof to the plaintiff, the lessee is outed by A. the plaintiff makes a lease to B. for years, and B. being outed brought an ejectione firmæ.

1. It was resolved, that the Queen as Dutchesse of Lancaster cannot be disseised, for although she be not seised in jure Coronæ, yet is it in seisin of the Queen, and cannot be taken away from her in respect of her person.

2. Gawdy, and Fenner held that the lessee being outed, the terme is turned into a right, and therefore it hath been adjudged that an ejectment will lye: as the case is in Dyer 29 H. 8. If tenant in taile, the reversion in the King suffers a recovery, although this shall not be to the prejudice of the Kings reversion, yet shall it bar the estate-tail. So if a parson makes a lease for years, and the parson and Ordinary confirme it, and the parson dies, and during the vacation the lessee is outed, he is hereby outed of his terme, yet is not the frank-tenement touched.

Clench on the contrary, That he who is outed hath an estate but at sufferance, for he cannot have an estate for years without a lease, and it is agreed he shall not have an estate of freehold by reason of the reversion in the Queen, and the possession of the lessor, shall maintain the possession of the lessee, as well as the possession of the lessee shall keep the freehold of the lessor: and if he have but an estate at sufferance, then cannot the lease to B. be good: for if tenant at sufferance of a common person makes a lease for years; this is a disseisin.

And Popham was of opinion with Gawdy and Fenner, wherefore judgment was given for the plaintiff.

I have seen a report 24 Eliz. in the Kings Bench, upon a demurrer between Edmund Frough and Henry Dixe, where the better opinion was, that if one enters on the terme of the Queen, he shall not thereby gaine any possession; but notwithstanding the termor may grant over his terme: but it was agreed that he shall have an ejectione firmæ: for by Plowden an assise will lye of a mill, where the water is divers, for the possession of the mill continues in him. But the justices doubted whether it was an ejectment, wherefore the parties did compound. In the 4 H. 6. Intrusion. If lessee for life, the remainder in the King be outed, he shall have an assise.

[16] TRIN. 36 ELIZ. IN C. B. ROT. 134.

THURSTONS CASE.

Ejectment.

Goffe brought an ejectment against Thurston, the case was this.

The abbot of Kingswold in Wiltshire, being seised of land in the 28th yeare of H. 8. did (with consent of the covent) make a lease for years by deed indented, and then the abbey came into the hands of H. 8. and from him to Edw. 6. and from him to the present Queen.

And it was pleaded that the defendant hath the lease, and that Henry Thinne did intrude on the defendant, and made a lease to the plaintiff, who being ejected by the defendant brought this action, and on this matter the parties demurred.

1. It was said that the plaintiff cannot bring this action, inasmuch as Henry Thinne by his entry on lessee for years, the reversion being in the Queen cannot gaine any possession, so that nothing passeth by his lease to the plaintiff. But the Court was against this, for he is a sufficient lessee to maintain an action of ejectment: and it was adjudged in the Exchequer Chamber, that the Queens lessee for years being outed may have an ejectione firmæ, which proves that he is put out of posses-

sion of his terme; and this very point was in a manner agreed the last terme, in the case of Norris.

Fenner, If H. enters on the possession of the Queen, and makes a lease for years, nothing doth passe, and the lessee cannot maintain an ejectione firmæ, for he gains no possession at all: but it is on the contrary here when he enters on the Queens lessee.

Gawdy, That is no difference, for the lessee for years of an intrudor shall maintain an ejectione firmæ: and I have seen a report 34 Eliz. between Badinton and Hawle in the Kings Bench, adjudged, that if the Queens copyholder be outed, and a lease be made for years by the intrudor, this lessee shall not have an ejectment if he be outed, but he shall have an action of trespasse against any stranger.

The second exception was taken to the pleading, because the defendant pleaded in que estate del lessee del abbe, without shewing how he came to the estate. And by the Court a good exception, for he shall be compelled to shew how he came to an estate in the terme, inasmuch as it cannot be by loyall meaus, vide 1, & 2 Eliz. Dyer 171. that a que estate of a particular estate of a terme is not good, and 7 Eliz. Dyer 238. where the plea was of a que estate of a termor, and exception taken to it; and the difference between it and a freehold, so in the 7 H. 6. 440. it was agreed that H. could not convey an interest by a que estate of a particular estate, as intail for life, or years, without shewing how he came by the estate, be it on the part of the plaintiff or the defendant.

The third exception was, that the defendant pleaded a lease made by the abbot and covent by indenture as it ought to be, without saying hic in Curia prolat. which exception was also clearly allowed by the Court, for he is privy to it, and therefore he ought to shew it. And for these two exceptions, but especially for the former. Judgment was given for the plaintiff.

[17] Mich. 36 and 37 Eliz. In C. B.

Palmers Case.

Action on the case for words.

Palmer an utter barrester of Lincolns-Inn, brought an action on the case against Boyer for these words; Palmer being steward to I. S. the defendant in discourse had with I. S. said; I marvail you will have such a paltry lawyer for your steward, for he hath as much law as a jack a napes: and the plaintiff shewed all the matter in the declaration, and that by reason of such words he was displaced of his office.

Williams Serjeant did move, in that the words were not, that he hath no more law then, &c. for then those words were actionable, but, that he hath as much law as, &c. for which words no action will lye. But resolved by the Court that the action will lye, for the words are slanderous and prejudicial to his credit, and by reason of them he was discharged of his stewardship, also an action will lye for saying, that he hath as much law as a jack an apes, or my horse; because they are unreasonable creatures, but if he had said, that he hath no more law than I. S. that is not actionable, although I. S. be no lawyer. And judgment was given for the plaintiff.

Pasch. 35 Eliz. In B. R.

Audleys Case.

A man brought an action of debt on an obligation made by the father of the defendant, in which writ the defendant was named son and heir apparent of the obligor, and judgment was given against the defendant, whereupon he brought a writ of error, for the writ does imply that his father was living, for he is his heire in truth and in fact, if his father be dead, and not apparent: to which was answered, that that was but surplusage which shall not abate the writ, as appeares by the book of the 10 Edw. 3. But the Court held that judgment should be reverst, for he ought to be

named heire, as in debt against executors, he shall be named executor. And judgment was reverst.

TRIN. 36 ELIZ. IN B. R.

DOWNINGHAMS CASE.

Ejectment.

The defendant in an ejectione firmæ pleaded that the lord of the mannor did enter into the land of a copyholder by reason of forfeiture for waste committed in suffering the houses to be uncovered, by which the timber is become rotten, and did not alledge in facto that the custome of the mannor is, that such waste is a forfeiture, for it was said, that although other waste by the common law is a forfei-[18]-ture, yet this permissive waste is not. Sed non allocatur: for all waste done by a copyholder is forfeitable.

2. It was resolved, that if a copyholder made a lease for yeares which is not according to the custome of the mannor, yet this lease is good; so that the lessee may maintain an ejectione firmæ, for between the lessor and the lessee, and all other, except the lord of the mannor, the lease is good, and so hath it been severall times adjudged in this Court.

TRIN. 36 ELIZ. IN B. R.

WISDOMES CASE.

Action on the case for words.

Stich brought an action on the case for slanderous words against Wisdome, the words were, There is many a truer and honester man hanged, and that there was a robbery committed whereof he thought him to be one, and that he thought him to be a horse-stealer.

And it was moved in arrest of judgment that these words were not actionable; for it is not said in facto, that he was in the robbery, or that he was a horse-stealer in fact, but onely by imagination, that he thought he was such a one: but judgment was given for the plaintiff.

TRIN. 36 ELIZ. IN B. R. ROT. 815.

PALMERS CASE.

Christopher Palmer brought an ejectione firmæ against John Humphrey, and declared that one George Hanger the eighteenth day of May, in the six and thirtieth year of Eliz. by his indenture did demise unto him a certain peece of land called the great Ashbroke, and other peece of land called Stocking, and also divers other peeces of land naming the peeces, and of one garden called Muchins Gardein, and of another peece of meadow called Michins Meade, and of seven acres of arable land, for the terme of two years; by vertue whereof the said Christopher entred, untill the defendant by force and armes, &c. did eject him, and did set forth in his declaration that the defendant ejected him out of the said peeces of land, and yet did not expresse the contents thereof in certainty: and upon not-guilty pleaded it was found for the plaintiff, and for the seven arable acres of land and the garden, the Court gave their judgment that it was certain enough, but as to the other peeces of land, the Court was divided: for Popham & Gawdy held that it was certain enough being in an ejectione firmæ, which is but in the nature of an action of trespasse, and the damages are the principall, and a man may bring an action of trespasse for a peece of land, without any other certainty: but Clench and Fenner were on the contrary, for he ought to set forth his term in the land, and then to shew the contents thereof, as well

in an ejectment, as in a precipe quod reddat, by which land is demanded, and a man shall have an ejectione firmæ de una visgata terræ, but shall not have a precipe **[19]** quod reddat of one portion of land, by Skeene and Hill, 7 H. 4. 40. 9 H. 6. 3. 5 H. 7. 9. And afterwards vide Mich. 37, & 38 Eliz. It was adjudged that this was good enough in an ejectione firmæ, for there the damages are the principall; but otherwise in a precipe, for there ought to be a certainty: but in an assise of novel disseisin it is good enough, but afterwards Mich. 38, & 39 Eliz. the case was debated in the Exchequer Chamber by writ of error, and the judgment was reversed.

HIL. 36 ELIZ. IN B. R. ROT. 34.

WALTERS CASE.

Love brought an action of debt against Wotton, who pleaded the Statute of Usury in bar, and by reason of mispleader, it was awarded by the Court, that the parties should plead de novo, and this award was entred in this manner, viz. et quia placitum illud in modo & forma placitat. est sufficiens in lege, the Court awarded that the parties should replead; and hereupon they pleaded, and judgment for the plaintiff: and the defendant brought a writ of error in the Exchequer Chamber, which was certified accordingly.

And there Gawdy moved that the record in this point might be amended, and to have the record certified de novo into the Exchequer Chamber; for that the first award is repugnant in it self, for it is awarded that they shall replead, because the plea est sufficiens, whereas it ought to be that they shall replead, because est minus sufficiens, as the paper books are, and the opinion of the Court was that it could not be amended, because that the fault is in the indictment it self, which is the act of the Court, and therefore cannot be amended.

Glanvill, It is no error in the judgment, for the judgment is only that they shall replead, but the error is in the judgment to the judgment, and may be well amended, and of the same opinion was Popham.

MICH. 36 AND 37 ELIZ. IN B. R. ROT. 579.

BARTWRIGHTS CASE.

Bartwright brought an action of debt upon a bond against Harris, the condition was, that if the defendant did acquit, discharge, and save harmlesse the plaintiff against an obligation, in which he and the defendant were bound to I. S. in 601l. that then the obligation should be void. The defendant said, that Bartwright was sued on this obligation by I. S. and upon default I. S. had judgment to recover, and that the defendant before execution did deliver to the plaintiff the 601l. and hereupon the plaintiff demurred.

Humbert, It is no plea, for he confesseth that the plaintiff was not yet taken in execution, yet inasmuch as he may be taken, therefore his body, goods, and lands are liable to the execution, and he hath not acquitted nor saved him harmlesse against the bond of I. S. vide Dyer 186. And the plaintiff had judgment &c.

[20] MICH. 36 AND 37 ELIZ. IN B. R. ROT. 25.

GREYES CASE.

Grey brought an action of trespasse against Bartholmew: the case was: A man did purchase divers fishes, viz. carpes, tenches, trouts, &c. and put them into his pond for store, and then died.

The question was, whether the heire or the executors should have the fish.

Popham, The heire shall have the deer in the park, and by the same reason, the fish.

Clench, If the fish be stolne it is felony, so that it appears there is a property in them, vide 18 Ed. 4. 10 Ed. 4. 14. 22 Ass. 98. that stealing of tench out of a pool is felony, by which it seems they are but chattels.

Popham, The book is so, and so is the law, but that is of stealing fish out of a trunk, or some narrow place where they are put to be taken at will and pleasure; but otherwise it is where they are put into a pond.

Fenner, He which hath the water shall have the fish: and Popham ex assensu Curiæ gave judgment for the heire. And in the principall case the executors did take the fish with nets, and the heire brought a trespasse and adjudged maintainable. See what chattels executors shall have, and what not, in 21 H. 7. 26. 10 H. 7. 6. & 30. an account will lye for fish in a fish-pond, so in the 5 R. 2. Waste 97. an action of waste did lye against a guardian in chivalry for taking fish out of a pool by the Statute of Magna Charta; but quære if it lies against a termor or guardian in socage upon an account for fish.

36 Eliz. In B. R. Rot. 767.

Leighs Case.

Leigh brought an ejectione firmæ for a chamber against Shaw, the case was; A lease was made of the rectory of Chingford in Essex, and of the glebe, excepting the parsonage house, saving and allowing to the lessee a chamber over the parlor next the church.

It was adjudged that the lease of the chamber was good, for as well as a man by his exception may except part of a thing, so as it shall be intended that it was never let or granted; so in this case when he saies, except the parsonage house, saving and allowing to the lessee a chamber, this saving makes the chamber, as it were excepted out of it, as if it had been leased; so a saving out of a saving, is as much as there had been no saving at all, and then this chamber not being excepted out of the lease shall passe clearly by the lease of the rectory. And judgment was given for the plaintiff.

[21] 37 Eliz. In B. R. Rot. 242.

Wrights Case.

Wright brought a writ of error against the Mayor and Comminalty of Wickombe, to reverse a fine levied by his ancestor of twenty acres of land, the defendants in abatement of the writ of error did plead that the plaintiff after the death of his ancestor did disseise the defendants of the land, and made a feoffment to a stranger. Judgment, &c. The plaintiff replied, that they did re-enter upon him, without that, that he did enfeoff a stranger modo & forma. The jury found, that there was a fine of twenty acres, and that the plaintiff being disseisor of all, made a feoffment of six of the acres to a stranger. Et si supra totam materiam, &c. And it was objected that the record was intire, and the error is a chose in action, and not a chose in droit, and therefore cannot be divided, but if it were a chose in droit, it is otherwise, as if a disseisee of twenty acres releaseth all his right in five acres, this doth extinguish all his right in the five acres: so upon a feoffment of parcell, yet the right remaineth as to the remnant: but of a chose in action which is meerly entire, no apportionment can be, as in the 31 Eliz. in the Kings Bench, between Charnock and Wrothesley, the case was; Husband and wife levied a fine of the wives land, and after because the wife was within age, they sued a writ of error to reverse the fine. The question was, if this should be reversed as to the wife onely, or against the husband according to the opinion of Belknap in the 50 Ed. 3. And after long debate it was resolved that it should be against both, for it is intire, and cannot be affirmed in part and disaffirmed in another part. And the Lord Norris case is very agreeable to this, where tenant for life did levy an erroneous fine, and then was attaint by Parliament,

and all the right which he had to any land was given to the Queen; and it was adjudged that there is no title of error, nor was it given to the Queen by this word, right, and then if it be so, the title of error is not of any right in the land, but onely to the suit, and if it be a suit, it is a suit intire, for he cannot have severall suits, as is agreed in Sir Richard Knightleys case. A man had judgment to recover 150l. and did release 20l. of it, and after sued execution, and the other brought an audita querela upon the releases, and defeated all the execution. But it is otherwise where such apportionment of such suit is done by act in law, as in 7 Ed. 4. fol. ultimo. The sheriff levied parcell of the debt by fieri facias, yet shall he have an action of debt for the residue upon the record: but in this case it is the act of the party himself that destroies his suit for part of the land, for which it shall destroy the other suit, for the error is intire as to all the land and cannot be divided, as in the 38 Ed. 3. and 12 H. 6. if a false verdict be found, and the party greived does make a feoffment of parcell, he shall not have an attaint for any part: so in the 19 H. 6. and the 39 Ass. If he who hath cause to bring a writ of error or attaint, does take a lease for years of parcell, he doth suspend his action, and if he takes in fee, it is quite gone. But it was resolved by the Court that the feoffment does not destroy the title of the writ of error, for more then so much as a feoffment was made of; and thereupon they first took a difference be-[22]-tween suspension and extinguishment of an action, for peradventure if he suspend his action as to any part for any time, this is a suspension unto all, but extinguishment of part; is a bar to that part onely; and Gawdy cited the case in 9 H. 6. where judgment was reverst for part onely, and it is not unusuall to have a fine reversed for part: as if a fine be levied of lands in ancient demesne, 47 Ed. 3. 9. a. there by Parsley, If there be error in law as to one parcell, and error in fact as to another parcell, the judgment as touching the matter of law may be reversed.

Fenner; He who hath title to reverse a fine, or recovery by writ of error, hath right in the land, and if he release all his right in the land, the error is extinct, and the reason of the Lord Norris case was not that the title to the error was an action in privity annexed to the party to the record and his heires, and cannot be transferred over to another, no more then a writ of partition between coparceners, or a nuper obiit.

Popham, He who hath title to have the writ of error hath no title to the land, although that thereby he be to be restored to the land: for if the land discend to one who hath title to have the writ of error, without doubt it shall not be accounted a remitter: but as to the matter now in question, he said, that if two men bring a writ of error in the realty, and the tenant plead the release of one, this is a good bar against both, because the error in the record is released: but if one who hath title to a writ of error, does make a release of all his right in one acre, this is a bar but for so much, inasmuch as the release is a bar but as to the restitution of the land onely, and no release of errors in the record, for by the reversall of a fine or recovery, the party may annihilate the record, and have restitution of that which the record before took from him, and therefore it shall bar the plaintiff. And the opinion of all the Court was, that the fine should be reversed for that part of the land onely, whereof no feoffment was made, but for some defects in the writ of error, judgment was stayed.

MICH. 37 AND 38 ELIZ. IN B. R.

BARNARDS CASE.

Smith brought an action of debt upon a bond against Barnard, the defendant pleaded that the plaintiff was outlawed, and a day was given him to bring in the record, at which day he made default.

Daniel moved that the judgment for the plaintiff in this case should be that the defendant should answer, for that the plea of outlawry was but a dilatory plea, and no plea in bar, as appears 21 Ed. 4. 15. but this difference was taken by the Court. In an action of debt upon a bond, utlary of the plaintiff is a plea in bar, and the reason is, because all the debts in specialties are forfeited to the Queen by reason of

the outlawry, and because the Queen is to have them, it is a good plea in bar: but in a trespasse or debt upon a contract, the outlawry is but to the abatement of the writ, and the Queen shall not have debts upon simple contracts, but after the outlawry pardoned, the plaintiff may have an action for them again. And because he **[23]** failed to bring the record at his day appointed, the plaintiff recovered, vide Dyer 6 Eliz. 227, 228.

HIL. 32 ELIZ. IN C. B.

LORD DACRES CASE.

Gregory Lord Dacres was summoned to answer Richard Gawton in a plea of debt for 26l. 14s. and did declare, that the defendant did retain the plaintiff to be his bayliff of his mannor of Moreford, &c. and to receive the defendants money for a certain time, and to do other businesses for the defendant, and to render an account: and afterwards before one Launcelot Love, the auditor assigned by the defendant, the plaintiff did account. Super quo computo præfatus Richardus pro diversis costagiis & expensis quæ idem Richardus circa prosecutionem & executionem negotiorum præfati Gregorii in surplusagiis in prædict. 26l. 14s. erga ipsum Gregorium, ultra omnes denariorum summas per ipsum Richardum ad ipsum dicti Gregorii recept. permansisset. And there upon he brought his action; and the defendant pleaded nil debet, and it was found for the plaintiff, and yet he had not judgment.

First, because the declaration was insufficient, because the plaintiff was not in surplusage to the defendant, but the defendant to the plaintiff, and so are all the presidents directly; and he ought to alledge he was in service, and that he had received goods, whereof no mention is made.

Secondly, because neither day nor place is alledged where the auditor was assigned.

PASCH. 33 ELIZ. IN C. B. ROT. 409.

OWSELEYS CASE.

Roger Owsely brought a replevin against Edmund Brach and others, the defendant made conusance as baily to John Levison; and said, that long time before the taking, &c. one William Coup was seised of a house and eight acres of meadow, &c. whereof the place is parcell, in his demesne as of fee, and did demise the same to Richard Coup for one and twenty years, reserving rent, and the lessee died, and the land came to his wife as his executrix, who married Roger Owseley, and that William Coup did levy a fine of the premisses to Stephen Noke and others, to the use of Stephen and his heires, and after Stephen entred and outed the termor, and infeoffed John Leveson and his heires, and then the termor re-enters, claiming his terme, and for rent arreare the defendant made conusans as aforesaid, and it was adjudged against the defendant, because this entry and feoffment by Noke to Leveson, and the re-entry of the termor is no attornment, and this varies from Littleton's case, where the lessor entred and made a feoffment, and the lessee re-entred, for Noke the lessor had **[24]** not any attornment, and can have no distresse, and his feoffee cannot be in better case then he himself: and if the first feoffee makes feoffment to B. who enfeoffs C. and the lessee re-enters, that is attornment but to the first feoffee, and not to the other, for he may be misconusant of it, because he was outed by the lessor, but note judgment was not given till Trin. 36 Eliz.

PASCH. 36 ELIZ. IN C. B.

OWENS CASE.

Edward Owen brought an action of waste against Peerce for land in ancient demesne, the defendant made defence, and pleaded to the jurisdiction of the Court,

because the land was ancient demesne, and the defendant was ruled to plead over, for it is but a personall action, and the statute is a beneficiall statute for the commonwealth, and (by the opinion of all the Court, except Walmsley) does extent to ancient demesne, & 40 Ed. 3. 4. ancient demesne is a good plea in replevin, 2 H. 7. 17. 21 Ed. 4. 3. it is no good plea in an action upon the Statute of Glocester.

MICH. 33 AND 34 ELIZ. IN C. B. ROT. 2122.

SIR EDWARD CLEERES CASE.

Sir Edward Cleere brought a quare impedit against the Bishop of Norwich, Edward Peacock, and Robert Hinston clerk, to present to an advowson holden in capite.

Anderson. A devise of an advowson in grosse is void, because it is of annuall value, whereof the King shall have the third part. But Owen, Beaumont, and Walmsley held the contrary, and so it was adjudged. See the case of the Earle of Huntington against the Lord of Montjoy, of a devise of liberties of Cramford, which were not of any annuall value, and yet the opinion of Wray and Anderson Justices was certified to some of the councell being arbitrators, that the devise was not good.

TRIN. 36 ELIZ. IN C. B. ROT. 2145.

BROWNES CASE.

Anthony Brown brought an action of trespasse against Richard Pease, the case was this; John Warren was seised in fee of the mannor of Warners, and of the mannor of Cherchall, and demised his mannor of Warners to the youngest son of Richard Foster his cosin in fee, at which time Richard the father had issue George Foster and John Foster. And he demised his mannor of Cherchall in hæc verba.

[25] I will my mannor of Cherchall to Margery Water for her life, and if she die, and then any of my cousin Fosters sons then living, then I will my foresaid mannor of Cherchall unto him that shall have my manner of Warners, and after the devisor died without issue, and the reversion of the mannor of Cherchall discended to Henry Warner as brother and heire of the devisor. And after the said Henry Warner by deed inrolled, did bargain and sell the mannor of Cherchall to Anthony Browne, who devised it to the plaintiff: and then George Foster dies without issue, and the mannor of Warners does discend to John Foster his brother and heire, who enters and enfeoffs the Lord Rich, and after marriage the tenant for life of the mannor of Cherchall dies, and the plaintiff enters, and the defendant enters upon him as servant to John Foster, whereupon the plaintiff brought this action: and judgment was given for the plaintiff, because that the words and the intent of the devise was, that the mannors of Warners and Cherchall should go together, and therefore the mannor of Warners was sold before the death of Margery, by John Foster, and after the death of Margery, John can take nothing by the devise.

MICH. 29 AND 30 ELIZ. ROT. 2325, OR 2929.

HAMBLETONS CASE.

John Hambleton had issue foure sons, John the eldest, Robert the second, Richard the third, and Thomas the fourth, and devised to each of them a parcell of land, to them and the heirs males of their body begotten, and if it happen that any of their heirs dye without issue male of his body lawfully begotten, then the survivor to be each others heire. If these words make a remainder, or are void, was the question. And it was adjudged against the plaintiff, for the Court held that all those that survived were joynt-tenants, and one joynt-tenant cannot have a trespasse against the other, for

by the intent of the will, it appears that the survivors should have that part, and the survivority of each other heire, each survivor, that is, all that survive shall be each others heire, and so the remainder should be to every one of them.

29 Eliz.

Fenners Case, argued before the Lord Mayor of London at Guildhall.

In this case it was adjudged, that if a man covenants that his son then within age, and infra annos nubiles, before such a day shall marry the daughter of I. S. and he does marry her accordingly, and after at the age of consent he disagrees to the marriage, yet is the covenant performed, for it is a marriage, and such a one as the covenantee would have, untill the disagreement, vide 7 H. 6. 12. Dyer 143. 313. & 369.

[26] 25 Eliz.

Webbe against Potter.

In an ejectione firmæ by Webbe against Potter, the case was; Harris gave land in frank-marriage to one White, and the deed was dedi & concessi Iohan. White in liberum maritagium Iohannæ filiæ meæ habend. dictæ Ioannæ & heredibus in perpetuum tenend. de capitalibus dominis feodi illius, with warranty to John White and his heires. Periam, The usual words in frank-marriage shall not be destroyed, for the words of frank-marriage are, Liberum maritagium cum Ioanna filia mea, in the ablative case, and although here it be in the dative case, it is good. And of the same opinion were all the Judges.

Also a gift in frank-marriage made after the espousals was held good by all the justices, 2 H. 3. Donor 199. 4 Ed. 3. 8. Dyer 262 B. And a gift in frank-marriage before the statute was a fee-simple, but now speciall taile, and if it be not a frank-marriage, he shall have an estate for life, and to prove this his opinion, he relied upon the intention of the donors which ought to be observed: for if the habendum does crosse the premisses it shall be void, but the remainder is good for the benefit of a stranger, but a rent cannot be reserved upon such a gift, during the four degrees, but after the reversion is good, if he do attorne to the grantee of the reversion.

Windham, Frank-marriage is not an estate in taile, for there wants the word, heires, Coke lib. 1. 103. So a gift to a man & semini suo, 10 Ass. 26. and after Meade agreed with Windham although the grounds of frank-marriage were not observed, yet that it was good; for although there be no tenure between the donor and donee, yet is it a good frank-marriage.

Dyer, It is no good frank-marriage, because the usuall words are not observed, and if the word liberum be omitted, it is not frank-marriage, neither is it good given to a man, but it must be to a woman, for a man cannot give land to a woman causa matrimonii prælocuti: and in this case the party ought to be of the blood of the donor, who by possibility may be inheritable to him, and there ought to be a tenure between them, and an acquittall, and if any faile, it is no frank-marriage, and he said further, that if it once takes effect as frank-marriage, and then the donor grants the reversion, or the reversion discends to the donees, yet it shall not be destroyed, but shall remaine as an estate in taile, and not for life, because it once took effect in the donees and their issues, and if land be given to a man in frank-marriage, the remainder in taile, yet this shall not destroy the frank-marriage, and the donee shall hold of the donor, and not of him in the remainder: and if one give land in frank-marriage, the remainders to the donees in taile, yet is this a good frank-marriage, and if the donor grants over his services, yet doth the frank-marriage continue, although the donees attorn, for they are incident to the reversion, and therefore the grant is void, but if the reversion be granted the services will passe, and he concluded that the husband had all, and the wife nothing, because no estate to her is mentioned in the premisses, and he could not construe the words to be the intent of the donor, for here is an expresse

limitation of the fee to the husband [27] and his heirs, which cannot be controlled by intendment. And after 25 Eliz. it was adjudged to be no frank-marriage, nor gift in taile, but a fee-simple: and the justices said, that the ancient books were that where it took not effect as a frank-marriage, it should be in especiall taile, yet those at this time are not law: but they agreed, that this at one time took effect as frank-marriage, and by matter ex post facto may be made an estate in taile.

MICH. 30 ELIZ.

GIBBS CASE.

Gibbs brought an action of trover against Basil, for a gelding; the case was.

One Porter stole this gelding from the plaintiff, and sold him to the defendant in open market, by the name of Lister, and it was entred so in the toll book that Lister sold him.

The question was, if this alteration of his name shall make any alteration of the property, although the sale was in open market.

Windham and Rhodes Justices, held this no good sale to bar the plaintiff, and grounded their opinion on the statute of the 2, and 3. Phil. and Mar. cap. 7. which provides that no property of stollen goods shall be altered that are sold, unlesse the name and surname of the parties to the sale be written in the toll-book: and Shuttleworth moved, that it should be in the market, and walked there for an houre together, which is not set forth by the defendant in his bar; but the justices said, that such speciall plea need not to be, but shall be intended.

ROUSES CASE.

It was moved in this case, that if tenant for terme dauter vie, does continue and hold in his estate, after the death of cestuy que vie: if he be a disseisor, and whether in pleading, the plea ought to be seised and not possest.

Shuttleworth, He was legally in at first, and therefore cannot be a disseisor, 15 Ed. 4. 41. A freehold could not be gained where he came in by the agreement of the party, and 12 Ass. 22. where the husband and wife were seised of a freehold, and after were divorced by suit, on the womans part, whereby the woman is to have all the land, yet if the husband continue possession and dies seised, this discent shall not take away entry, because he was no disseisor.

Gawdy, He is tenant at sufferance and no disseisor, and there it was moved, that if tenant at sufferance, or a disseisor makes copies of copyhold lands, if they be good or voidable: and note that Wilde took here a diversity between a termor that holds over, and a tenant at sufferance; for in case of a tenant at sufferance, there is no freehold taken from the lessor, which the continuance of possession doth not take from him, but where the tenant holds over his terme, there the freehold is disturbed, and therefore there is a disseisin: but at that present it seemed to the Judges that there was no diversity. But [28] the next terme Godfrey moved, that if tenant for anothers life held over his estate he had fee-simple, and he granted that it was otherwise in some cases, for if he claim to be tenant at the will of the lessor, he shall not gaine a fee-simple: for Littleton in his Chapter of Releases. 108. saith, that tenant at sufferance is where a man in his own wrong doth convey lands and tenements at the will of him that hath the freehold, and such occupyer claimeth nothing but at will. But in this case the tenant claimes otherwise then at will of the lessor, he does not claim any thing but at the will of the lessor; as in the case of Littleton, but claimes to hold over against the will of the lessor, which is no tenant at sufferance, and 10 Ed. 4. if a man makes a lease at will, and the lessor dies, and he continues possession and claims fee, the heire shall have a mordancester, and 18 Ed. 4. 25. if cestuy que use dies, and the tenant continues in, and the tenant is impleaded, the lessor shall not be received, and the reason is, because there is no reversion in him, but the tenant hath it, and 22 Ed. 4. 38. by Hussey Justice, If a termor holds over his terme, there an estate in fee is confest

to be in him by matter of law, but it is a doubt whether he be a disseisor or not, but it seemeth not, for a trespasse doth not lye against him before regresse, and in the 7 H. 4. 43. If a guardian holds the possession at the full age of the heir, or tenant for years after his terme expired, the estate shall be judged in fee. And in our case he hath not claimed to hold at will, for he hath done contrary, for he hath made copies.

By all the justices, if tenant at will, or for years, or at sufferance, make a lease for years, this is a disseisin, and a tenant at will doth thereby gaine a freehold, and thereby doth claim a greater estate then he ought, and so it is in this case.

2. Admitting him to be tenant at sufferance, the question is, if he may grant copies, and if whether they be good: and it seems he may, for no trespasse lies against him, because he is dominus pro tempore, and it is not like a copy made by an abator or disseisor, for it hath been adjudged that copies made by them are void, but in this case his act of making copies agrees with the custome; as in Grisbrooks case, if an administrator sells goods, and paies debts with the money, and after he who is executor proves the will, he shall never avoid this sale, for that it was done according to the will which the executors were compelled to do: so in the 12 H. 6. if a baily cuts trees and repaires an ancient pale, this is good, and 6 R. 2. if he paies quit-rents it is good.

Coke, He comes in by right, and therefore is tenant at sufferance, and like this case is Dyer 35 H. 8. 57. Lord Zouches case, where cestuy que use for life, the remainder over in taile, made a leaso for the terme of the life of the lessee, and dies, and the lessee continues his estate. And the opinions of the justices of both benches were, that he is but tenant at sufferance.

Popham, If a mannor be devised to one, and the devisee enters and makes copies, and then the devise is found to be void, yet the copies of surrender made by such devisee are good; but contrary where new or voluntary copies are made by him, 7 Eliz. and in the Lord Arundells case, a feoffment in fee was made of a mannor upon condition, the feoffee upon condition grants voluntary copies, those are good.

Atkins, on the contrary: and he made a difference between a tenant at will, and a tenant at sufferance, for a tenant at will shall **[29]** have aid, but so shall not the other, as in the 2 H. 4. and a release to one is good, to the other not, &c. and whereas he holds over he doth assume an interest which shall not be thought wrongfull, for he is neither abator nor disseisor, and therefore dominus, and therefore the copies made by him are good, 4 H. 7. 3. Tenant at sufferance may justifie for damage-feasant. And all the justices held for the plaintiff, and that he that made the copy was but tenant at sufferance, and not disseisor, and that he had no fee. And the judgment was to be entred, unless the defendant shewed better matter.

TRIN. 28 ELIZ. ROT. 329.

SMITHS CASE.

Smith assumed upon himselfe, that when I. S. was indebted to I. D. in an obligation of forty pounds, that if I. D. would not implead the said I. N. that then if the money were not paid at such a day, that then he, viz. the said Smith would pay the money: upon which assumpsit after the day I. D. brought his action on the case, and did set forth in his declaration that he did not implead I. N. and it was moved by Kingsmill, that he could not have this action untill I. N. be dead, for so long as he lives I. D. hath time to implead him. As if a man promiseth another that he will be named in his action that he hath against a third person, and if the third person payes not the money at such a day, then he will, he cannot sue unlesse he shewes he hath discharged the other of the obligation.

Clench, It is implied that he will never implead him.

Shuttleworth Justice, Not so, for if hereafter he sue him contrary to his promise, then the other who made the assumpsit shall have his action on the case, and recover to the value of the summ in the bond. And after the case was moved again, and the plaintiff brought the obligation in Court, and thereupon the obligation was entred, so

that now the plaintiff could not implead I. N. in posterum, for which judgment was entred for the plaintiff.

29 ELIZ.

COSENS CASE.

Cosen the father had issue three sons, John, George, and Thomas. John the eldest died in the life-time of his father, his wife enseint with a daughter, the father makes a devise in these words:

That if it shall please God to take to His mercy my son Richard, before he shall have issue of his body, so that my lands shall descend to my son George before he shall be of the age of one and twenty years, then my overseers shall haue my land untill George come to the age of one and twenty years.

[30] If Richard who is yet living had an estate in taile by these words, was the question. And all the justices agreed that it was a plain implication to make an estate-taile in Richard the second son, 13 H. 7. 17.

29 ELIZ. IN C. B.

WARRENS CASE.

William Warren brought an action of debt for forty pounds, and in his declaration confessed satisfaction of twenty pounds, and hereupon a writ of error was brought in the Kings Bench, and the judgment reversed: for by his declaration he had abated his owne writ, and he ought to have judgment according to his writ, and not to his count. And error was brought upon the outlawry; for if the first record was reversed, the outlawry thereupon is reversed.

4 AND 5 PHIL. & MAR.

Benlowes Serjeant moved this case, a man seised of lands and tenements in London, devises them by these words.

I will and bequeath unto my wife Alice my livelyhood in London for terme of her life. By this will the lands in London passe to the wife by this word, livelyhood. Nota, for Brook Justice said, that it was in ancient time used in divers places of this realm, and had been taken for an inheritance: to which Dyer agreed.

CASE OF SLANDER.

Brook said, that if a man speak many slanderous words of another, he who is slandred may have an action on the case for any one of these words, and may omit the others: but if a man write many slanderous things of another in a letter to a friend, an action upon the case will not lye, for it shall not be intended that it is done to the intent to have it published.

MICH. 1 AND 2 ELIZ.

N. Arch-bishop of York, and I. B. executors of the last will and testament of Thomas Duke of Norfolk, did bring a writ of ravishment de guard, and then he was deprived by his own consent: the question is, if the writ shall abate.

Benlowes, It shall abate, for if a dean and parson of a church bring an action for such a custome, and then resigne, the writ shall abate, because it is their own act.

Dyer, The writ shall not abate, for the action is not brought in **[31]** their own

persons, but in their testators, and therefore the action shall continue. And if a man be outlawed he may bring an action as executor, and the writ shall not abate.

Browne, If I make I. S. my attorney, and he (the warrant of attorney still continuing) is made a knight, yet is not the warrant of attorney determined, although the word knight, which is now part of his name be not in the warrant, therefore in this case the writ is good.

MICH. 7 ELIZ.

Note, it was said by Browne, that if H. does let the cite of his mannor, with all his lands to the said mannor appurtenant, hereby all the demesne lands do passe; but if it were with all the lands appertaining to the said cite, nothing passeth but the mannor-place.

PASCH. 6 ELIZ.

A man seised of the mannor of Dale, doth let the same with all the members and appurtenances to the same, to have and to hold all the members of the said mannor to the lessee, for terme of years.

Walsh and Weston were of opinion that this was a lease for years of the mannor onely, and that the limitation of the word, members, being after the habendum was void. But Dyer and Browne were of the contrary opinion: and Browne said, that when the habendum is used by way of limitation, it shall not be void. As if he let his mannor of Dale, to have and to hold one acre parcell thereof for a terme of years, the lease is void for all, but if there had been no habendum but the lease for years had been limited in the premisses of the lease, that is good enough: and if the lease had been habendum every part thereof, that had been a good lease of the mannor, for all the parts comprehend all the mannor. And Dyer said, that the word, members, shall be taken for the townes and hamblets wherein the mannor hath jurisdiction.

Note, it was said by Dyer, that if partition be made by the sheriff, although the writ be not returned, yet it is good enough, and none of the parties shall except against it, and so was the better opinion concerning the estate of Culpeper and Navall in the county of Kent.

Sutton brought a writ of ravishment of a ward against Robinson, wherein it was resolved by Dyer, Carus, Weston, and Benlowes, that if the tenant enfeoff his lord and others, all the seigniory is extinct: also if the tenant does infeoff the lord but of a moyety, yet is all the seigniory extinct: and Dyer said, that if the tenant does infeoff the lord and a stranger to the use of another and his heires, and makes livery to the stranger, this is no extinguishment of the seigniory, but if the livery were made to the lord, it is otherwise; and yet is the possession instantly carried away to the stranger by the statute of 2 H. 7. 13.

[32] A man seised of lands devises the same to his wife, to dispose and imploy them for her self and her son, according to her will and pleasure.

Dyer, Weston, and Walson held that the wife had a fee-simple by the intendment of the will, and the estate is conditionall, for ea intentione will make a condition in a devise, but not in grant, vide Dyer 26. 6.

A woman tenant in taile makes a lease for one and thirty years, and after takes a husband, who have issue, the husband (being tenant by the curtesie) surrenders, the heire doth oust the lessee, and the lessee brings an ejectment: and it was held that the surrender was good, and that the privity was sufficient.

MICH. 40 ELIZ.

In an action of the case for calling one bastard; Dyer and Walsh said an action would lye, but Browne on the contrary, because it shall be tried in the Spirituall Court. And Dyer said, that at Barwick Assises a formedon in the discender was brought, and one said, that his father by whom he claimed was a bastard, and thereupon he brought an action against him for those words, and recovered.

Catlin said, that if lands be given to a man and to the heires, he shall engender on the body of an English woman, and he marries a French woman, and she dies, and then he marries an English woman, that now this is a good estate in special taile.

PASCH. 7 ELIZ.

The prior and monks of the charter-house (before the dissolution) made a lease for foure years, reserving the ancient rent of twenty five quarters of wheat per annum, and then the house was surrendered into the hands of King Henry the Eighth, and then the Lord Chancellor did let the said rent of twenty five quarters of wheat to I. S. for foure and twenty years. And it came into question between I. S. and the termor, if this was warranted by the 27 H. 8. 28. Harper and Portrell, It is not, for the statute is, that they may make leases of any mannors, lands, tenements, and hereditaments for one and twenty years, &c. and this wheat is neither land, tenement, nor hereditament, but a chattell, and shall be demanded in an action of debt. But the opinion of all the Court was, that the lease was good, and they did agree that it was directly within the word hereditaments, for it may discend or escheat, and the wife shall be endowed thereof. Also upon a lease of corne a rent may be reserved, for a man may reserve a rent upon a lease of a rent, and the rent is not parcell of the reversion, but onely incident thereunto, and the lessor hath the same inheritance therein as he hath in the reversion.

[33] TRIN. 7 ELIZ.

An assurance was made to a woman, to the intent it should be for her joynture, but it was not so expressed in the deed. And the opinion of the Court was, that it might be averred that it was for a joynture, and that such averment was not traversable; and so was it in the case between the Queen and Dame Beaumont.

Winter brought an action of the case against Barnam for these words; viz. Thou murtherer: Dyer and Walsh said, that the action would lye, for there are some words that cannot be qualified, as murtherer, theef, extortioner, false knave, and in such case an action will lye, but contrary where such words are spoken in a jesting way.

Note by Dyer, that the Lord Fitz-James, late Lord Chief Justice of England, did devise his land to Nicholas Fitz-James in taile, with divers remainders over, and in the same devise he devised divers jewels and peeces of plate, viz. the use of them to the said Nicholas Fitz-James, and the heires males of his body. In this case it was the opinion of the Court, that the said Nicholas had no property in the said plate, but onely the use and occupation. And the same law where the devise was that his wife should inhabit in one of his houses which he had for terme of years, during her life, because the wife takes no interest in the terme, but onely an occupation and usage, out of which the executors cannot eject her during her life, but Walsh held the contrary.

HIL. 8 ELIZ.

If a bishop make a lease for years the second of May, and the dean and chapter confirme it the first of May, this is a good lease after the bishops death by Catlin and Southcote.

Wray, How can a lease be confirmed before it be made. Catlin and Southcote, The assent before is a good confirmation after.

HIL. 40 ELIZ.

An obligation wanted these words, In cujus rei testimonium, and yet adjudged to be good, 7 H. 7. 14. Dyer 19 A.

It was said by Catlin in the Star Chamber, that if an infant being a feme covert,

or other infant does levy a fine by grant and render to her or him in taile, or for life, and the husband dye, the wife shall not have a writ of error, because she is tenant of the land, and she cannot have a writ of error against her selfe, so that she is without remedy, so in the case of the other infant.

Cardell, Master of the Rolls, in the case between Stinkley and Chamberlain said, that when executors had goods of their testator, to dispose of to pious uses, they cannot forfeit them, for that they have them not to their own use, but their power is subject to the controle-**[34]**-ment of the Ordinary, and the Ordinary may make distribution of them to pious uses. And it was said at the Bar, that the Ordinary might make the executors account before him, and to punish them according to the law of the church if they spoile the goods, but cannot compell them to imploy them to pious uses.

HIL. 28 ELIZ.

In an action of slander, the words were, Thou art an arrant whore and hadst the french pox. It was moved in arrest of judgment, that the words were not actionable, because part of them relate to the time past, but by the Court adjudged that the action is well brought, because it is a discredit to the woman, and thereby others will shun her company.

TRIN. 31 ELIZ.

INTER WINTER AND LOVEDAY.

In this case which was put by Coke, it was agreed, that a stranger as Cornwall in this case was, could not tender the money to be paid upon the mortgage, for it ought to be one who hath interest in the land: and so was it in the 28 H. 8. between Whaydon and Ashford, where the mother ought to have made the tender for her son within age, and because it did not appear within the verdict what age the infant was, whether he was of the age of fourteen years, or more, so that his mother could be guardian to him by reason of his nurture or not, it was awarded that she could not make a loyall tender.

In an assumpsit for a hundred pounds, the case was; That the defendant in consideration of a French crown given him by the plaintiff, did assume and promise, that if he did not such an act before such a time, that then, &c. It was moved by Godfrey, that the plaintiff can onely recover so much as he is damnified by the French crown: and the like case was before the Chancellor, where a gentlewoman took the death of her husband so heavily, that she said, she would never marry againe: and her son comforted her, and said, God will provide a new husband, and said, that he would give her ten pounds to pay a hundred, when she should marry, which money she accepted of, and then the son brought an assumpsit for the hundred pounds within half a year after she married. And the matter was brought into the Chancery: and the Master of the Rolls awarded ten pounds onely, and said, he would give never a penny more, because it was unreasonable to bar a gentlewoman from marriage.

The Lord Rich was seised of Hadley Park, and of all the tythes thereof, and payed for the tythes but one buck in the summer, and a doe in the winter for thirty years past. The park was disparked and turned into arrable land, and the parson would not receive this fee buck and doe, but would have tythe corne, and thereupon **[35]** brought him into the Spirituall Court, and he brought a prohibition. And Carus and Catlin said, that he need not pay other tythes but buck and doe, for although they be not tythable, yet may they be paid by composition, and he may not take them, but they are to be delivered to him: and in like manner partridges and pheasants in a garden are not tythable, yet may they be paid in lieu of tythes, and shall be brought dead to the parson, and although there be no park, yet may he give a buck out of another park, and perhaps it may be made a park agen.

MICH. 13 AND 14 ELIZ.

Note, it was said by Dyer, that an administrator durante minoritate, cannot bring an action of debt, for he is but as a servant or bailiff in such cases.

A devise was made to the Major, Chamberlaine, and Governors of the Hospital of Saint Bartholmews: whereas they were incorporate by another name, yet the devise held good by Dyer, Weston, and Manwood, for it shall be taken according to the intent of the devisor: and Weston said, that a devise to A. B. a mans eldest son is good, although his name be not B. because the other words do make a sufficient certainty.

It was said, that by the grant panagium hoggs may eat the grass, but if a man grant his acrons, the grantee must gather them, and where panagium is granted the grantee may put in his hoggs into the place granted.

If tenant for years hold over his terme, he is tenant at sufferance, and his descent shall not take away entrie: but if tenant for terme of anothers life holds over his terme, he is an intruder, and his descent shall take away entrie. Quod fuit concessum per Dyer.

A court baron may be holden at any place within the mannor, but not out of the mannor, and so a leete may be held in any place within the liberty and franchise, and although no court hath time out of mind been holden within the mannor, yet it is not thereby lost, for it is incident to a mannor of common right, Coke L. 4. 26. 6. 27. A.

MICH. 14 AND 15 ELIZ.

An account was brought by Tottenham against Bedingfeild, who pleaded ne unques son baily pur account render.

Gawdy prayed the opinion of the Court if the action would lye. And the case was thus.

The plaintiff had a lease of a parsonage, and the defendant, not being lessee, nor claiming any interest, took the tythes being set forth, and carried them away. If the lessor may have an account against such trespassor, was the question.

Manwood Justice, An account will not lye because there is no pri-**[36]**-vity, and wrongs are always without privity, yet I will grant that if H. receive my rents, I may have an account against him, for my assent to have him receive it makes a privity, and when he hath received the rent, he hath not committed any wrong against me, because it is not my money till it is paid: and therefore in this case I may resort to my tenant, and compell him to pay the rent to me because the receit is no wrong: but it is otherwise in the first case, for when the tythes are set forth, they are presently in the possession of the parson, so that when the defendant takes them, he is a wrong seisor of them, and therefore no account will lye against him. And so was it adjudged in a case of a mannor in London, where one under colour of a devise did occupy the land for twenty years, which will afterwards was made void; and thereupon he to whom the right of the land belonged brought an account, and it was adjudged that it would not lye.

Harper, An account will lye against a procter, so that the plaintiff may charge him as procter, and it is no plea for him to say he is no procter, no more then it is for a guardian in socage to say, he is not prochein amy.

Dyer, There are three actions of account. One against a baily, another against a receiver, the third against a guardian in socage. And if an account be brought against a man as receiver, he must be charged with the receipt of the money: but if the defendant pretends he is owner of it, it is contrary to the nature of an account, and therefore he is not chargeable in such action, but he may plead ne unque son baily pur account render: for in an account (as my brother Manwood said) there must be privity: but an abator or an intruder shall not be charged in an account, because they pretend to be owners. But in this case the lessee may have an action of trespasse against him, for the tythes were immediatly upon the setting forth in the

possession of the lessee, and by the statute of the 31 H. 8. 7. he may have an ejectione firmæ: but an account will not lye in this case.

MICH. 14 ELIZ.

Tenant in dower commits waste, and the waste was assigned in this case, that the lessee had destroyed a hundred does of the plaintiffs, whether this was waste or no, was the question.

Dyer, I think it no waste, unlesse she had destroyed all the deer.

Manwood, If a lessee of a pigeon house destroy all the old pigeons, except one or two, yet it is a waste, and so is this, although all be not destroyed.

MICH. 15 ELIZ.

A man is indebted by obligation in a hundred pounds to a testator, this obligation is not assets in the hands of the executors untill it be recovered by them, because it is but a chose in action; but if in such case the executor release the debt now he hath determined the action, and hath made it assets in his hands to the whole value of the bond.

[37] BLISS AGAINST STAFFORD.

Margaret Bliss who was in remainder after an estate in taile, did bring an action on the case against Edward Strafford, for slandring her title in affirming that A. had issue one B. who is alive, and the defendant pleaded not guilty, and the action adjudged good by all: but did abate for an exception to the count.

PASCH. 13 ELIZ.

Upon the Statute of Recusancy made the 29 of Elizabeth, Thomas Salherd and Henry Evered being committed of recusancy, for not paying twenty pounds for every month, a commission was awarded to enquire of their goods and lands in Suffolk to levy the said debt; and amongst other lands certain copyhold lands were seised, and being returned, the parties came in, and by way of plea did set forth, that some of their lands seised were copyhold, and did pray quod manus Dominæ Reginæ amoveantur, and hereupon the Queens Attorney demurred; upon which the question was, if copyhold lands were within the said statute of the 29 Eliz.

Snagge, The lands and hereditaments which the statute speaks of, are such as are known by the common law, and not by custome, for if I grant all my lands and hereditaments in D. my copyhold lands will not passe: so that it seems to me copyholds are not within the statute.

Popham contra. If copyhold lands are not within the statute, some persons shall be free; and he held that lands in ancient demesne were within the meaning of the statute, although not within the words: and he agreed, that where a grant is made of all my lands and tenements in D. that copyhold lands passe not, because they cannot passe by such assurance, and that copyhold lands were not within the Statute of Bankrupts, if they be not particularly expressed, and a copyhold cannot passe by grant but by surrender. But after great debate it was adjudged, that copyhold lands are not within the statute by reason of the prejudice that may come thereby to the lord, who hath not committed any offence, and therefore shall not loose his customes and services.

TRIN. 30 ELIZ.

In the case of Viscount Bindon, it was holden that if a man hath judgment in debt upon an obligation and no execution, yet he may commence another action upon the same obligation, but otherwise of contract, 9 Ed. 4. 51.

A question was moved, that if a man grants vesturam terræ what doth passe: and it was said by Clerk, that one man may have the vesture & another the soil. Lord Chief Baron, He who hath vesturã terræ cannot dig the land: and if many have a meadow together, viz. to be divided amongst them every year by lots how much every one shall have of grasse in such a place, and how many in such a place, and so to change **[38]** every year according to the lots, they have not a freehold, but onely vesturam terræ, Dyer 285. 6. 14 H. 7. 4. & 6. 21 H. 7. 37. Dyer 375. 6. 13 H. 6. 13. 14 H. 8. 6.

In the case of a dean and chapter, the question was, that if lessee for years be rendring rent with clause of re-entry for non-payment, and then the reversion or rent be extended by a statute, or seised into the hands of the King for debt, if the lessee shall pay the rent according to the extent, and no breach of the condition although he pay not the lessor. And the Chief Baron held it was no breach of the condition, because he is now compellable to pay it according to the extent.

CALTONS CASE.

It was moved by Serjeant Fenner, and agreed by all the barons, that if the King make a lease to A. rendring rent, and there the lessee lets parcell hereof, rendring rent, in this case the second lessee shall not have the priviledge of the Exchequer to fly thither to be sued concerning this land, because that by such means all the causes in England, may be brought into the Exchequer, and hereupon Fenner said, that he had demurred upon a bill exhibited into the Exchequer Chamber by such a lessee, and prayed the Court that he might not answer, and he was thereupon dismist.

Upon not guilty pleaded, the parties joyned issue, and after evidence given, and the jury dismist from the Bar, some of them had apples, and figgs, whereof the Court taking notice when they came to give their verdict, did examine them upon their oathes, and they who had eaten were fined five pounds, and committed to the Fleet. And some of the justices did doubt if the verdict were good; and upon many presidents had, it was adjudged good: and they relyed much on the president of the 12 H. 8. Rot. 102. where one of the jury did eat before they were agreed, and yet the verdict was good: and after a writ of error was brought, and the judgment affirmed, 20 H. 7. 3. 13 H. 4. 13.

PASCH. 27 ELIZ.

A man gives land to I. S. in the premisses, habendum to him and three others for their lives, et eorum diutius viventium successive: the question was, what estate I. S. had, and whether there be any occupancy in the case.

Coke held, that I. S. had but an estate for his own life, because he cannot have an estate for his own and anothers life, where the interest of both begin at one instant, and the habendum by no means can make a remainder; as if a lease be made to one for life, habendum to him and his first begotten son, this makes no remainder to the son, although some have held to the contrary: so of a lease to one for years, habendum to him and another, does not make any remainder to the other: also the word, successive, will not make a remainder, as in the 30 H. 8. Br. Joynt-tenant 53. Also one cannot have an estate for life, and **[39]** for anothers life also in present interest, for the greater doth drowne the lesse, but if the greater be present and the other future, as a lease to him for life, the remainder to him for anothers life, or a lease for life and three years over, this is good; but if a lease be made for life and for years, the lease

for years is drowned, 19 Ed. 3. Surrender 8. where tenant for life of a mannor did surrender to him in the reversion, &c.

Gawdy, If a lease be made to one for life, and so long as another shall live, quære, what estate he hath.

And as to the second point, certainly there cannot be an occupancy, for if the estate be void, the limitation is void; also the occupancy is pleaded que un tiel, and does not say, claymant comme occupant, &c. for if a man comes a hawking on land, he is not an occupant, and the book of entries is, that he ought to plead it.

Clinch Justice, Every occupant ought to be in possession at the time of the death of the tenant, for otherwise the law casts the interest upon him in the reversion. But Gawdy and Chute denied this: and after, viz 29 Eliz. the case was moved again by Popham, and he made three points.

1. If the other three had a joynt estate.
2. If they had a remainder.
3. If there be an occupancy. And he was of opinion that they had nothing by the habendum, for they were not named in the premisses, & they cannot have a remainder for the incertainty, but if those three had been named in the premisses, habendum to them successive, as they had been named, there they had a remainder, for there the certainty appeared, 30 H. 8. 8. Dyer 361. Also there can be no occupancy during the lives of the other three: but he agreed to the book of the 18 Ed. 3. 34. that a lease for life, the remainder to him for anothers life was good: and that if a lease be made to I. S. and a monk, it is void to the monk, and the other hath all, and that during the life of the monk there can be no occupancy. And if I make a lease to I. S. for the life of a monk, it is a good lease: and till the same terme judgment was given, that they could take nothing in possession joyntly, nor by way of remainder, and that no occupancy could be in the case, and that I. S. had estate for terme of his owne life onely.

STILE AGAINST MILES.

Stile parson did suggest that the land was parcell of the glebe of the parsonage, and that the said Stile did let the said glebe, being foure and twenty acres to Miles for years, rendring thirteen shillings foure pence rent; and in a prohibition the case was, if tythes were to be paid. And Wray said, that although it was parcell of the glebe, yet when it was leased out tythes ought to be paid, and if no rent be reserved, tythes ought to be paid without question: but there may be a doubt where the rent is reserved to the true value of the land; but here the rent is of small value, wherefore tythes shall be paid also. And the reservation of the rent was pro omnibus exactionibus & demandis; yet the justices took no regard of those words. But Godfrey said, that those words would discharge him; but Wray on the contrary, for that this tythe is not issuing out of the land, but is a thing collaterall, and if a parson do release to his parishioners **[40]** all demands in the land, yet tythes are not thereby released, for such generall words will not extend to such a speciall matter. And in the 15 of R. 2. Avowry 99. one held of another by ten shillings for all services, suits, and demands; yet the tenant shall pay relief, because it is incident to the rent, and 8 Ed. 3. 26.

MICH. 29 ELIZ. ROT. 2574. OR 2375.

STEPHENS AGAINST LAYTON.

In an ejectione firmæ upon issue joyned, the case in a speciall verdict was, that a lease by indenture was made by William Beale to one William Pyle and Philip his wife & primogenito habend. to them, & diutius eorum viventi successive for terme of their lives, and then the husband and wife had issue a daughter: the question was, if the daughter had any estate. And three justices held that she had no estate, because she was not in being at the time of the lease made, and a person that is not in esse cannot take any thing by livery, for livery ought to carry a present estate, where the estate is not limited by way of remainder, 18 Ed. 3. 3. 17 Ed. 3. 29 & 30 adjudged:

but it was said at the Bar, that if the estate had been conveyed by way of use, it is otherwise. And the said justices held clearly that the word successive, would not alter the case: and the case was further found, that William Beale and Sampson Beale did covenant with one Lendall, that if Tho. Beale son of Sampson Beale, should marry Margaret the daughter of the said Lendall (if she would assent) and also that the said Lendall did covenant that the said Margaret should marry the said Thomas (if he would assent) pro quo quidem Maritagio sic tum postea habendo, the said William Beale covenanted, that he would make, or cause to be made an estate to the said Thomas and Margaret, and to the heirs of their bodies for the joynture of the said Margaret, and it was further found, that afterward a fine was levied between the said Thomas and Margaret plaintiffs and Sampson Beale and William Beale deforceants, qui quidem finis fuit ad usus & intentiones in indentura prædict. specificat. by force whereof the said Thomas and Margaret were seised: but the jury found nothing of the marriage, whether it took effect or not; and further found that William Pile and Philip his wife had primogenitam prolem a daughter, and then died, and then Thomas Beale died, and his wife intermarried with one Lamock, who made a lease to the plaintiff, who was ousted by Layton the lessee of Philip Pile. And hereupon it was moved by Gawdy Serjeant, that inasmuch as the marriage took no effect between Thomas and Margaret, the uses cannot be in them, but the fine shall be to the use of the conusor, which was opposed by Walmesley Serjeant, who said, that it was not like a covenant in consideration of marriage to stand seised of such a mannor, for there if the considerations faile, the uses faile also, for the consideration onely is the sole and entire cause that makes the uses to arise: but in this case the consideration is not materiall, but the fine effectuall, without consideration of money paid: and if a feoffment be made to the use of I. S. although no money be paid, yet I. S. shall have the land.

[41] Windham, The cases differ much, for here the fine is not exprest to be levied to the use of Thomas and Margaret, but to the uses and consents contained in the indenture: but he said, that the common course was to limit the use to the conusor, untill the marriage took effect, and after, as before was urged by Walmsley. And the jury found that Thomas and Margaret, were seised accordingly.

Windham, They are no judges to determine doubts in law.

Rhodes, Justice, Herein they have taken notice but of the matter in fact, and he affirmed the difference put by Walmsley.

Windham, The case de matrimon: prælocut: is stronger that this case, for the secret intention shall reduce the land, if the marriage take no effect. And after (the Court being full) they all agreed to the difference put by Walmsley, and also that the sale afterwards was not good by reason of this limitation. And judgment was given for the plaintiff accordingly.

Hil. 26 Eliz.

Britman against Stanford.

Upon a speciall verdict, the case was. A house, stable, and hayloft were demised to one for yeares, rendring foure and twenty pounds rent per annum, and foure and twenty pounds for an in-come, quarterly by equall portions, upon condition that if any of the rent or in-come be behind at the time it ought to be paid, that then the lease shall cease and determine. The lessee makes a lease of the stable to the lessor, and after part of the in-come is behind and unpaid, and the lessor enters for the condition broken, into the house: and if this was a good entry, was the question. And judgment was given that the condition was gone and void, by reason of the lessors taking part of the thing demised, because a condition is speciall and intire, and not to be severed. And in this case Fenner said, that a grantee of a reversion cannot take benefit of a collaterall condition, as in case of a grosse summe, but in case of a rent, waste, &c. it was otherwise.

MICH. 29 AND 30 ELIZ. ROT. 2529.

DOCTOR LEWIN AGAINST MUNDAY.

In a replevin by Lewin against Munday, it was found by verdict, that a fine was levied the 14th of Elizabeth, between Lowla and Rutland, plaintiffs, and Fook and seven others deforceants of the mannors of Gollochall, whereby the defendant did grant the mannor to the plaintiffs, and the heires of one of them, who granted and rendred twenty pounds per annum to the said Fook and his heires, with a distresse for non-payment. Fook seised of the rent, makes a grant to a stranger in this manner; that whereas a fine was levied the 14. of Eliz. of the mannor aforesaid, and divers other lands, &c. and mistook the mannor, for he put the names of the conusees in place **[42]** of the conusors, and so e contra, and that it was levied of the mannor, and divers other lands, whereas the fine was levied of the mannor solely; and that he did grant the said rent, granted unto him to the said stranger and his heires: and this grant was adjudged good by Anderson who said, that if one recite that he hath ten pounds of the grant of I. S. whereas it was of the grant of I. D. yet it is good.

HIL. 30 ELIZ. ROT. 17. 32.

HUNTS CASE.

Hunt brought an action on the case against Torney, and declared that he being seised of lands in Swainton in Norf. in fee, secundum consuetudinem mannerii; the defendant did promise to the plaintiff, in consideration the plaintiff would permit him to occupy the same for the space of five years, that he would pay him at the Feast of All-Saints next coming, and so yearly twenty pounds at the Feasts of the Annunciation, and All-Saints by equall portions, during the terme aforesaid, and alledged that he had injoyed the lands by the space of a year and half, and so brought his action on the assumpsit. And Anderson was of opinion that untill the five years were expired, no money was to be paid, because the contract was intire. But all the other justices on the contrary, for the consideration was to pay a certain summe yearly, which made severall duties and so severall actions. For by Periam, if a man be bound to pay I. S. twenty pounds in manner and forme following, viz. ten pounds at such a day, and ten pounds at such a day, in this case the obligee cannot have an action of debt for the first, before the day of payment of the last ten pounds be past, because the duty in it self is an intire duty, but if a man be bound to pay I. S. ten pounds at such a day, and ten ponnds at such a day, here the obligee shall have his action for the first, because the duty was in it self severall.

Anderson at another day said, that if a man makes a lease for ten years, rendring rent, in that case he may have an assumpsit for the rent due every year: so if I covenant with you to build you twenty houses, the covenantee shall have a severall action for each default.

Periam, That case of the assumpsit is much to the purpose, for an assumpsit is in the nature of a covenant, and is indeed a covenant without writing.

Rhodes cited this case. Gascoigne promised in consideration of a marriage of his daughter with such a mans son, to give seven hundred marks, and to pay a hundred marks every year, untill all the summ were paid, and it was held clearly in this Court, that a severall action might be brought upon every hundred pounds, but because the action was brought for all the seven hundred marks before the seven years were out, judgment was given against him, for if a man be bound in a bond of a hundred pounds to pay twenty pounds for so many years, he shall not have an action of debt until the last year expired. And after judgment was given for the plaintiff, viz. Mich. 29 Eliz. Rot. 2248.

[43] 28 Eliz.

Between Sticklehorne and Hatchman.

Adjudged by the Court, that if for not scouring of a ditch or mote, the groundsells of the house are putrified, or trees cut downe which are in defence of the house, whereby the house by tempests is blown down, waste shall be assigned in domibus pro non scourando, &c.

In an ejectione firmæ, Broker Prothonotary said, that where the title of him in the reversion is not disclosed in pleading, nor cometh in question, aid shall not be granted.

Pasch. 28 Eliz. In C. B.

Yardley against Pescan.

The Queen seised of an advowson being void, the ancestor of Pescan presented, and so gained it by usurpation, and then the church being void, he presented again, and his clark is now dead, and then the Queen grants the advowson to Yardley the plaintiff, and he brings a quare impedit in the name of the Queen, supposing that this usurpation did not put the Queen out of possession, and it was argued that the grant could not passe without speciall words, because it is of the nature of a chose in action, and this was moved the last terme, and then Dyer, Meade, and Windham held that this usurpation did gaine possession out of the Queen, and that she should be put to her writ of right of advowson, and now this terme Fenner moved the case againe, and the opinion of Anderson that was the Chief Justice of the Common Pleas, was clearly, that the Queen was not out of possession, for he said, that it was a rule in our books, that of a thing which is of inheritance, the act of a common person will not put the Queen out of possession, but if she had but a chattell, as the next advowson, then perhaps it is otherwise: but Meade, and Windham held very earnestly the contrary, and they relied on the book of 18 Ed. 3. 15. where Shard said, that if the King had an advowson in his owne right, and a stranger who had no right did happen to present, that put the King out of possession. And the King shall be put to his writ of right, as others shall. Vide 47 Ed. 3. 14 B. 18 Ed. 3. 16. The defendant there did alledge two presentments in his ancestor after the title of the King, and demanded judgment if the King should have a writ of possession, and the plea was admitted to be good; but after Pasch. 25 Eliz. judgment was given for the Queen, for that she might very well maintain a quare impedit, and the two presentments did not put her out of possession.

[44] 31 Eliz. Rot. 211.

Sir Robert Rowley made the Lord Keeper Sir Robert Catlin, and the Master of the Rols, his executors, and did devise a terme to Sir Robert Catlin, and died: and they writ their letters to the Ordinary, certifying that they were made executors, but that they could not attend the executing of the executorship, and therefore they required him to commit the administration to the next of kin, ut lex postulat. The Ordinary enters in the register, quia executores prædicti per testamentum prædictum distulerunt, &c. and thereupon committed the administration over: afterwards the Lord Catlin received the rent of the farme, and after granted it to a stranger; the administrator ousted the lessee, and he brings an ejectment. And if this writing was a refusall in the executors, or not, was the question: and it was said by Ford Doctor of the Civill Law, that it was a refusall, and he said, that if legatees being executors do refuse to prove the will, yet by the civill law they shall have their legacies. But adjudged by the Court, that if legatees do refuse to prove the testament, that by the common law they have no remedy for their legacies, for by the refusall there is a dying intestate, and then nothing could be devised; and also, said, that this writing was a refusall of the executors, so that the Ordinary might presently commit administration, and therefore Sir Robert Catlin could take nothing as legatee.

PASCH. 31 ELIZ.

The array of a pannell was challenged, because the sheriff was cosin to the plaintiff, and upon a traverse it was found that they were cosins, but not in such manner as the defendant had alledged; and per Curiam, the array was quasht, for the manner is not materiall, but whether he be a cosin, or not, 18 H. 6. 18

PASCH. 31 ELIZ.

It was resolved in the case of Miles against Snowball, that if the sheriff return one who hath no freehold, yet he shall be sworne in the jury, if he be not challenged by the parties: and after upon the evidence it was moved. If a woman make a deed of feoffment to severall persons, of a house and land, wherein she herself inhabiteth, and is seised, and delivers the deed to the feoffees, without saying any thing, if this be a good feoffment: of which Periam doubted, because she did inhabit there all the time, but if it were of other lands on which she did not dwell, and she comes there to make livery, and delivers the deed upon the land and saies no words, yet is this a good feoffment, because she comes thither to make livery.

Anderson, The feoffment in this case is good, for if she hath an intent to make livery, the delivery of the deed is good livery, quod Periam & tota Curia concesserunt, if she had intended to make livery, vide Co. lib. 6. 26. & lib. 9. 136. Dyer 192.

[45] PASCH. 31 ELIZ.

A woman brought an action of debt as administratrix to another, the defendant pleaded that the plaintiff was an alien born in Gaunt, under the obedience of Philip King of Spaine, the Queens enemy. And Walmsley moved for the plaintiff that this was no plea, because that the recovery is to anothers use: but the Court was against him, for the Court will not suffer that any enemy shall take advantage of our law; and then he moved that that King was no enemy, because wars were not proclaimed. But Anderson said, that a more open enemy then King Philip cannot be, who had conspired the death of the Queen, and had endeavoured to invade the realm, and subvert the State: which Windham granted; but Periam hærebat aliquantulum whether he could be called enemy in law before such proclamation. But Walmsley said, that the plea was that the woman was born under the obedience of the Emperor, who was in amity with the Queen, and the Court replied, Plead as you will abide by it.

PASCH. 13 ELIZ.

In a trespasse of assault and battery, the plaintiff declared to his damages of twenty pounds, and the jury found for the plaintiff, and gave thirty pounds damages. And by the Court the plaintiff shall recover no more than he hath declared for, and this ought to be done of course by the clarks, 2 H. 6. 7. 8 H. 6. 4. 42 Ed. 3. 7.

MICH. 30 AND 31 ELIZ. ROT. 610.

BOND AGAINST RICHARDSON.

In debt, the defendant pleaded payment at the day, and gave in evidence payment at another day, before the day of payment, and so was it found by the jury in a speciall verdict. And Anderson said, We are all agreed that judgment shall be given against the plaintiff, for payment before the day, is payment at the day, and judgment was given that the plaintiff should be barred.

Willis against Whitewood.

A man was seised of lands in socage, and made a lease for years by paroll, and died, & his wife was guardian in socage to his son; and the lessee accepted of a new lease by deed of the guardian in socage, and then the guardian died, and a new guardian entred, and ousted the lessee; and if the second guardian could do this, was the question.

Anderson, It cannot be a surrender, for a guardian hath no estate that may be surrendred; but it is an extinguishment of the lease; and **[46]** if a woman guardian in socage takes husband, and dies, the husband shall not be guardian in socage.

Almeskey against Johnson.

Johnson had a second deliverance returned, which was returned averia eloigniata, &c. whereupon he prayed a withernam of the cattle of the plaintiff, and it was granted; and then came the plaintiff and satisfied the defendant, his damages and charges, and paid a writ of restitution to have his cattle again taken in withernam.

Fleetwood, Cattle taken in withernam are not repleivisable, how then can you have your cattle, and then we shall not be paid for the meat. And the Court held, that the cattle were not repleivisable, but for satisfaction of damages he shall have restitution of the cattle, and so is the course, which was confirmed by the clarks. And Walmesley cited 16 H. 6. replevin to warrant this: and as to the meat, he had the use of the cattle, whereby it was reason he should sustain them: and a writ of restitution was granted.

Mich. 31 and 32 Eliz.

In case of a farmer of Dame Lineux Manwood, it was said, that the order called the Cistrenses Order, had a priviledge that they should pay no tythes for the lands that propriis manibus excolunt: but if they let it to farmers, then they were to pay tythes, and now comes the Statute of Monasteries 31 H. 8. If the Queen should pay tythes, was the question. And it was said, that the Queen, and her farmers also should hold the land discharged of tythes as well as the particular persons of the order should, for the King cannot be a husband, and therefore his farmers shall hold the land discharged, so long as the King hath the freehold in him, although he make a lease thereof for years, at will, but so if the King sell the land to another, or the reversion to another, then the farmers shall pay tythes.

Mich. 31 Eliz.

It was said by the barons in the case of one Beaumont, that a debt which is not naturally a debt in it self, but a debt onely by circumstance may be assigned to the Queen. As where a man is bound in a bond to save another harmlesse, and failes thereof, the obligation may be assigned to the Queen. But in such case a present extent shall not be awarded but the processe shall be onely a scire facias against the party, to see if he hath any thing to plead against it, which note well.

And where a man recovers damages in an action on the case, parcell of the damages cannot be assigned to the King before execution, for he must bring a scire facias upon such record. And Manwood Chief Baron held clearly that a moyety hereof could not be assigned over, 22 H. 6. 47.

[47] One was indicted of treason at S. Edmundsbury, coram justiciariis ad diversas felonias, &c. audiendas, and after the indictment made mention of Bury, and did not say prædict. and by the opinion of the justices the judgment was quasht.

TRIN. 30 ELIZ.

An action of the case was brought against one Gilbert, for saying that the plaintiff was a suitor to a widow in Southwark, and that he cousened her of her money in procuring false witnesses to cousen her: and a verdict found for the plaintiff. And in arrest of judgment it was said, that in the case of Kerby it was adjudged that cousener will not beare action, and so was it adjudged in this case.

MOSSE AGAINST READE.

The defendant called him theef, and thou forgest a deed; and a verdict was found for the plaintiff: and in arrest of judgment, it was said, that theef generally, without saying of what nature specially, will not bear action. But Wray Chief Justice denied that, and said that it had of late been adjudged to the contrary; and Gawdy against him. But as to the words, that he had forged a deed, adjudged that the action will lye, although it be not specially alledged what manner of deed was forged.

PASCH. 32 ELIZ.

Collings informed upon the statute of buying of tythes against Robert Davyes and Stock: and it was said by Periam, that although the words of the statute be pro termino diversorum annorum, yet if a lease be made but for one year, yet is it within the penalty of the statute.

MICH. 31 AND 32 ELIZ.

Cripps brought a quare impedit against the Bishop of Canterbury, and others, and declared upon a grant of the next avoidance, and the defendant demanded oyer of the deed, and the plaintiff shewed a letter which was written by his father to the true patron, by which he had writ to his father that he had given to his son that was the plaintiff the next avoidance; and upon this there was a demur. And the whole Court for the demur; for that such letter was a mockery, for the grant was not good without deed: and judgment was given accordingly.

[48] In Tymbermans case it was said, that if a sheriff took one in execution by force of a capias, although he return not the writ, yet an action of debt will lye against him upon an escape; and Periam said it had been so adjudged.

Katherine Gilham brought an ejectment as administratrix to her husband, quare determino eject. & bona & catalla sua ibidem inventa cepit, &c. and a verdict for the plaintiff, and it was alledged in arrest of judgment, that this word sua shall not be intended her own goods, and not the testators. And the Court was of opinion that sua shall be intended in such manner as administrator, and no otherwise. And therefore judgment was affirmed.

MICH. 31 AND 32 ELIZ.

BALDWIN AGAINST MORTIN.

Use to the husband and wife, habendum to the husband for thirty years, the wife shall take nothing thereby, and this case was argued at the Bar and Bench, and was called the Earl of Cumberlands case.

Fleetwood moved that an action was brought against the husband and his wife, and did declare a trover of the goods of the plaintiff by the wife, which she converted to her own use, and prayed that the action might be against the husband onely, because that the woman could not convert them to his own use during the coverture, but onely to the husbands use. And the opinion of the Court was, that the writ was good against them both, and that the conversion was in nature of a trespasse, and so the action would well lye.

MICH. 32. AND 33 ELIZ.

KENT AGAINST WICHALL.

In a trespasse quare clausum fregit & herbam conculcavit, the defendant pleaded that he tendred sufficient amends to the plaintiff, and he refused the same, and demanded judgment, &c. And upon a demurrer, the opinion of the Court was, that this is no plea in trespasse, but in a replevin it is a good plea. Sed non dixerunt causam diversitatis, 21 H. 7. 30. 9 H. 7. 22. F. N. B. 69. G. 31 H. 4. 17.

Drew demanded of the Court, that whereas Edmund Leusage had bound himself in an obligation by the name of Edward Leusage, if this was good or not; and it seemed to the Court quod non est factum, and Anderson and Walmesley said expresly that it was void, 34 H. 6. 196. Dyer 279. 21 H. 7. 8.

[49] Sir John Arrundell and his wife, brought a quare impedit against the Bishop of Glocester and others, who pleaded in bar that William Sturton was seised of a mannor to which the advowson was appendant, and bound himself in a statute-merchant of two hundred pounds to one Long, and the statute was extended, and conveyed the interest of the statute to one of the defendants, and then the church became void: and by the Court the advowson may be extended, and if it become void during the conusees estate, the conusee may present.

Note, it was said by the Justices of the Common Pleas, that if a man promise another that he shall have a lease in his land for eight years, or it is agreed amongst themselves that one shall have a lease of the others land for eight yeares, that is no lease of the land, but onely a contract and agreement; but if one promise another that he shall have his land for eight years, or openly agree that one shall have the others land for eight years, this is a good lease for eight years by force of the agreement.

A. came before the Major of Lincolne, and acknowledged a statute-merchant, and the seal of the major was not put to it: and it was adjudged that the statute was not good, but a man may sue upon it as an obligation, because the seal of the party is to it.

PASCH. 36 ELIZ.

In a waste the case was, that a lessee for yeares purchased trees growing upon the land, and had liberty to cut them within eighty yeares, and after the said lessee purchased the inheritance of the land and devised it to his wife for life, the remainder to the plaintiff in fee, and made his wife executrix, and died, who after married with the defendant, who cuts the trees, whereupon the action is brought. And by opinion of all the Court the action was maintainable, for although the trees were once chattels, yet by the purchase of the inheritance they were united to the land: and judgment was given for the plaintiff accordingly.

PASCH. 36 ELIZ.

Upon an exigent, the sheriff returned, that after Divine service he made proclamation, and did not say, that there was no sermon: and therefore the Judges held that the return was not good; for by the statute, if there be a sermon in the church, the sheriff shall make his proclamations after the sermon, and if there be no sermon, then after Divine service: and because it did not appeare whether there were any sermon or not, the opinion of the Court was ut supra.

It was said that a man shall not aver against a postea in the Kings Bench, or the Common Pleas, to say that it was contrary to the verdict, nor shall he be received to say, that the Judges gave a judgment, **[50]** and the clarks have entred it contrary to their judgment: but otherwise is it in court barons, or other base courts, not Courts of Record, 10 Ed. 3. 40.

35 AND 36 ELIZ.

NEWMAN AGAINST BEAUMOND.

If the Ordinary grants the administration of the goods of B. to A. and after grants the administration to R. this second grant is an appeale of the first, without any further sentence of repeale, for the administrator is but a servant to the Ordinary, whom he may charge at any time.

In an action of debt on a bond bearing date the nineth of July, the defendant pleaed a release of all actions the same day, usque diem dati ejusdem scripti, and it was adjudged that the obligation was not discharged, because the release does exclude the nineth day on which it was made.

MICH. 37 AND 38 ELIZ. ROT. 211.

HOLMAN AGAINST COLLINS.

Holman brought a writ of error against Collins, upon a judgment given in the Court of Plymmouth, in the county of Devon, the case was;

Collins was possessed of a peece of ordnance, and in consideration that he would tender this to Holman for to put into his ship which was then going to sea, and that Collins would stand to the hazard of losing it: the said Holman did assume upon himself, and did promise to give Collins certain goods which he should gain by the voyage, and after the said ship did return laden with certain goods, and for non-satisfaction the said Collins brought his action on the assumpsit, and had judgment to recover. And Crook assigned these errors;

1. That the stile of the Court was not good, for it was Curia Dominæ Reginæ burgi prædict. tent. coram Majori de Plymmouth, without saying, secundum consuetudinem villæ prædict. and he who is Judge of the Court, ought to be either by patent or prescription, and then for not expressing the stile of the Court, nor by what authority they held their Court, it is error; and he cited the case in the Lord Dyer 262. and a judgment, 30 Eliz. Rot. 32. given in the very point: another error was, that no day was prefixed for the defendant to appear, but generally ad proximam Curiam, which is error, although it be held every Munday. And for these errors judgment was reversed.

[51] TRIN. 28 ELIZ. ROT. 948.

MERCER AGAINST SPARKS.

[S. C. Noy, 35. See *R.* v. *Munslow*, [1895] 1 Q. B. 763; *Nevill* v. *Fine Arts & General Insurance Company*, [1895] 2 Q. B. 161; [1897] A. C. 68; *Allen* v. *Hood*, [1898] A. C. 37.]

Mercer had judgment to recover against Sparks in the Common Pleas, upon an action of the case for words; and Sparks brought a writ of error in the Kings Bench, and assigned for error, that the plaintiff did not expresse in the declaration that the defendant spake the words malitiose, but it was adjudged, that it was no error, because the words themselves were malicious and slanderous, wherefore judgment was affirmed.

SAVAGRES CASE.

It was adjudged in the Common Pleas, that if a Baron, or others mentioned in the statute of 21 H. 8. take divers chaplaines which have many benefices, and after they discharge their chaplaines from their service, they shall retain their benefices during

their lives, and if the Baron takes others to be his chaplaines, they cannot take many benefices during the lives of the others, which are beneficed and discharged of their services; for if the law were otherwise, the Lords might make any capable of holding benefices by admitting them to be their chaplaines.

In an action of false imprisonment brought against the major, citizens, sheriffs and commonalty of Norwich; it was moved where the issue should be tried: and by the Court the issue shall not be tryed there; and in the same case it was moved, whether the sheriff could summon himself, and it was answered by the Court that he could not: and Periam said that so it had been after adjudged.

MICH. 29 AND 30 ELIZ.

In an avowry adjudged by the Court (Anderson being absent) that in an avowry it is sufficient for the avowant to say, son franktenement, but if the plaintiff traverse it, it is no plea without he makes to him a title, and that is the difference of pleading son franktenement, on the part of the avowant, and on the part of the plaintiff. And Welson said, that so were all the presidents, that it is no plea to traverse the bar in the avowry, without making title: and Periam said, that it is no title to plead de son seisin demesne, but he must make out his title paramount; his seisin demesne.

[52] MICH. 29 AND 30 ELIZ.

BLOSS AGAINST HOLMAN.

John Bloss brought an action of trespasse quare vi & armis for taking of his goods, against Holman, and the defendant pleaded not guilty, and the jury gave a special verdict, viz. that the plaintiff at the time of the trespasse was of the Mystery of the Mercers, and that at that time the defendant was his servant, and put in trust to sell his goods and merchandizes in shopa sua, ibidem de tempore in tempus, and that he took the goods of the plaintiff named in the declaration, and carried them away, and prayed the advice of the Court, if the defendant were culpable or not; and upon the postea returned, Shuttleworth prayed judgment for the plaintiff. And the doubt was because the declaration was quare vi & armis, because it appeared that the defendant had custody of the goods: but Shuttleworth doubted whether he had custody, and cited the case of Littleton, viz. If I give my sheep to compasture, &c. and he kills them, an action of trespasse lies: and the justices held that in this case the action did well lye; and Periam said, that the defendant had onely an authority, and not custody or possession, and judgment was given for the plaintiff, 3 H. 7. 12. 21 H. 7. 14. And Windham said, that if he had imbezelld his masters goods, without question it was felony. Quod fuit concessum, (Anderson absente) and the law will not presume that the goods were out of the possession of the plaintiff; and the next day came the Lord Anderson and rehearsed the case, and said, that the defendant had neither generall nor speciall property in the goods, for it is plaine, he could have no generall property, and speciall he had not, for he could not have an action of trespasse if they were taken away, then if he had no property, a trespasse lies against him, if he take them; so if a shepheard steal sheep, it is felony, for he hath no property in them, wherefore he gave judgment accordingly.

MICH. 29 AND 30 ELIZ. ROT. 1410.

COOKE AGAINST BALDWIN.

A lease was made for one and twenty years, to one Truepenny and Elizabeth, if she, and he, or any child, or children between them lawfully begotten, should so long live, and then they were married, and the wife died without issue. If the lease be determined or not, was the question. And it was moved that it was determined,

because it is conjunctive, if he and she, &c. and now one of them is dead without issue, and it is not like the case of Chapman, where a man covenants to enfeoff one and his heires, for it is impossible to enfeoff his heires, he living, and therefore in that case it shall be taken for a disjunctive: and if I make a lease for years to two, if one of them dye, the other shall have all, because they take by way of interest; but if a lease be made to two, during the life of one of them, if one dye, the **[53]** lease is gone. Quod fuit concessum: and here the meaning is, that the lease shall be determined if one of them dye.

Rhodes Justice, The meaning is against you, for by the word (or) which comes after, it appears that they are to have their lives in it.

Anderson, By the words it is plain, that after the death of one the lease is determined, and that which moves me to think it was so intended, is, because it was intended (as it seems to me) to be a joynture for the wife, which was made by them before marriage; and then if by the death of one it should be gone, and she have nothing, could not be the meaning; to which the other justices assented. And all the Judges agreed that the lease was not determined by the death of one; and judgment given accordingly.

MICH. 29 AND 30 ELIZ.

In a quare impedit by Sir Thomas Gorge Knight, against the Bishop of Lincolne, and Dalt oninecumbent, the case was; That a mannor with the advowson appendant was in the hands of the King, and the church became void, and the King grants the mannor with the advowson: if the grantee shall have the presentation; or the King, was the question. And all the justices held clearly that the avoidance would not passe, because it was a chattell vested. And Periam said, that in case of a common person without question an advowson appendant would not passe by such grant; for if the father dye, it shall go to his executor, but if it be an advowson in grosse in case of a common person, there is some doubt: but in the principall case all the Judges held ut supra, and said, that so it was in 9 Ed. 3. 26. Quare Impedit 31. And in Dyer in the case of the Church of Westminister, but F. N. B. is contrary, 33 N.

MICH. 29 AND 30 ELIZ. ROT. 728.

House and Elkin brought an action of debt upon an obligation made to them, against Roger Grindon, as sheriffs of London, upon condition of appearance at a certain day in the Kings Bench: the defendant pleaded that he being arrested by a precept out of the Kings Bench appeared at the day: and upon this they were at issue to be tried by the country: and a repleader was awarded, because it was triable by record, for although the sheriff do not return the processe, yet the defendant ought to come into the Court at the day, and there speciall entry shall be made of his appearance. And so was it adjudged this terme in the case between Bret and Shepheard: but Bradford Prothonotary said it was well enough, for it may be that he appeared there, and there was no record of it, to which it was answered, that it was no apparance unlesse there were a record: but the case in Court was ut supra.

[54] HIL. 30 ELIZ.

In an ejectment by Dorothy Michell against Edmund Dunton, the case was; A woman makes a lease for years, rendring rent, with a covenant that the lessee should repaire the house, with other covenants, and then devised the same lands to the same lessee for divers years more, yeilding the like rent, and under such covenants as were in the first lease, the remainder over in fee, and dies, and then the first lease for years does expire, and the lessee continues in by force of the second lease by vesture of the devise, and repaires not the houses, so that if the first lease had been in being, he had broke the covenant. If this shall be such condition as he in the remainder may enter, was the question.

Shuttleworth, It is a condition, for he cannot have a covenant, and then it shall be intended that it is conditionall: but by all the Court, there appears no such intent, for it appears that he holds under like covenants.

Anderson, The nature of a covenant is to have an action, but not an entry, and therefore there shall be no entry.

Shuttleworth, To what end then serves these words (under like covenants) Periam, They are void. And at last it was resolved by all the justices, that the will expressing that the first lessee should have the land observing the first covenants, it shall not be now taken to be a condition by any intent that may be collected out of the will: for a covenant and condition are of severall natures, the one giving action, the other entry, and here the intent of the will was, that although the covenants were not performed, yet the lessee should not forfeit his terme, but is onely bound to such paine as he was at the beginning, and that was to render damages in an action of covenant. And judgment was given that the plaintiff should be barred.

MICH. 29 AND 30 ELIZ. ROT. 2449.

The Earle of Kent brought an action of debt upon a bond against William Bryan, which was indorsed with a condition, that if the defendant did permit the plaintiff, his executors or assignes, not onely to thresh corn in the defendants barn, but also to carry it away from time to time, and at all times hereafter convenient, with free egresse and regresse, or else to pay eight pounds upon request, &c. that then, &c. And in truth the defendant permitted the corn to lye there two years, in which time the mise and rats had devoured a great part of it, and then the defendant thresht it, and the earle therefore brought this action: and upon demur it seemed to Walmsley that there was no forfeiture of the bond, because the earl took not the corn away in convenient time, for convenient time is such as shall prejudice no person (quod fuit negatum per justitiar.) and here is great prejudice to the defendant, because the plaintiff did not carry away the corn: and he put many cases, where things ought to be done in convenient time, as in the 21 Ed. 4. where an arbitrement ought to be performed in convenient time. But the opinion of the Court was, that he might come in convenient time, although he comes long after, and **[55]** the words are not within convenient time. Windham said, that if the words had been within convenient time, it would have made a difference.

Anderson, If the words of the condition had been, that he should suffer the plaintiff in time convenient to come, and thresh and take away his corn, then perhaps he ought to send within a year according to Walmsleys saying, but the words here are at all convenient times, and that day that the servant came was a convenient day to thresh and carry away; and the words, At all convenient times shall be construed, that at any time when it pleaseth the earl he may come, unlesse it be night, or Sabboth day, and if the word, convenient, had not been mentioned, then by the words, from time to time, and at all times after, then the earl may come at any time either in the day or night, and that a hundred years after as he pleaseth, and then the word, convenient, does restrain him that he cannot come but in the working daies, but does not restrain any time in which he shall come, but onely in conveniency of time, which is at times of labouring and watching. And so was the opinion of the Court, ut supra.

An action of debt was brought upon a lease for years, the defendant pleaded nihil debet per patriam, and did intend to give in evidence an entry of the plaintiff before any rent behind. And by the Court he could not do it, for it is contrary to the issue.

HILL. 30 ELIZ. ROT. 904.

BETWEEN SPITTLE AND DAVIS.

In a replevin, the case was; One Turk seised of lands in fee, devised parcell thereof to his eldest son in taile, and the other parcell to his youngest son in fee.

Provided, and his intent was, that if any of his sons or any of their issues, do alien or demise any of the said lands, before any of them comes to the age of thirty years, that then the other shall have the estate, and does not limit what estate, and then one of the sons makes a lease for years before such age, whereupon the other enters, and before he comes to the age of thirty years, he aliens that part into which he made entry, and the other brother being the eldest enters and makes a lease to Spittle the plaintiff for three years, and Davies by commandment of the younger brother enters, and takes a horse damage-feasant, and Spittle brought a replevin: and upon demur, it seemed to the Court, that this was a limitation, and by vertue of the will the estate devised to them untill they aliened, and upon the alienation to go to the other, & upon such alienation the land is discharged of all limitations, for otherwise the land upon one alienation shall go to one, and upon another alienation shall go back again, and so to and fro ad infinitum, vide Dyer 14. & 29. And afterwards all the Judges agreed, that after one brother had entred into the land by reason of the alienation, that land was discharged forever of the limitation by the will; and judgment was given accordingly.

[56] TRIN. 27 ELIZ. ROT. 190.

CARTER AGAINST LOWE.

In an ejectment, the case was; A termor devised his terme to J. S. and made his wife executrix and died, the woman enters and proves the will, and takes husband, who takes a lease of the lessor, and after the devisee enters and grants all his estate to the husband and wife, and herein two questions were moved.

1. If by this acceptance of the new lease by the husband, the term which the woman had to another use, viz. to the use of the testator shall be deemed a surrender: and the opinion of the Court was clearly without argument, that it was a surrender. But admitting it was no surrender, but the first terme continues, then the second question is,

2. If when the devisee enters into the terme devised to him, without consent of the executor, by which entry he is a wrongfull seisor, and a disseisor, and after he grants his right and interest to the executor; if this grant be good or no, because he had not any terme in him, but onely a right to the terme suspended in the land, and to be revived by the entry of the executor, and adjudged that it was a good grant, and it shall inure first as the agreement of the executor by the acceptance of the grant, that the devisee had a terme in him as a legacy. And secondly the deed shall have operation by way of grant to passe the estate of the devisee to the executor, and so no wrong, and the case was resembled to the case of surrender to the grantee of a reversion, which first shall inure as attornment, and after as surrender, and so was it adjudged.

TRIN. 37 ELIZ.

In an action on the case for these words; Carter is a prigging pilfering merchant, and hath pilfered away my corne and my goods from my wife and my servants, and this I will stand to: and the action was commenced in a base court in the country, and judgment given and the record removed by writ of error: and it seemed to the court that the words were not actionable, wherefore judgment was reverst. Sed quære rationem.

GOWOOD AGAINST BINKES.

A man did assume and promise to I. S. in consideration that he would forbeare a debt due to him untill such a time: that he would pay the debt if A. B. did not pay it, and he that made the promise died, and the money was not paid, and therefore an action was brought against his executors, who traversed the assumpsit, and a verdict found **[57]** against them, and in arrest of judgment it was moved, that an

action grounded on a simple contract, lies not against executors unlesse upon an assumpsit for a debt or duty owing by the testator himself, and not of such a collaterall matter as the forbearance of the debt of another: but by Gawdy, judgment was given for the plaintiff; whereupon Popham said, that he believed this judgment would be reversed by writ of error in the Exchequer Chamber, and the same day at Serjeants-Inn such a case was depending in the Exchequer Chamber to be argued, and reversed for the cause ut supra. And the case was between Jordan and Harvey, and entred Trin. 36 Eliz. Rot. 384.

Hil. 37 Eliz. Rot. 34.

Castleman against Hobbs.

In an action of the case for saying, Thou hast stollen half an acre of corne, (innuendo) corne severed, the defendant demurred upon the declaration.

Fenner, It is not felony to move graine and take it away.

Popham agreed to it, and that the word innuendo would not alter the case, unlesse the precedent words had vehement presumption, the corne was severed; and in this case no man can think that the corne was severed, when the words are, half an acre of corne: on the contrary, if the words had been, that he had stollen so many loads, or bushels of corne; and Gawdy was of the same opinion: and judgment against the plaintiff, &c.

Hil. 38 Eliz.

In an account the plaintiff declared, that he delivered goods to the defendant to merchandize for him, the defend. said, that the goods with divers other of his own proper goods were taken at sea, where he was robbed of them. And it was moved that this was no plea in bar of an account, but if it be any plea, it shall be a plea before auditors in discharge: but admitting it be a good bar, yet it is not well pleaded, for the plaintiff as it is pleaded cannot traverse the robbing and try it, for things done super altum mare are not tryable here, wherefore the defendant ought to have pleaded that he was robbed at London, or any other certain place upon the land, and maintain it by proofs that he was robbed on the sea.

Gawdy, It is no good plea, for he hath confest himself to be accountable by the receipt, 9 Ed. 4., and it is no plea before auditors, no more then the case was in 9 Ed. 4. for a carrier to say, that he was robbed.

Popham, It is a good plea before auditors, and there is a difference between carriers and other servants and factors; for carriers are paid for their carriage, and take upon them safely to carry and deliver the things received.

[58] Gawdy, If rebels break a prison, whereby the prisoners escape, yet the goaler shall be responsible for them, as it is in the 33 H. 6.

Popham, In that case the goaler hath remedy over against the rebels, but there is no remedy over in our case.

Gawdy, Then the diversity is when the factor is robbed by pyrates, and when by enemies.

Popham, There is no difference.

Hil. 38 Eliz. Rot. 40.

In a writ of error upon a judgment given in Nottingham, the error assigned was; because the defendant had no addition, for it appeared the action was in debt; and the record was, that H. Hund complained against Richard Preston of, &c. in the county of Nottingham, husbandman, the which addition is not in his first name, but in the alias, and that could not be good, and therefore it was prayed that judgment might be reversed. But by the Court, the Court of Nottingham had no authority to

outlaw any man, so that addition is not requisite, wherefore it is no error: and judgment was affirmed.

TRIN. 37 ELIZ. ROT. 553.

BROWNE AGAINST BRINKLEY.

In an action of the case for words; the declaration was, that the plaintiff was produced as a witnesse before the Justices at the Assises at Darby, where he deposed in a certain cause, and the defendant said, Browne was disproved before the Justices of Assise at Darby, before Mr. Kingsley (innuendo) that he was disproved in his oath, that he took before the justices: and adjudged against the plaintiff; for although he was disproved in his oath, yet it is not actionable in this case, for that disproof might be in any collaterall matter, or any circumstance; but otherwise if the words had been, that he was perjured, and the (innuendo) will not help the matter, and so was it adjudged. The Chief Justice and Fenner being onely in the Court.

TRIN. 36 ELIZ.

HIGHAM AGAINST BEAST.

In an action of trespasse by the parson of Wickhambrooke in the county of Suffolk, against the vicar of the same place, for taking of tythes, and on the generall issue the jury gave this speciall verdict:

That the place where, &c. was a place called B. the freehold of I. S. and parcell of the mannor of Badmanshall, and found that the Pope as **[59]** supream Ordinary, heretofore made such an indowment to the vicaridge in these words; Volumus quod vicarius, &c. habebit tertiam partem decimarum bladorum & fœni quomodocunque pervenientem de maneriis de Badmanshall; and the question was, if the vicar by this indowment shall have the third part of the tythes growing upon the land of the freeholders within the mannor, or not. And it was said, by the Court, that a mannor cannot be without freeholders, and inasmuch as they are to be charged with the payment of tythes, one and the other together shall be said to be the tythes of the mannor, and so it was adjudged that the vicar should have tythes of the third part of the land of the freeholders, as well of the demesnes, and copyholders.

TRIN. 37 ELIZ. ROT. 438.

WILLOUGHBY AGAINST GRAY.

A venire facias did beare teste out of the terme, and also there was no place mentioned in the writ, where the visne should be impannelled, and after the writ said coram justiciariis, and did not say, apud Westmonasterium, and a tryall was had hereupon, and judgment given which was prayed might be reversed for these causes. But it seemed to the Court, that notwithstanding all that was alledged, it was good enough, for although the venire facias was not good, yet if the distringas had a certain return and place therein: and the jury appeared and gave their verdict, so that a verdict was had, the statute will aide the other defects: as in the case adjudged between Marsh and Bulford, where the venire bore teste out of the term. But Fenner said, that the teste was in the term but on the Sabbath day, which was not dies juridicus.

TRIN. 38 ELIZ. ROT. 622.

Kinton brought an appeal of mayhem, against Hopton, Flam, and Williams; Hopton pleaded, not guilty; Flam pleaded that he was mis-named, and demanded

judgment, &c. et quoad feloniam & mahemium, not guilty, & de hoc ponit se super patriam, & prædict. Kinton similiter: and Williams pleaded, no such man in rerum natura, as Flam, and demanded judgment of the writ, and as to the mayhem and felony, not guilty, et de hoc ponit se super patriam, &c. And as to the other two pleas to the writ Kinton demurred, & prayed that the writ might be awarded him, and a venire facias to try the issue. For Tanfeild urged, that by pleading over to the felony, he waved the plea to the writ, for there was a diversity between an appeal of murther, and of mayhem, for in murther, as it is 7 Ed. 4. and 3 Ed. 6. although he plead to the writ of appeal, yet of necessity he must plead over to the murther, because it is in favorem vitæ, or else if he will joyne in demurrer upon the plea to the writ, he doth confesse thereupon the felony, and therefore he must plead over, not guilty. But in mayhem it is other-[60]-wise, for although the declaration was for felony, yet is a mayhem but a trespasse onely, and all are principalls, and the life of the defendant is not questioned, but he shall onely render damages, and therefore if he plead over to the felony that is a waver of the plea, and so a venire facias ought to issue out, to try if he be culpable or not, and of this opinion were Popham, Fenner, and Gawdy clearly, and agreed to the diversity between the appeal of mayhem and murther.

MICH. 38 AND 39 ELIZ.

KING AGAINST BRAINE.

A man sells sheep, and warrants that they are sound, and that they shall be sound for the space of a year, upon which warrant an action of the case was brought, and it was moved that the action did not lye, because the warranty is impossible to be performed by the party, because it is onely the act of God to make them sound for a year. But Clench and Fenner on the contrary; for it is not impossible, no more then if I warrant that such a ship shall return safe to Bruges, and it is the usuall course between merchants to warrant the safe return of their ships.

MICH. 38 AND 39 ELIZ.

WENTWORTH AND SAVELL AGAINST RUSSELL.

In a writ of parco fracto, the plaintiffs declared that they were tenants pro indiviso, of a mannor in Yorkshire, and that the defendant held of them certain lands as of their mannor, rendring rent, which rent was behind, and for which they distrained and impounded the distresse, and the defendant broke the pound and rescued the distresse, and thereupon they brought this action; and the defendant demurred on the declaration, because the plaintiffs did not shew how they were tenants pro indiviso, or tenants in common, or coparceners. But the Court ruled the declaration to be good: and Gawdy said, that a tenant in common alone, without his companion, may have an action de parco fracto. And judgment was given for the plaintiff.

HIL. 39 ELIZ.

Popham said, that in Lancashire there is a parish called Standish, within which are many townes, and one of the townes is called Standish: and if a man seised of lands in the town of Standish, and [61] also of land in the other townes, do let all his land in Standish onely, his land within the town of Standish doth passe, and not all his land within the parish of Standish in the other townes. For where a man speaks of Standish or of Dale, it shal be intended to be a town and not a parish, unlesse there be expresse mention of the parish of Standish, or of Dale. Gawdy and Fenner on the contrary, for the grant of every man shall be taken strongest against himself, and therefore all the land as well within the parish of Standish, as within the town of Standish shall passe: and Fenner said, that when Dale is mentioned in any precipe,

it shall be intended the town of Dale, because towns are noted at the common law, and not parishes, for parishes were ordained by the councell of Lyons, but notwithstanding in grants, there shall be no such intendment, but the intendment shall be according to the common usage and understanding of the country, and country-men in favour of the grantee: and when a man speaks of Standish, or any such place, it shall as well be intended to be a parish as a town.

Hil. 29 Eliz.

Clarentius against Dethick.

Clarentius brought an action of the case against Dethick, by the name of Dethick, alias Garter: the defendant demanded judgment of the writ, for the Queen by her letters patents had created him king at arms, et quod nuncuparetur Garter principalis rex armorum, and that he should sue and be sued by such name, and because he was not sued according to his creation, he demanded judgment, &c.

Tanfeild prayed that the writ might abate, for this case had been here in the Court in question before, where Dethick was indicted by the name of Dithick onely, and because he was not named according to his creation, he pleaded that matter, and the indictment was quashed.

Gawdy, I remember the case very well, and it was adjudged at my first coming to this Court, and in truth the judgment passed against my opinion, which then and still is, that when he is sued as king at armes, in such case wherein his office or other thing belonging to his office comes in question, then he ought to be named according to his patent, but when he is sued as I. S. then it is sufficient to name him by his proper name.

Popham, Upon the creation of any deanery which is ordained and granted by patent of the King, the dean shall sue and be sued by the name of dean of such a place, yet if such dean doth sue or is sued about any matter concerning his naturall capacity, it is not necessary to name him dean. Fenner. But this is a name of dignity, and by his installation is made parcell of his name, and if a man be made a knight, in all actions he shall be so named; wherefore it seemed to him that the writ ought to abate. Et adjournetur.

Hil. 37 Eliz.

Hugo against Paine.

Hugo brought a writ of error against Paine, upon a judgment given in the Common Pleas upon a verdict, the error assigned was **[62]** that one Tippet was returned in the venire facias, but in the habeas corpus and the distringas he was named Tipper, and so another person then was named in the venire tryed the issue. Curia, Examine what person was sworne, and what was his true name, to which it was answered that his name was Tippet according to the venire facias, and that he was summoned to appeare to be of the jury, and he inhabits in the same place where Tipper was named, and that no such man as Tipper inhabited there, and therefore it was awarded by the Court that the habeas corpus and distringas should be amended, and his true name put in, and judgment was affirmed, &c.

Hil. 38 Eliz. Rot. 944.

Rainer against Grimston.

Rainer brought an action of the case against Grimston in the Kings Bench, for these words, He was perjured, and I will prove him so by two witnesses; without speaking in what Court he was perjured, and the plaintiff had judgment, and upon

error brought by the defendant, it was moved that the words were not actionable: but in the Exchequer Chamber, the first judgment was affirmed.

HIL. 39 ELIZ. ROT. 859.

CHANDLER AGAINST GRILLS.

In a trespasse, the parties were at issue, and a venire facias was awarded on the roll returnable Octabis Trinitat. and the venire was made six daies after the day of Octabis returnable at a day out of the terme, and the distringas was made, and the jury impanelled, and a verdict and judgment for the plaintiff: and in a writ of error brought this matter was assigned, and the first judgment affirmed, for this is aided by the statute, being it is the default of the clark: and the case was cited between Thorne and Fulshaw in the Exchequer Chamber, Mich. 38, & 39 Eliz. where the roll being viewed, and the venire not good, it was mended and made according to the roll, being that which warrants it and is the act of the Court, and the other matter but the mistake of the clarks. But if the roll were naught then it is erroneous, because the venire is without warrant, and no record to uphold it, and so was it held in the case of Water Hungerford and Besie.

HIL. 39 ELIZ.

DURING AGAINST KETTLE.

During brought an action against Kettle after a tryall by verdict in London, and in arrest of judgment, it was alledged, that the venire facias is, Regina vicecomit. London salut. præcipimus tibi quod, &c. where it should be præcipimus vobis, &c. But ruled by the Court that this venire being as it were a judiciall writ that ought to ensue the other proceedings, it was holden to be amendable, and so it was accordingly.

[63] PASCH. 39 ELIZ.

EAST AGAINST HARDING.

It was moved, whether if a lord of a mannor makes a lease for years, and after a copyholder commits a forfeiture, the lessee for years shall take advantage hereof: and it was said by Popham, that the feoffee or lessee shall have advantage of all forfeitures belonging to land, as in case of feoffment, and the like, but on the contrary for not doing of fealty.

MICH. 39 ELIZ.

COLLINS AGAINST WILLES.

The father makes a promise to Willes, that if he would marry his daughter, to pay him 80l. for her portion, but Willes demanded a 100l. or else did refuse to marry her, whereupon the daughter prayed her father to pay the 100l. and in consideration thereof she did assure him to pay him 20l. back again. The 100l. is paid, and the marriage took effect. And the father brought his action on the case against the husband and wife, for the 20l. Gawdy, and Fenner said, that the action would lye: but Popham held the consideration void.

MICH. 39 AND 40 ELIZ.

PENN AGAINST MERIVALL.

In an ejectment the case was, If a copyholder makes a lease for years which is a forfeiture at the common law, and after the lord of a mannor makes a feoffment, or a lease for years of the freehold of this copyhold to another; if the feoffee or lessee shall take advantage hereof was the question. Popham, He shall not, for the lease of the freehold made by the lord before entry, is an assent that the lessee of the copyholder shall continue his estate, and so is in nature of an affirmance and confirmation of the lease: to which Clench and Fenner agreed; and therefore upon motion made by Yelverton Serjeant, and Speaker of the Parliament, judgment was given, quod querens nihil capiat per billam.

MICH. 6 ELIZ.

One enters a plaint in a base court to pursue in the nature of a writ of entry in the post, and had summons against the party untill such a day, at which time, and after sun-set, the steward came and held the court, and the summons was returned served, and the party made default, and judgment given: the question was, if the judgment was good. Dyer, Welch, and Benlowes held the judgment good, although the court was held at night: and Dyer said, that if it were erroneous, he could have no remedy by writ of false judgment, nor otherwise, but onely by way of petition to the lord, and he ought in such case to do right according to conscience, for he hath power as a chancellor within his own court.

[64] LANE AGAINST COUPS.

In an ejectment by John Lane against Coup, and the plaintiff declared on a lease made by William Humpheston, the case was; William Humpheston being seised of land in fee, suffered a common recovery to the use of himself and his wife for life, the remainder seniori puero de corpore Gulielmi Humpheston, and to the heirs males of the body dicti senioris pueri. Plowden, One point is, that when a remainder is limitted seniori puero in tail, if puer shall be intended a son, or a daughter also; and methinks it shall be intended a son onely, for so are the words in common and usuall speech, and words in deeds ought to be expounded as they are commonly taken, and not to go to any strict construction of the words as (heirs) in the Latine is used also for goods by the civill law, but we use it only for lands, and so libra in Latine signifies a weight; and yet if I am bound in vigint. libris, if I forfeit my bond, I must pay money, and not lead, or the like. And so the word puer is sometimes taken for a servant. Claudite jam rivos pueri, &c. and the same reason that it may be intended for a daughter, may be for a servant also. Gawdy, I suppose the son shall have it and not the daughter, for although pueri was taken for male and female, yet now it is taken for male in any modern author, but to omit curiosity of words, we ought to consider rather the intent of the parties, and there are many circumstances to prove that he intended this to his son, and not to his daughter, for he made it for setling his inheritance, and it shall not be supposed that he intended his daughter should have it. Also where the case may be taken two waies, the most usuall shall be intended; as in case of a reservation of a rent at Michaelmas, that shall be intended at the chiefest feast; also in this case it shall be intended that he would advance the most worthy of his blood, and therefore to that purpose the conveyance shall be expounded; for if there be two I. S. and I give land to I. S. it shall be intended to my next neighbour, but if one be my cosin, although he dwells forty miles from me, yet he shal have the land: and to this Southcote accorded.

31 Eliz. In B. R.

Hone against Clerk.

A woman lessee for life takes husband, who by indenture makes a feoffment of the land to I. S. for these words; Sciant per Richardum How & Katherin. uxor. ejus dedisse I. S. unum messuagium habendum prædict. I. S. heredibus suis ad solum opus & usum of the said I. S. and his heirs, during the life of Katherine. The question was, if this was a forfeiture because the wife was tenant for life; and the attorney argued that it was, for the words pro termino vitæ Katherin. are referred to the use only and not to the estate; for by these words habendum to him and his heirs the estate is limited, and therefore it is a forfeiture: but after comes the limitation of the use, ad usum I. S. and his heirs during the life of the woman, and after the death of the woman the use remaines in the feoffor: and he cited the Lord Sturtons case, in the beginning of the Queens raign; the Lord Sturton gave land to Clerk and his heirs, to the use of Clerk and the heirs of his body, and adjudged that it was not an estate in taile, for the limitation of the estate was before in the premises. Coke, on the contrary, and [65] said, that those words, for life of the wife, are to be referred to the limitation of the estate, for if a double sense be in words, such sense shall be taken as shall avoid all wrong, and therefore it shall not be so expounded, as that the grant shall not take effect, and that a forfeiture shall ensue, 4 Ed. 2. and see a notable case for exposition of words, and for relation of words and sentences, 34 Ed. 3. Avowry 58. 28 H. 8. Dyer. Gawdy, It is a forfeiture. Clench said he would advise; but afterwards it was adjourned a forfeiture; for as Wray said, the estate given was forfeit.

Mich. 36 & 37 Eliz.

Bagnall against Porter. In B. R. Rot. 353.

A man by indenture bargains and sells his land, and if the bargainor pay 100l. at such a day, that then he shall be seised to the use of the bargainor and his heirs, and did assume to make such assurance for the security of the land as should be advised by the councell of the bargainor, and the bargainee bound himself in a recognizance to performe the said covenants. And in debt upon the recognizance, it was shewn that the bargainor paid the money at the day, and had tendred to the bargainee a deed in which was comprised an acquittance of payment of the money, and also a release of all his right, and the bargainee refused to seale it. Coke was of clear opinion that he ought to have sealed it, for it is necessary to have the deed to mention payment of the money, for otherwise the bargainee and his heirs may claim the land for default of payment. Gawdy of the same opinion, and cited 19 Ed. 4. Popham, The case is not so clear, for if he had tendered an acquittance only, there is no doubt but the bargainee might refuse to seale it, and by the same reason he may refuse when it is joyned to a thing that he is bound not to do, viz. to seal the release: but at last the matter was referred to arbitration.

Hillar. 37 Eliz.

Coke demanded this question, A man having two daughters his heires, does demise his land to them in fee; what estate had they by this demise? For if a man deviseth land to his eldest son, it is voyd, and he is in by descent. That it was holden by the Court, that they shall hold by the devise, because that he gives another estate to them then descended, for by the descent each of them had a distinct moyety, but by the devise they are joyn-tenants, and the survivor shall have all. And Fenner sayd, If a man had land in burrow-English and guildable lands, and devised all his land to his two sons, and dyes, both of them shall take joyntly, and

the younger shall not have a distinct moiety in the burrow-English, nor the elder in the guildable land, but they are both joyn-tenants.

PASCH. 37 ELIZ.

CARRELL AGAINST READ. IN B. R. ROT. 270.

A lease for years was made of divers fenny grounds in Cambridge ss. and the lessee covenanted to defend the ground, for being surrounded with water, and to drain the water out of other lands that were demised to him in the said county. And upon an action of covenant for not performing, the defendant pleaded that the plaintiff had entred in the land demised. And adjudged no plea by the Court, because the covenant was not in respect that the lessee should enjoy the land, nor was it a covenant adhering to the land, but to a collateral thing; but if it had been in respect of enjoying the land, there it is a good plea to say that the plaintiff had en-**[66]**-tred, but where the thing to be done is collaterall, it is otherwise, and also if he did plead such plea, yet it is not a bar, unlesse he holds him out of possession, Coke lib. 3. 221. 4 Ed. 3. 29. the lord shall not have a cessavit after entry in parcel, 10 Ed. 4. 11. 35 H. 6. Bar 162. 19 Ed. 4. 2.

TRIN. 37 ELIZ. IN B. R. ROT. 1076.

DOGRELL AGAINST PERKS.

In an action of covenant, the defendant pleaded, that it was enacted by the Major of London, and common councel, that if any citizen takes the son of an alien to be his apprentice, that the covenants and obligations shall be void, and he shewed that he was the son of an alien, and became an apprentice to the plaintiff who is a citizen, and made the covenants with him for his apprentiship: and demanded judgment. And it was held no bar; for notwithstanding the act, the covenant is good, for it is the act of the defendant, although the act of the common councell be against it: but the said act may inflict punishment, or any citizen that breakes it. And judgment was given for the plaintiff.

TRIN. 41 ELIZ. IN B. R.

KNOTTS AGAINST EVERSTEAD.

Lessee for life, the remainder for life, the remainder in taile, he in the reversion who had the fee does enter and enfeoffs the lessee for years; and adjudged that by this feoffment nihil operatur. Popham said, that he who hath a term cannot license another that hath nothing in the land to make a feoffment, for he who hath the freehold wants nothing but possession to make a good livery: but in this case he who makes the livery had not the freehold, and therefore the license is void. But Tanfeild said, that if lessee for life gives leave to a stranger to make livery, it is void, but if he consent that the stranger shall make a feoffment, it shall amount to a disseisin, and the feoffment is good. Which was denied by the Court. And Clench said, if a lessee for ten years makes a lease for one year to him in reversion, there he in the reversion who hath the land for a year, may make a feoffment to the lessee for ten years, and it is good.

TRIN. 41 ELIZ.

MOYLE AGAINST MAYLE.

[See *Elias* v. *Griffith*, 1878-79, 8 Ch. D. 526; 4 App. Cas. 454.]

Moyle brought an action of waste against Mayle, and declared that he had leased to him a mannor and a warren, and that he had destroyed a cony-borough and subverted it, and assigned other wastes in cutting down certain thornes. Williams, The action of waste will well lye, and said that a warren consisted of two things, of a place of game, and of liberty, and to prove that a waste did lye for a liberty, he cited the statute of Magna Charta, cap. 5. in which a warren is intended, also the statute of Marlebridge, cap. 24. and the statute Articuli super Chartas, cap. 18. by which statutes it is evident that a waste does lie for warrens, and a warren is more then a liberty, for a writ lies quare warrenam suam intravit, and by the 12 H. 8. if lessee of a warren does break the pale, it is a waste, also if lessee of a pigeon-house stop the holes, so that **[67]** the pigeons cannot build, a waste doth lye, as it hath been adjudged. Also if lessee of a hop-yard ploweth it up and sowes graine there, it is waste, as it hath been adjudged. Also the breaking a weare is waste, and so of the banks of a fish-pond, so that the water and fish run out: to all which cases the Court agreed, except to the principal. For the Court held it was not waste to destroy cony-boroughs, for wast will not lye for conies, because a man hath not inheritance in them, and a man can have no property in them but only possession, and although by a speciall law, keepers are to preserve the land they keep, in the same plight they found it, yet this does not bind every lessee of land. Walmsley, The subversion of cony-boroughs is not waste, and it was usuall to have a waste against those who made holes in land, but not against those who stop them up, because thereby the land is made better: and it was said, that to dig for stones was a waste, unlesse in an ancient quarry, although the lessee fill it up againe. And Walmsley said, that in Lancashire it is waste to dig marle, unlesse it be imployed upon the land: and said it was not waste to cut thornes, unlesse they be in a wood stubbed and digged up by the roots; but if they grow upon the land then they may be stubbed, and it is no waste: but to cut down thorne-trees that have stood sixty or a hundred years, it is waste.

HIL. 32 ELIZ. IN B. R.

SIR GEORGE FARMER AGAINST BROOK.

In an action of the case the plaintiff claimeth such a custome in the town of B. that he and his ancestors had a bake-house within the town to bake white bread and houshold-bread, and that he had served all the town, with bread, & that no other could use the trade without his license, and that the defendant had used the trade without his license upon which the defendant demur'd. Morgan, This is a good prescription, and it is reason that a prescription should bind a stranger, vide 11 H. 6. 13. A. prescribed to have a market, and that none should sel but in a stall, which A. had made, and was to pay for the stall, and held there a good prescription. And the Arch-bishop of Yorks case in the Register. 186. is a good case. A man prescribed that he had a mill, and he found a horse to carry the corn thither, and that therefore they ought to grind there, and because they did not, he brought his action on the case. Buckley contra. It cannot be intended to have any commencement by any tenure, 11 H. 4. A. procured a patent that none should sell any thing in London without paying him a penny, adjudged not good, and the case of the arch-bishop was good, because he had it ratione dominii & tenuri. And adjudged the principall case, that the action will not lye.

23 ELIZ. IN C. B.

FARRINGTON AGAINST CHARNOCK.

King Henry the 8. granted turbariam suam in D. at Farrington rendring rent sur 21. years and then the lessee imployed part of it in arable land, and relinquisht part of it in turbary: and then Q. Mary grants totam illam turbariã before demised to Farrington; and adjudged that that passed only which was turbary, and the other part, that was converted into tillage did not passe.

[68] MICH. 18 ELIZ. IN B. R.

Sir Arthur Henningham brought a writ of error against Francis Windham to reverse a common recovery had against Henry Henningham his brother: and the error assigned was, that there was no warrant of attorney of the record. And it was agreed by the Bar and Bench, and adjudged error. But the great point was, if the plaintiff could have a writ of error? The case was; Henry the father had Henry his son and three daughters by one venter, and the plaintiff by another venter, and died seised of the land intailed to him, and the heirs males of his body. Henry enters and makes a feoffment, the feoffee is impleaded, and voucheth Henry, who looseth by default in the recovery, and dies without issue, and whether the daughters which are heirs generall, or the plaintiff which is heir in tail shall have the error. Gawdy and Baker for the defendant, who said, that the plaintiff could not have the error, but the daughters who were the heirs to Henry, for an action alwaies discends according to the right of land, and it seems that the heir in burrow English shall have error or attaint, and not the heir at the common law, which was agreed by all on both sides; but it was said, that this varies much from the present case, for two reasons; one, because he came in as vouchee which is to recover a fee-simple, and he shall render a fee-simple in value, which is discendable to the heirs at the common law. Secondly, he hath no estate-tail. Bromley Solicitor, and Plowden contra, and laid this ground, that in all cases where a recovery is had against one by erroneous processe, or false verdict, he which is grieved shall have redresse of it, although he be not party or privy to the first judgment, and therefore at the common law if a recovery be had against tenant for life, he in the reversion shall have error of attaint after his death, and now by the statute of R. 2 in his life, so in a precipe, if the tenant vouches, and the vouchee looseth by default, the tenant shall have error, for the judgment was against him, and he looseth his term: and in the 44 Ed. 4. 6. in a trespasse of battery against two, one pleads, and it is found against him, and the plea of the other not determined, damages by the principall verdict is given against them both, which (if they be excessive) the other shall have an attaint. And Bromley said, there could not be a case put, but where he that hath the losse by the recovery should have also the remedy; and Baker cited 9 H. 7. 24. 6. that if a recovery be had against a man that hath land on the part of the mother, and he dies without issue, the heir of the part of the father shall have the error. But Bromley and Plowden denied this case, and that 3 H. 4. 9. it was adjudged to the contrary: and Wray said to Baker, that he ought not much to rely on that case, for it was not law, and said, that if tenant for life makes a feoffment, and a recovery is had against the feoffee, the first lessor shall not avoid this. Bromley There is no use, for he may enter by forfeiture; but in our case, of whatsoever estate it be at the time of the recovery, the right of the estate-tail is bound, and therefore it is reason that the heir in tail shall avoid it. Jeffrey of the same opinion, and cited 17 Ass. A conusor makes a feoffment, and then execution is sued against the feoffee by erroneous processe, the feoffee shall have the writ of error, although he be not party to the first record, but the reason is, because of his interest in the land. And Bromley and Plowden said further, that notwithstanding the feoffee recovers against the vouchee, and the vouchee recover over the land, yet this recovery shall go to the estate-tail. And judgment was given for the plaintiff.

[69] TRIN. 32 ELIZ. IN B. R.

Trussell was attainted of felony by outlawry, and after an execution is sued against him at the suit of a common person, and he is taken by force thereof, and after he takes a habeas corpus out of the Kings Bench, and Coke prayed that he might be discharged of this execution, for where a man is attaint of felony he hath neither goods nor lands, and his body is at the Kings disposall, and so is not subject to the execution of a common person, 4 Ed. 4. But Harris Serjeant and Glanvill on the contrary, for although he be attaint of felony, yet may he be in execution, for his own offence shall not aid him: and so was it in Cross case in the Common Pleas; where a man being attaint of felony was taken in execution at the suit of a common person, and he escaped out of prison, and an escape was brought against the Sheriffs of London, and a recovery against him. And at last by advise of the Court, because he was indebted to many persons, and to discharge himself from his creditors, intended to have a pardon for his life, and so deceive them, therefore he was committed to the Marshalsey upon this execution.

TRIN. 42 ELIZ.

MALLOY AGAINST JENNINGS. ROT. 1037.

In a replevin the case was; A man seised of land in fee, is bound in a recognizance of 100l. and then bargains and sells all his land to the plaintiff, and then the recognizance is forfeit, and the conuzee sues out a scire facias against the conuzor before the deed was inrolled, and had judgment to have execution. And the question was, if the bargainor was a sufficient tenant against whom the execution was sued. Williams Serjeant, The bargainor was tenant at the time of the scire facias before inrolement, and although it was inrolled after, shall have relation to the first livery to prevent any grant or charge: and if an action be brought against an executor, as in his own wrong, and the suit depending he takes letters of administration, this shall not abate the writ. So in our case, the bargainor was seised of the land when the scire facias was brought; and if a man makes a lease for life, rendring rent, and then the lessor bargains and sells the reversion, and before the inrolement the rent is behind, and the bargainee demands the rent which was not paid, and then the deed is inrolled, yet he cannot enter for the forfeiture, which I have seen adjudged: & in the 28 H. 8. Dyer. disseisee of one acre makes a release to the disseisor of all his lands, and delivers it as an escroll to be delivered to the disseisor, and then he disseiseth him of another acre, and then the deed is delivered to the disseisor, yet the right in the second acre shall not passe. And he much relied on Sir Richard Brochets case, 26 Eliz. who made a recognizance to Morgan upon condition to convey unto him all his lands whereof he was seised the first day of May, and it hapned that one Corbet had sold him land by indenture the 24 day of April, but the deed was not inrolled untill the 24 day of May after: and the question was, if the conuzor was bound to convey these lands, or not, and adjudged that he was not, for inasmuch as the deed was not inrolled the first day of May, he was not seised, and great mischief would ensue if the law should be other-**[70]**-wise: for no man will know against whom to bring his action, for a bargain and sale because inrolement may be done secretly. Herne Serjeant, The bargainee is seised before inrolement, and by the statute of 5 Eliz. which wills, that none shall convert land used to tillage, unlesse he puts other land to tillage within six months, yet none will say that it is a breach of the statute, although pasture be presently converted to tillage, and he cited Chilburns case, 6 Eliz. Dyer 229. that proves that before the inrolement land passeth to the bargainee, and the bargainee hath a freehold in him before the inrolement, and whereof his wife shall be endowed, and if the bargainor levies a fine, or acknowledge a statute, the bargainee shall avoid them, and denied the case of Morgan, cited by the other side, and cited the case of 6 Ed. 6. where were two joynt-tenants, and one of them bargained and sold his moyety, and then the other joyntenant died, and then the deed was inrolled, there

nothing passed but a moyety, but it seems in that case that by the bargain and sale the joynture is severed before the inrolement, so that there is no survivorship, but the book speaks not of it; and if a bargainee be of lands held of the King without license of a alienation, there the forfeiture to the King shall relate to the first delivery of the deed. Warberton contra. Before the inrolement there is but a commencement of the bargain, and before all circumstances in the deed mentioned, are performed, it is no bargain; and I hold the deed shall have relation to the delivery to prevent all charges, & contracts, but as to strangers it shall not have such relation. If tenant for life bargains and sells his land to another and his heirs, and then makes a feoffment in fee to another before inrolement, this is no forfeiture. Anderson, A release made to a bargainee before inrolement is void, then if this scire facias be well brought, no act of the bargainee shall avoid it. Walmsley, If there be a bargainee, and before the inrolement the bargainor enfeoffs him, he is in by the feoffment and not by the bargain, which proves that no estate is really in the bargainee before inrolement. Kingsmill, The reason of that is, because it is out of the statute, for the bargain and sale was onely delivered, and he said that the wife of the bargainee in such case shall be indowed: but the Court denied that, and all agreed that the wife of the bargainee before inrolement shall not be indowed. Kingsmill said, that it was a usuall course in a recovery to make the bargainee tenant to the precipe. And it was said by all the justices, that if tenant for life be impleaded, the bargainee of the reversion after inrolement shal be received, and yet (if hanging the writ) he purchase the reversion, he shall not. And after many arguments it was adjudged that the scire facias was not well awarded: and judgment given for the plaintiff.

37 Eliz. In C. B.

Day against Austin.

In a trespasse, the defendant justified the taking of a furnace fixt to the earth, because the sheriff upon an extent sold it to him. And by the Court it was held a good discharge: for if a stranger takes my horse, and sells him, a trespasse will not lye against the vendee, but a detinue. But if one sells my horse, and a stranger takes him, he is a trespassor. Walmesley and Beaumond, Although such furnace be fixed by the termor, yet he may take it away within the term, but **[71]** the sheriff cannot attach it; and the termor may pull down a wall made by him, and it is not waste. And at another day the case was recited to be thus. The lessee made a furnace for the use of a dyer, and fixed it to the wall of his house, and the lessee being condemned in debt, the sheriff came to the furnace, and put his hands upon it, and delivered it to the defendant; and the lessee brought a trespasse. Glanvill, A furnace may be delivered in execution, and the house never the worse, but otherwise of the doors, because the lessee cannot be without them, 42 Ed. 3. 6. it is not waste to take away a furnace, 21 H. 6. 26. said there that the heir shall have such furnace, but this does not prove that it is not a chattell, but the cause wherefore the heir shall have it, it is because it is annext to the land, as in the case of writings which are meer chattels. Beaumound, It is doubly fixt, to the land and to the wall; and it is clear that the sheriff cannot take it from the wall. Dyer, The diversity is when the furnace is fixt to the middle of the house, and when to the wall, for the termor may take it from the middle of the house, but not from the wall, for the wall is worse for taking it away, and therefore it is waste: and to this Owen agreed.

Pasch. 35 Eliz. In B. R.

Rotheram against Crawley. Rot. 332.

In debt upon a bond, the case was; Divers questions were made between the plaintiff lord, and the defendant tenant, concerning relief, whereupon they referred themselves to the arbitrement of I. S. who did award, that the plaintiff should make

a release to the defendant (which was done) of all actions, duties, and amercements: and then upon this action brought by the plaintiff for a collatterall thing, the release was pleaded in bar. Coke Attorney, The plaintiff shall not be barred by this release, for deeds ought to be expounded according to the intent of the parties, and the intent of the party was to release no duty but the relief, which was only in question, & this word, duties, being interposed between reliefs and amercements, shall be intended duties of such nature as reliefs and amercements, and no otherwise, as it is in Dyer 23 Eliz. A man grants and to farm lets such land with wood, this is no grant of the wood, and yet there are words sufficient to passe the wood, but being conjoyned with the words, and to farm let, it shall be expounded that it was not intended to have it be an absolute grant. But adjudged that it was a good bar, and judgment was given accordingly.

Hil. 37 Eliz.

Goodway against Michell.

Goodway brought a trespasse against divers persons, quare clausum fregerunt & duas ramas & perches of hedge, fregerunt the defendant by way of justification said, that the place was in the parish of Hadnam in Ely, and that all the parishioners time out of mind, have used to have passage through the said close in Rogation week, to make their perambulation of the parish, & because that the plaintiff hindred the defendants as parishioners, ramas & sepes fregerunt, whereupon the plaintiff demurred. Sperling, The justification is not good, for although parishioners may justifie the having a way over my ground, yet they cannot break the hedges; also they have broken two perches, and two gates, which is excessive for a foot-path, 15 H. 9. 10. 6. A commoner cannot break all the hedge upon the land where he hath common. Savile cont. All the parishioners ought to go their perambulation, and being a great number they may well enough justifie, [72] for they are not compelled to keep the foot-path. 6 Ed. 2. F. N. B. 185. b. Parishioners may pull down a wall that hinders them in their way to the church: and in the Book of Entries, there is a president where the vicar and parishioners did justifie an entry for this very cause, & prescribed as we do in this case; so they may prescribe in a way, or other thing of easement or pleasure, 7 Ed. 4. 26. a. 15 Ed. 4. 29. a. Anderson, There is no question but parishioners may justify their going over any bodies land in their perambulation. Warberton, Parishioners shall not prescribe in an easement, as in any way to the church. Owen, The books make a difference between things of interest, as in common, for in such things parishioners cannot prescribe, and things of easement, as a waste, for in such things a man may prescribe. Anderson, It is plain that parishioners cannot prescribe, for none may prescribe but those that have perpetuall continuance, and therefore tenant for years or for life, or parishioners cannot prescribe, but must be aided by custome. Walmsley of the said opinion, for there is no descent or succession in parishioners. And judgment was given for the plaintiff.

Trin. 37 Eliz. In B. R.

Norton and Sharp against Gennet. Rot. 178.

A prohibition was sued by the plaintiffs as executors to I. S. who surmised that the defendant sued them in the Court Christian for a legacy of 200l. and that the testator had goods but to the vale of 350l. and set forth how he was keeper of the prison of Ludgate, & that he was bound to A. and M. Sheriffs of London, to discharge and save harmlesse the same sheriffs from all escapes, which bond was to the value of a 1000l. and shewed that one Holmes was taken by a capias utlegatum at the suit of a stranger, and how the testator suffered him to escape, whereupon an action of debt was brought against the sheriffs, and a judgment, whereby the obligation made to

them by their testator is forfeit, and pleaded riens intermaines, and because the Court Christian would not allow this plea, they prayed a prohibition, upon which Coke Attorney-Generall demurred. And it was agreed by Gawdy Justice, Coke and Tanfeild, that if the bond to the sheriff be not forfeit, then is the surmise good, and the legacy shall be paid: but Fenner said to Coke, Quomodo probas? Who answered, The difference is when a bond is made by the testator for payment of money in a suit at the Court Christian for a legacy, such a bond is a good plea, although the bond be not forfeit, as in the 9 Ed. 4. 12, & 13. for the condition of the bond is part of the bond, and a duty, but otherwise it is where the condition is collaterall for the performance of covenants: but in our case the condition is not broken as is supposed, for the capias utlegatum issued the 25 of Eliz. and so the arrest meerly void, for every capias ought to be returned the next term after the teste, 21 H. 7. 16. 6, & 8 Ed. 4. 4. & 6. Sed alii contra. But after a consultation was moved for, if a recovery was afterwards had against the executors: and it was answered, that it was not the course to make a bond to the party but to the Court. But Fenner said, that if such course be allowed, no legacy would be paid. And judgment was given that a consultation should be awarded if the legatee would enter into a bond to the executor to make restitution if, &c. or otherwise not.

Hil. 38 Eliz. In B. R.

Haddon against Arrowsmith.

In an ejectment, the case was; The Queen being lady of the mannor of Winterburne in the county of Berks, by her steward did license a copyholder for life to make a lease for three years, if he should so long live, the copyholder did make a lease generally to the plaintiff for three years, who **[73]** being ejected brought this action. Stephen, The action will not lye because the copyholder hath not pursued his licence, for license or authority must be pursued very strictly as well in form as substance, 10 H. 7. license to enfeoff by deed, or license to impark 300. acres, he cannot enfeoff by paroll, or impark but 100. acres, and it was resolved the last terme in the Exchequer, that if the King license his tenant to alien, he cannot alien to one in tail, the remainder to the donor in fee: and so in our case where he makes a lease for 3 years absolutely, he hath not performed his license. Gawdy contra, For when his license is to make a lease for yeares, if he so long live, these words (if he so long live) are but surplusage; for the law saies, that if copyholder for life makes a lease for years, and dies, the lease is determined, and therfore the clause in the license is no more then the law saies, and so is void. Quod fuit concessum per totam Curiam. Fenner, The condition in the license is meerly void, for the lord gives nothing by the license, but only doth dispence with the forfeiture, and the lessee is in by the copyholder and not by the lord, for the lord cannot condition with him in his license. Clench, The lord may license on condition, as where the lord doth licence his copyholder on condition that the lessee shall repair the house, or shall not cut trees, for otherwise the copyholder may cut them, and the lord hath no remedy, for his license is a dispensation of the forfeiture. Popham contra, A condition to a license is void, as a license to make a lease for years, on condition that he pay 20l. the second year, this is void for the reason given by my brother Fenner, for the license does not give a right, but only executes it, as a livery, or attornment; but a limitation to such license is good, as license to alien for two years, he cannot alien for three, but in our case the condition & the limitation made by the lord is void: and the difference is between a copyholder in fee, and a copyholder for life, for if the lord doth license his copyholder in fee to make a lease for three years if he so long live, and he makes a lease absolutely, this is no forfeiture, for this lease shall be a good interest against the heir of the copyholder, but otherwise of a copyholder for life. And judgment was given for the plaintiff.

PASCH. 38 ELIZ. IN C. B.

BISHOP OF ROCHESTERS CASE.

The Bishop of Rochester brought a writ of annuity against the Dean and Chapter of Rochester, and declared of an annuity by prescription, from the Prior of St. Andrewes of Rochester, wch. priory was dissolved the 28 H. 8. & 31 H. 8. their possessions were committed by the King to the Dean and Chapter of Rochest. Anderson, The annuity does not remain, for an annuity chargeth the party and not the possession, and therefore when the corporation is dissolved which is the person, the annuity is gone. Walmesley, But in 2 H. 6. 9. it is said there, if a priory be charged with an annuity, the annuity shall continue, although it be charged to an abby. Anderson, That is true, for there the corporation is changed only, but here it is dissolved. Williams, But that is saved by the 31 H. 8 for annuities are exprest in the saving. Anderson, But this is an annuity or rent with which the land is charged. Beaumond, If it be anything wherewith the land is charged, it is saved, but the person is only charged with this annuity. Walmsley, But the 21 H. 7. is, that an annuity out of a parsonage is not a meer personall charge, but chargeth the parson only in respect of the land. And the Court would consider on the case.

[74] PASCH. 38 ELIZ. IN B. R.

THE CASE OF THE DEAN AND CHAPTER OF NORWICH.

The case was, A church in which there had been a parson and a vicar time out of mind, and the parson used to have the great tythes, and the vicar the small, and for the space of forty years last past, it was proved that the parson had tythes paid him out of a field of twenty acres of corne, and now the feild is sowed with saffron, and the vicar sued for the tythes of saffron in the Court Christian, and the parson had a prohibition. Coke, I conceive the parson shall have the tythes, for by the statute of 2 H. 6. it is enacted that tythes shall be paid as hath been used the last forty years, and this hath been alwaies tythable to the parson, and although the ground be otherwise imployed, yet the parson shall have the tythes; and so was it in Norfolk, in the case of a park, whether the parson prescribed pro modo decimandi, to be paid three shillings fourepence, for all tythes rising out of the said park, and although the park was after converted to arable, yet no other tythes shall be paid.

Popham, It hath been adjudged otherwise in Wroths case of the Inner Temple in the Exchequer. But the law is clearly as hath been said; and the difference is, when the prescription is to pay so much money for all tythes, or when the prescription is to pay a shoulder of every buck, or a doe at Christmas, for there if the park be disparkt, tythes shall be paid, for tythes are not due for venison, and therefore they are not tythes in specie. And I conceive that tythes of saffron-heads shall be comprehended under small tythes, and although the tythes of this feild have been paid to the parson, yet it being converted to another use, whereof no grosse tythes do come, the vicar shall have the tythes: and so if arable land be converted into an orchard, the vicar shall have tythe of the apples; and so if the orchard be changed to arable, the parson shall have tythes. Quod Fenner concessit.

36 ELIZ.

HIGHAM AGAINST DEFF.

In a trespasse, the case was, that a vicaridge by composition was indowed of the third part, omnium bladorum decimarum, of the mannor of D. If he shall have tythes of the freeholders of the mannor, was the question. Johnson, He shall not have them, for a mannor consisteth of two things, viz. of demesns and services, and the free-

holders are neither parcel of the demesnes nor the services, and therefore no parcell of the mannor, and this is proved in 12 Ass. 40. a rent-charge was granted out of a mannor, the tenancy escheats, it shall not be charged with the rent.

Tanfeild contra, For this word, mannor, does extend to the precincts of the mannor, and not to the demesnes and services onely, and therefore if a venire facias be awarded de viceneto manerii de D. the freeholders shall be returned; also a survey of a mannor shall be as well of the freehold lands, as of the demesnes, and if the King grants a leet within the mannor of D. all the freeholders are bound to appear.

Fenner, Grants ought not to be restrained to their strict words, but are to be construed according to the intent of the parties.

Trin. 38 Eliz. In B. R.

Ewer against Henden. Rot. 339.

In an ejectment the jury found that I. S. being seised of a capitall messuage in the county of Oxford, and also of a house and land in Walter, [75] in the county of Hartford, makes a lease for years of his house and land in the county of Hartford, and then by will does demise his house in the county of Oxon, together with all other his lands, meadowes, pastures, with all and singular their appurtenances in Walter in the county of Hartford, to John Ewer: and whether the house in Walter, in the county of Hartford does passe, or not, was the question.

Tanfeild, The houses shall pass, for if a man builds a house upon Black Acre, and makes a feoffment of the acre, the house shall passe, and so if a man does devise una jugata terræ of copyhold land, the house of the copyhold does passe also, for so is the common phrase in the country; and so if a man be rated in a 100l. subsidy, that does include houses, and by the grant of a tenement the house passeth, but if a man demand a house in a precipe, there the house ought to be named.

Whistler contra, It is true that if a man generally does devise his land, the houses passe: but in this case the devisee hath particularized his land, his meadow, and his pasture, and if he intended to have passed his houses he would have mentioned them as well as his lands.

Fenner, I am of the same opinion, for this speciall numbring of particulars, does exclude the generall intendment; and if the devisor had a wood there, that would not passe by these words.

Popham contra, For if a man sells all his lands in D. his houses and woods passe by this word, lands, and so was it agreed in a case which was referred to Dyer and Wray Chief Justice, and there reason was, because that a warrant of attorney in a precipe of a house, woods, and land, is onely of land, which proves that land does comprehend all of them, and therefore I conceive, if a man does devise, or bargain and sell all his lands in D. the rents there shall passe, for they were issuing out of the land: but if a man be seised of three houses and three acres, and he deviseth all his land in D. and one of his houses, the other houses will not passe, for his expresse meaning is apparent, but here the words are in generall as to the lands in Walter, and therefore the houses do passe. But afterwards it was adjudged that the house did not passe, for by the particular mentioning of all his lands, meadowes and pastures, the house is excluded.

Pasch. 4 Eliz.

Hunt against King.

In a writ of error upon a judgment given in the Common Pleas in a formedon brought there; the case was, tenant in tail enfeoffs his son, and then disseiseth his son, and levies a fine to a stranger, and before the proclamations passe, the son enters and makes a feoffment to a stranger, the father dies, and the son dies, and the issue brings a formedon. The question was, whether by the entry of the son the fine was so defeated that the estate-tail was not barred. Dyer, The estate-tail is barred, and

made a difference where the fine is defeated by entry, by reason of the estate-tail, and where it is defeated by entry by reason of another estate-tail, as in 40 Eliz. Tenant in tail discontinues, and disseiseth the discontinuee, and levies a fine to a stranger, and retakes an estate in fee, before the proclamations passe, the discontinuee enters, and then the tenant in tail dies seised, and adjudged that the issue is not remitted, for the statute 32 H. 8. saies, that a fine levied of lands any way intailed by the party that levies the fine shall bind him, and so it is not materiall whether he were seised by force of the estate-tail, or by reason of another estate, or whether he have no estate.

[76] And all the justices were of opinion that the estate was barred, for although the discontinue had avoided the fine by the possession, yet the estate-tail remains concluded, and he shall not enter by force of the estate-tail, but by force of the fee which he had by discontinuance.

Popham, Avoidance of a fine at this day differs much from avoidance of a fine at the common law, for it appears by the 16 Ed. 3. that if a fine at the common law be defeated by one who hath right, it is defeated against all, but at this day the law is contrary, for if a man be disseised, and the disseisor die seised his heir within age, and he is disseised by a stranger who levies a fine, and then five years passe, the heire shall avoid this by his nonage, yet the first disseisee is bound for ever, for the infant shall not avoid the fine against all, but only to restore the possession. And therefore it was adjudged in the Lord Sturtons case, 24 Eliz. where lands were given to him and his wife, and the heires of him, and he died, and his issue entred and levied a fine to a stranger, and before the proclamations passed, the mother enters, it was adjudged that the issue was barred, for the wife shall not avoid this but for her own estate: and so if a stranger enters to the use of him who hath right, this shall not avoid the fine.

Fenner did agree to this, and said that it had been so adjudged; but all the justices agreed, that the estate-taile being barred, the entry shall go to the benefit of him who hath most right to the possession, and that is the discontinue; and therefore the plaintiff in the formedon hath good title to the land, but onely to the fee, and not to the intaile, for that is barred by the fine.

28 Eliz. In C. B. Rot. 2130.

Gibson against Mutess.

In a replevin the case was; John Winchfeild was seised of lands in fee, and by his will did devise all his lands and tenements to Anthony Winchfeild and his heires, and before his death made a deed of feoffment of the same lands, and when he sealed the feoffment, he asked, if this feoffment will not hurt this last will, & if it will not, I will seal it? and then he sealed it, and made a letter of attorney to make livery in any of the said lands, the attorney made livery, but not of the lands which were in question, and then the testator died. And the question was, if the devisee or heire of the devisor should have the land. And it was said in behalf of the heire, that if the testator had said, it shall not be my will, then it is a revocation. Quod Curia concessit: but it was the opinion of the Court, that it appears that it was the intent of the testator that his will should stand, and if it be not a feoffment it is not a revocation in law, although that the attorney made a livery in part, so that the feoffment was perfect in part, yet as concerning the land in question, whereof no livery was made, the will is good; and the jury found accordingly that the land does not descend to the heire.

Fenner cited a case of Serjeant Jeffereys, where it was adjudged, that where one had made his will, and being demanded if he will make his will, doth say, he will not, that this is no revocation.

[81] Sir Wolston Dixy against Alderman Spencer.

20 Eliz. In C. B.

In a writ of error brought upon a judgment given in an assize of fresh-force in London, the case was, Sir Wolston Dixy brought an action of debt for rent arrear against Spencer upon a lease for years made to him by one Bacchus, who afterwards granted the reversion to Dixy, and the tenant attorned, and for rent arrear Dixy brought an action, &c. The defendant pleaded in bar, that before the grant made to Dixy, the said Bacchus granted it to him by parole, according to the custome of London; whereupon he demanded judgement, if &c. and the plea was entred on record, and hanging the suit, Dixy brought an assize of fresh force in London; and all this matter was here pleaded, and it was adjudged a forfeiture of the land; and hereupon Spencer brought a writ of errour, and assigned this for errour, that it was no forfeiture.

Shuttleworth. It is no forfeiture untill a trial be had whether the reversion be granted, or not; as in wast: the defendant pleads that the plaintiff had granted over his estate, this is no forfeiture; and in the 26 Eliz. in a quid juris clamat, the defendant pleaded that he had an estate tail, and when he came to have it tryed, he acknowledged he had an estate but for life, and that was no forfeiture. But the Court said, they could remember no such case.

Walmesley. It was so adjudged, and I can shew you the names of the parties.

Periam Justice. If there be such a case, we would doubt of it, for there are authorities to the contrary as the 8 Eliz. and 6 Rich. 2.

Anderson. If the defendant in a trespass prayes in aid of an estranger, this is a forfeiture; and if it be counter-pleaded, it is a forfeiture, and the denial alters not the case.

Walmesley. The books in 15 Ed. 2. Judgement 237. and 15 Ed. 1. that judgement in a quid juris clamat, shall be given before the forfeiture.

Anderson. In my opinion he may take advantage before judgement as well as after, if the plea be upon record. And so was the opinion of the Court.

The Dutchess of Suffolks Case.

Pasch. 4 & 5 Ph. & Mary. In C. B.

[See *Cowley* v. *Cowley* [1900], P. 123, 305; [1901], A. C. 450.]

In a quare impedit against the Bishop of Exeter, the writ was ad respondendum Andrew Stoke & Dennisæ Franciscæ de Suffolk uxori ejus. Benlowes demanded judgement of the writ, &c. because she lost her name of dignity by marriage with a base man, as it was adjudged, 7 Ed. 6. Dyer 79. where Madam Powes and her husband brought a writ of dower, and the writ abated, because she called her self Dame Powes, whereas she had lost her dignity by marrying with her husband.

Stanford agreed, for mulier nobilis, si nupserit ignobili, desinit esse nobilis.

[82] Brookes. There is a difference where a noble woman marries a noble man of less noble degree than she is, and when she marries one that is not at all noble; for in the first case she shall hold the dignity of her second husband, but in the last case she shall retain her antient dignity. And so it was observed, where the Marquis of Dorset had two daughters, the elder was married to the Lord Audley, and the youngest to a gentleman, and the eldest took place alwayes, as wife to a baron, but the youngest kept her place as a marquisses daughter.

Dyer. I was of counsel in the case of the Lady Powes already mentioned, and she would by no means lose her dignity, and an herauld was brought into Court, that said she had such dignity, although it was held clearly on the contrary by our law by Montague and Hales, and the writ did abate.

Stanford. A noble man loseth his honour by his own act, as by attaint, and so

hath the woman here by taking such husband, and the nobility of such woman is lost also by attainder.

Brookes said, that he knew where the sons of a duke and marquis had a trespass brought against them for hunting a park by the name of Squires, and it was good; wherefore it was said to Benlows, that he must plead to the writ.

PASCH. 4 & 5 PH. & MARY. IN C. B.

A feme sole having the custody of the land, and body of an infant took husband, and she and her husband did tender convenient marriage to the infant, which he refused, and married himself elsewhere, and at his full age entred into the land; if it be necessary that both shall joyn in a writ of forfeiture upon the marriage, or that the husband alone shall have it, was the question.

Brown Justice. Both shall joyn, and so it is ruled in a book.

Dyer contr. The husband alone shall have this writ, for he may discharge it or release it; and by the 5 Ed. 3. 14 & 6. the husband alone may have a writ of trespass; and if the wife have an advouson, and a stranger present, the husband alone shall have a quare impedit; and the same law is, where the woman hath a rent, and the husband distreyns, and rescous is made, the husband alone shall have a rescous.

Prideaux. The wardship of a ward and land is a thing real, and the survivor shall have it, and not the executors of the baron; and if an action be accrued before marriage, as if a bond be made to her before marriage, she shall joyn with her husband in the action upon the bond: but if a right to an action does accrew after marriage, there she shall not joyn, as here the right of the husband does not accrew untill marriage: for the action is not in respect of the wardship, but of the tender and refusal, and his marriage elsewhere, all which do accrew after the coverture.

Stanford. If a man bring a quare impedit for an advowson which he hath in right of his wife, and hath judgement to recover, and dyes, the wife shall present, and not the executors of the husband; so if he recover in a trespass, the wife shall have execution for the damages.

Prideaux. If a lease be made to a woman, and a rent reserved nomine pœnæ, and she takes husband, and the rent is behind, both **[83]** shall joyn in the action for the pain. Dyer. This action is grounded upon a real covenant. Stanford. Damages recovered in a trespass are not real, yet the wife shall have them, if the husband dye before execution. Dyer. The trespass is done to the disinheritance of the wife, and therefore she shall have damages; and in 43 Ed. 1. Statham. The husband alone brought a ravishment of a ward, for a ward he had in right of his wife and the writ held to be good; but there it is said, that otherwise it is in right of a ward; and if they joyn in a writ of ravishment of ward, and recover, and the husband dye before execution, his executors shall have execution, and not the wife: but it is said there (quære) and at last it was agreed that the action should be allowed: but the surest way is to have both joyn.

PASCH. 6 ELIZ.

POWTRELLS CASE. IN C. B.

In an ejectment the case was, A woman-tenant in tail did make a lease for 31 years, and took husband, and had issue; the wife dyes, and the husband is tenant by the curtesy, and surrenders to the heir, who puts out the lessee, who brings this action.

Dyer. I doubt whether this surrender be good, for tenant by the curtesy is but in reversion, and hath nothing in possession, and it is dubious how he can surrender.

Weston and Brown. He may surrender for a term, or frank-tenement may be surrendred to him that hath the estate in reversion or remainder, if it be not a mean estate, as tenant for life, the remainder for life, the remainder in fee, the first tenant for life cannot surrender to him that hath the fee. But the great point of the case was, if the issue could avoyd the lease during the life of the tenant by curtesy; and the Court held he could not, for the tenant is in as a purchaser. And by Walsh and

Carus. If tenant by the curtesy grants over his estate, and then enters into religion, the grantee shall have his estate during the tenants natural life, quod omnes concesserunt; and it was said also, that if the heir had been impleaded during the life of the tenant by curtesy, he shall not have his age, quod fuit concessum.

Mich. 14 & 15 Eliz.

Tottenham against Bedingfield.

In an account the defendant pleaded he was never his baily for to render account.

Gawdy prayed the opinion of the Court if the action would lye, for otherwise he would not trouble the Court. The case was, the plaintiff had a lease of a parsonage, and the defendant being no lessee, nor claiming any interest, takes the tithes being set forth, and carries them away, if the plaintiff could have this action was the question.

Manwood. It will not lye; for an account lyes where there is privity, but wrongs are alwayes without privity; but I agree, that if **[84]** one receive my rents, I shall have an account against him, for by my consent afterwards I do make a privity; for although that he hath received the rent, he hath not done wrong to me, inasmuch as it is not my money untill it be paid to me: but otherwise it is where a man disseiseth me of land, for that is meerly a wrong, and so is it in this case; for when the tithes were set forth by the parishioners, the law sayes they are in the possession of the parson; and therefore when the defendant took them away, he does it wrongfully, and therefore no account will lye against him; and so it was adjudged in London in the case of one Monax, who under colour of a devise, did occupy land for 20 years, and after the devise it was adjudged voyd, he that had right to the land, brought an account against him, and adjudged that it does not lye.

Harper contr. For an account does lye against a proctor, and the plaintiff may charge him as proctor, and it is no plea for him to say that he did not occupy as proctor, no more than it is a plea for him who occupies as guardian, to say he was not the prochein amy.

Dyer. There are three actions of account. 1. Against a baily. 2. Against a receiver. 3. Against a guardian in socage; and if an account be brought against one as receiver, he ought to charge him with the receipt of money, and I conceive that there ought to be a privity to charge one with the receipt of money: but if one claim as baily, or as guardian in socage, he is chargeable in account: but an abator or a disseisor is not, because they pretend to be owners, and in this case, because by the setting forth the tithes the property is in the parson, therefore he being lessee for years, he shall have an ejectione firma, and not an account.

Hillar. 32 & 34 Eliz.

Carter against Kungstead. In C. B. Rotulo 120.

In a trespass the jury gave this special verdict. John Berry was seizin of the mannour of Stapeley in Odiam, and of other lands in Odiam, and the 32 H. 8. suffered a common recovery of all his lands in Odiam, Stapeley and Winkfield, to the use of himself and his wife for life, the remainder to the heirs males of his body, & quod ulterius starent of the mannour of Stapeley, with the appurtenances, to the use of himself for life, the remainder to the heirs males of his body, whereby they were seized prout lex postulat. The husband dyes, the wife makes a lease for 19 years, and whether the mannour of Stapeley were conveyed or not, was the question.

Harris. She shall have all; for when the whole estate is limited at the beginning of a deed, it shall not be abridged afterwards.

Periam. The estate is by way of use, which shall be expounded according to the intent and will of the limiter; and if this had been done by will, it is clear the woman should not have the mannour of Stapeley.

Anderson. If I devise my land to J. S. and afterwards by the same will I devise it to J. D. now J. S. shall have nothing, because it was my last will that J. D. should have it; but otherwise it is of a use; for if I do limit an estate to the use of J. S. and in the last clause do limit the same estate to J. D. the limitation to J. D. is voyd for the repugnancy.

[85] Periam. As to the case of the will, I conceive it is voyd to both, because it cannot be known who shall have it.

Anderson. I am sure the law hath been taken as I have said; and there was a case in the Upper Bench, where a man one day made part of his will, and another day made another part, which was repugnant to the first part, and adjudged that the last was good, and the first voyd.

Periam. I agree to this case, for here is a difference in time.

Anderson. So is there in my case; for when I am writing my will, I am thinking how I shall dispose of my estate, and it shall be intended that I have best advised concerning that which I have done last.

Walmseley. A use is not to be compared to a will, for the statute of 27 H. 8. hath made it an estate, and then by the 19 of Edw. 3. If a man limits an estate at the beginning of a deed he cannot after abridge it.

Periam. I put this case: if a man covenants upon consideration to be seized to the use of himself for life, and after to the use of his son: but he further sayes, that his meaning is, his wife shall have it for her life, this is not a voyd clause, but good to the wife; and the case was adjourned till next term. And Harris argued again, and said, that a use was but matter of trust, and for that it is apparent that the intention was that the wife should have nothing, there is no reason that another construction should be made.

Walmseley. The limitation of the use is but a declaration how the use shall be, and does not give any thing; and the opinion of the Court was against the plaintiff who was lessee of the woman, and that the last clause does countermand the first, as to the mannour of Stapeley.

MICHAEL. 31 & 32 ELIZ.

BROKESBYES CASE. IN C. B. ROT. 18. 15.

Bartholomew Brokesby brought a quare impedit, and it appeared by his declaration, that the next avoydance was granted to him, and one Humphrey Brokesby, and then the church became voyd, and Humphrey did release to Bartholomew totum statum & titulum &c. and then Bartholomew being disturbed, brought a quare impedit in his name alone.

Harris. The plaintiff shall be barred, for the other shall be named with him, for the release is voyd; for when the church becomes voyd, it is a thing in action, and of privity and confidence, and cannot be released nor transferred.

Dyer 283. a. 28 H. 8. 26. a. Where it is said, that it cannot he granted over, no more than an executor may release his executorship to his companion.

Beaumont. In my opinion it is not a chose in action, but an interest which the executors have; and by the 14 H. 4. and 14 H. 6. If a man be seized of an advowson in the right of his wife, and the church is voyd, and the wife dyes, yet the husband shall present, which proves it is not a chose in action; for in the 49 Edw. 3. 23. the husband shall not have an obligation that was made to his wife; **[86]** and in our case by this avoydance the church is become an interest and a chattell: and therefore one joyntenant may release to another by reason of their privity, although they have no possession.

Fenner. The release is totum statum jus & titulum, but here he hath no estate nor possession, and therefore the release is void. And to prove that there is no estate nor possession, it is proved by the pleadings of the grant of the next avoydance, for he shews that the church became voyd, and that ea ratione pertinet ad ipsum presentare, and not by force whereof he was possest, and if none hath the advowson which becomes voyd, and the lord claymes the advowson, yet he shall not have the present avoydance, and as to the case of the joyntenants, one cannot release to the other for default of

possession for the release wanes by reason of their joint possession which is out of them, but release of the demandant to the vouchee is good by reason of the privity of law that is betwixt them; and in 11 H. 4. He who hath right after the incumbent is instituted and inducted, may confirme his estate, and therefore the release here is good.

Anderson. We are all agreed that the release is void, and gave judgment that the plaintiff should be barred.

BRETTON AGAINST BARNET.

MICH. 41 & 42 ELIZ.

A man delivers money to J. S. to be redelivered to him when he should be required: which J. S. refused, and therefore an action of debt was brought, and the defendant demurred, for that an action of debt would not lie, but an account, as in the 41 Ed. 3. 31. & 33.

Walmseley. An action of debt will very well lie. And he took a difference between goods and money: for if a horse be delivered to be redelivered, there the property is not altered, and therefore a detinue lies, for they are goods known: but if money be delivered, it cannot be known, and therefore the property is altered, and therefore a debt will lie. And if Portugalls or other money that may be known be delivered to be redelivered, a detinue lies.

Owen and Glanvill agreed to this, and Glanvill cited a judgment given in Hilary Term, wherein he was of councell, which was that a man delivers money to another to buy certain things for him, and he does not buy them, the party may bring an action of debt, but he said that the plaintiff ought to aver that the defendant had not redelivered them. And judgment was given for the plaintiff.

MICH. 41 & 42 ELIZ.

GREEN AGAINST WISEMAN. IN C. B.

In an ejectment. The defendant pleaded, that a feoffment was made to the use of J. S. the lessor of the defendant, who by force thereof, and of the statute, was seised, and made a lease to the defendant; and that one Green entred and made a lease to the plaintiff, and did not say that he entred upon J. S. And all the question was, whither when a feoffment is made to the use of another, if he have such a seisin before his entry, whereof he may be disseised.

[87] Glanvill. He hath no freehold, neither in deed nor in law before entry.

Walmseley. This is contrary to all the books: for a possession in law is so translated from the feoffee to cestuy que use, that the wife of the feoffee shall not be endowed.

Owen. He ought to have alleged a disseisin.

Anderson. As he might have possession by force of a devise at common law, so he shall have possession of the land here by force of the statute, and it is in cestuy que use, before agreement or entry, but if he disagree, then it shall be out of him presently but not before he disagree. And after viz. Hillar. 42 Eliz.

Williams moved the case again, and Walmseley said then, that he might be disseised before his entrie or agreement, and the pleading shall be that he did enter, and did disseise him, but he shall not have a trespass without actuall entrie, for that is grounded on a possession: Glanvill agreed to this, and advised Williams to adventure the case thereupon.

HILLAR. 41 ELIZA.

SMITHS CASE. IN C. B.

The patron of an advouson before the statute of 31 Eliz. for symony, doth sell proximam advocationem, for a sum of money, to one Smith, and he sells this to Smith

the incumbent: after which comes the generall pardon of the Queen, whereby the punishment of Smith the incumbent is pardon'd, and of Smith the patron also. If the incumbent may be removed was the question: Williams said, that the doctors of the civil law informed him, that the law spirituall was that for symony the patron lost his presentment, and the Ordinary shall present, and if he present not within six months, then the metropolitan, and then the King.

Spurling Serjeant. This punishment cannot discharge the forfeiture, although it dischargeth the punishment.

Glanvill contra. and said that this point was in question, when the Lord Keeper was atturney, and then both of them consulted thereupon, and they made this diversity viz. between a thing void and voidable, and for symony the church is not void untill sentence declaratory, and therefore they held, that by the pardon before the sentence all is pardon'd, as where a man committs felony, and before conviction the King pardons him, by this pardon the lord shall lose his escheate, for the lord can have no escheate before there be an attaindor, but that is prevented before by the pardon, and so here this pardon prevents the sentence declaratory, and so no title can accrue to the Ordinary.

Walmesley cont. If the patron be charged by the sentence, he may plead the pardon. But if a quare impedit be brought by a third person, the pardon of the King shall be no bar to him, for the title appeares not to him, but only the punishment.

Anderson. They may proceed to sentence declaratory, notwithstanding the pardon; for the pardon is of the punishment, but the sentence does not extend to that, but only to declare that the church is void.

Glanvill in 16 Eliz. a man was deprived of his benefice for incontinency, and after he was pardoned and restor'd.

Walmsley. I doubt much whither the King can pardon symony:

[88] And Williams said, that the doctors of civill law said, that neither the Pope nor the King could pardon symony, quoad culpam, but only quoad pœnam they may. And the Court at last said, that if the parties would not demur, they would hear the doctors upon this matter.

JELSEY AGAINST ROBINSON.

TRINIT. 25. ELIZ. CONTINUED UNTILL PASCH. 28 ELIZ. IN C. B. ROT. 704. & 1544.

Upon a speciall verdict upon an ejectment, the jury gave this speciall verdict. That the King was seised of the mannor of Freemington, and of the hundred there, and granted this to Hampton to hold of the mannor of East-Greenwich by fealty, and 13l. rent, and then the King being seised of the mannor of Crankford, of which the place in question was parcell, does grant his mannor of Crankford, and his manor of Freemington, to the Marquess of Exceter and his heirs, who by his will does devise legacies to his servants, and does devise that all his legacies shall be payd out of the mannors of Freemington Uplaing and Crankford. All which mannors I give to my cosen Blunt and his heires. And the defendant, as servant to Baker who was heir to the marquess, did eject the plaintiff; the question was, if by the devise of the mannor of Freemington the rent of 13l. did passe nor not, if it does not passe, then by the statute of 32 H. 8. the 3. part of the mannor of Crankford does not go to the devisee, but descends to the heire at the common law.

Shuttleworth for the plaintiffe. The seigniory does not passe by the devise of the mannor, for the intent thereof shall be collected, by the words of the will. 15 H. 7. 12. a. 19 H. 8. 9. and 6. but here he limits a distresse out of a lordship, which cannot be 3 H. 6. Also it is doubtful if the seignory being entire, may be divided by force of the statute of the 32 H. 8. And I thinke not; for when the statute sayes that the lands devised shall be devised into three parts, and that is to be understood of such an estate as may be divided, but so cannot a seigniory: for put the case that the lord held by a hauke, the whole mannor shall descend and cannot be divided, and so de catalla fellonum. Fenner contra. For it seems to me that the seigniory passeth,

and so it shall be, if he held but a mesnalty 7 Ed. 4. A man held by frankalmoigne, he shall say, infra feodum summ, and in reputation amongst men a seigniory is a mannor: for if a man makes a feoffment of a mannor, with livery where he hath no mannor, yet shall it passe, 7 E. 3. where a mannor passeth by the name of knights fee. And as to the intirenes of the seigniory it is easily answered, for although the rent were entire, yet it may be severed, for a rent charge is entire, yet a proportionment may be made thereof 44 Ed. 3. To which the Court agreed that the rent without doubt might be severed.

Walmseley, for the plaintiff, The question is if the rent passeth by the name of a mannor to the devisees. If a grandmother deviseth land to her daughter J. S. whereas she is her daughters daughter, yet this is good, because in common speaking she is so called, but here the words are not apt, nor used in common speaking, viz. that rent should be taken for a mannor, and therefore it is voyd, as a gift to the right heirs of J. S. who is attaint 19 H. 8. And he concluded with this difference: that where the words have any affinity or likelihood **[89]** to the mannor, then it will passe by the name of a mannor. As if a man deviseth his house and land by the name of a mannor it shall passe. But here being but a service, it is otherwise.

Gawdy cont. For if the rent passe not nothing shall passe, which is a hard construction on a will. For 21 Rich. 2. Devise 27. a devise ecclesiæ Sancti Andreæ is a good devise to the parson of the church.

And in Brett and Rigdens case a man devised a mannor in which he had nothing, and after purchased the mannor, the devise is good. And in 26 H. 6. Feoffment 12. land will not pass by deed by the name of a house, but land will pass by the name of a carue, and a carue by the name of a mannor, and I hold that the rent in this case will passe by the name of the mannor, for a mannor does consist of demesnes services, and rent may be called a mannor as well as a carue, and the King gives it by the name of a mannor to the devisor, and that is the reason that the devisor calls it a mannor: and if you grant to me an advowson by the name of the church and rectory, and I devise the rectory, the advowson and the church will passe by the name of rectory: and in Plouden. 194. a man did let his house and great demesnes rendring rent, and did devise to another all his farme; there the devisee shall have all the rent and the reversion also.

MICHAELM. 29 & 30.

BISHOP OF LINCOLNES CASE. ROT. 1528. & 2200.

In a quare impedit, brought by the King, against the Bishop of Lincoln and Leigh, the incumbent: the case was, The bishop had an advowson in gross, and presented J. S. who took a second benefice with cure, whereby the first became void, and continued so untill lapse fallen to the Queen, and after the title of lapse fallen to the Queen, the bishop presented one J. who was inducted, and by reason of recusancy to pay tythes, was deprived, and by the statute 26 H. 8. the church became void ipso facto, whereupon the bishop presented one Leigh within six months, and now the Queen would present. Fenner. This case is the same with Bosherulls, lately adjudged. But the Court said, that here was a privation for recusancy; and therefore it would make a difference. And afterwards Pasch. 30 Eliz.

Walmesley, for the Queen said, that if a lapse be fallen to the Ordinary, if the patron doth present before the bishop hath collated, he ought to receive his clerk, but where it is divolved to the King, the patron by no means can defeate the King, but he may remove his clerke at his pleasure, but if such incumbent be present after such lapse, and die, then the title of the King is gone, and his time passed by the act of God: but in our case the avoydance which does oust the King from his lapse, is avoidance by reason of recusancy to pay tithes, which is the proper act of the incumbent, as is a resignation, and no such avoydance being by the act of the party himself shall oust the King of his presentation, for in the 2 H. 9. in annuitie against an abbot, who resigns the writ shall not abate, for then the plaintiff shall never have a good writ. So in our case, if the King be outed of his lapse by such devises, he

shall never have a lapse, for every one will usurp upon the Kings [90] lapse, and will presently resign or misdemesn himself whereby to avoid the lapse. And in the 18 Ed. 4. the 19.

By Pigot. A writ brought against a prior shall not abate, although the prior be not deposed, for it is his own fault.

Fenner. This lapse is given the King by his prerogative, but on this condition, that he take it in due time: for so is the nature of things lapsed, for if after a title accrued to the King he suffer usurpation, and the incumbent die, his lapse is lost, for the nature of the lapse is such that it must be taken at its time, and where the title of the King is limited to a time, there he shall not have his prerogative: for a prerogative cannot alter estates. As if the King grant a seigniory in gross rendring rent, and the tenant to the lord dies without heir, whereby the tenancy escheates, the seigniory is extinct, and the rent of the King is gone, as well as it is in the case of a common person. And so if the King have a rent seck for life out of my land, if I die he cannot distreine in my land for the arrerages as he may in my life time. And so where the statute gives annum diem & vastum to the King, yet he shall not have it after the death of the tenant for life, so if the King reserve a rent upon a lease to an estranger, and the stranger enters, in respect of the land, whereby his entire rent is suspended, now the condition as to the King also is suspended during that time, for the nature thereof is to be attendant upon the rent 22 H. 3. If a man grant a rent upon condition to cease during the minority of his heir, and after this rent comes to the King, and the grantee dies, the rent shall cease during the minority of his heir: so that by all these cases the reason appears that the nature of the lapse is to be taken hac vice, and the King must take it then, or not at all: and where it is objected that by this means every lapse may be taken from the King: I conceive that far greater inconvenience will be to the patrons on the other side: for when a lapse is devolved to the King, and a stranger presents, if then the true patron may not present untill the death of such incumbent, perhaps the incumbent will resign, or be deprived, and a stranger shall be presented again and again in like manner, and so by this means the patron shall never continue his advowson, for by the couin between the stranger, and the neglect of the King to take his lapse, the incumbent shall never die. And afterwards in this term, it was adjudged that such usurpation shall not take away the lapse from the King, because the avoydance accrued by the act of the incumbent. Cook ib. 7. 27. a.

HILLARY. 29 ELIZ.

LASSELL'S CASE.

Lassell brought an action of debt upon an obligation, the defendant pleads, that the condition was, that he should personally appear before the justices, and set forth, how he was taken by a latitat by the plaintiff who was shiriff, who took this obligation upon his deliverance: and urged the statute of 23 H. 6. and said that the obligation was not according to the statute. And by the opinion of three justices (Anderson being absent) if it were in such an action wherein a man may appear by atturney, then it is void. And the plaintiff shewed a judgment given in the Kings Bench, wherein in such case judgment was given for the sheriffs, and it was between Seekford and Cutts 27. & 28. Eliz. Rot. 373. And the next terme it was moved again.

[91] Anderson. The obligation is void; for when an express form is limited by the statute, no variance ought to be from it. But the other three justices were against him, for they held that he ought to appear in his proper person in case of a latitat.

Anderson. I deny that, for latitats have not been of above 60 years continuance; vid. Cook, lib. 10. Beufages case; and his first institutes, 225. a.

PASCH. 25 ELIZ.

KAYRE AGAINST DEURAT. IN C. B. ROT. 603.

In a waste, the plaintiff declared how the defendant was seized in fee, and made a feoffment to the use of himself for life, the remainder to the plaintiff in fee, after which he committed waste. The tenant said, that he was seized in fee, without that he made a feoffment as the plaintiff declared; and upon issue joyned, it was found that the defendant was seised in fee, and that he made a feoffment to the use of himself for life of J. S. without impeachment of waste, the remainder ut supra; and whether this was the feoffment which the plaintiff alledged, they prayed the advice of the Court.

Anderson, Chief Justice. If the impeachment of waste be not part of their issue, then the verdict is voyd for that point, and that which is found more than their issue is voyd, 33 H. 6. the defendant pleaded that he was not tenant of the free-hold, and the jury found that he held joyntly with another, there the plaintiff shall recover. And then at another day it was said by the justices, that the jury had found such an estate as was alledged by the plaintiff; and although that they further found this priviledge to be dispunisht of waste, which upon the matter proves that the plaintiff hath no cause of action, yet because the tenant may choose whether he would take hold of this priviledge or not, the jury cannot finde a thing that is out of their verdict, and whereof the defendant will not take advantage by pleading, and for this cause their verdict was voyd. 7 H. 6. 33. 21 H. 7. 12. where one pleaded in bar a feoffment, and traversed the feoffment, and hereupon they were at issue, and the jury found that he had enfeoffed the tenant after the fine levyed to the plaintiff; this cannot be found, because it is out of their issue, 31 Assi. 12. and judgement was given for the demandant.

HILLAR. 29 ELIZ.

MICHELL AGAINST DONTON. IN C. B. ROT. 639.

In an ejectment a man makes a lease, rendring rent, with a covenant that the lessee shall repair the houses, with other covenants and conditions of re-entry for not performance, and then he devised the same land to the same lessee for divers years after the first years expired, yielding the same rent, and under the same covenants as in the former lease, and he devised the remainder in fee to the plaintiff, and the first lease expires, and the defendant being possest **[92]** by force of his second lease, doth not repair the houses; and if the plaintiff might enter, was the question.

Shuttleworth. In as much as he devised the land under the same covenants as the first lease was, and the first was with covenants and conditions, the second shall be so also, the rather because he deviseth the remainder over, so that the devisee cannot take advantage of the covenants, but of the conditions he may, and the second lease is conditional. But the whole Court was against him.

Shuttleworth. To what purpose then are these words in the devise, under the same covenants.

Periam. They shall be voyd. And by all the justices the intent of the will was not that the lease should be conditional, for covenants and conditions differ much, for the one gives an action, but not the other; but the intent was, that he should perform the covenants upon pain to render damages in a writ of covenant.

BOTTENHAM AGAINST HERLAKENDEN.

29 & 30 ELIZ. IN C. B. ROT. 1620.

Herlakenden was seized of land, and devised the same to the plaintiff for years, the remainder to his wife for life, proviso, that the plaintiff should pay to the woman

20l. per annum; and if he failed of his payment, &c. wherefore the woman entred, and if this shall be called reservation or reversion, was the question.

Anderson. A man cannot make a reservation on a devise.

Periam. A man may to himself and his heirs, but not to a stranger.

Anderson. Every devisee is in, in the sier by the devisor, and why shall not this then be a reservation to the devisor, and a grant of the reversion to the woman.

Gawdy. Wherefore cannot a man devise land, reserving rent, when by the statute 32 H. 8. he may devise at his pleasure?

Periam. Because his pleasure must correspond with the law.

Anderson. If I devise land to another, reserving rent to me and my heirs, and then devise the reversion, he shall have the rent as incident to the reversion, and the Judges were divided, wherefore, &c.

29 Eliz.

Glover against Pipe. In B. R. Rot. 838.

In debt upon a bond the condition was, that where Glover the plaintiff had a copyhold of inheritance, and had leased it to the defendant, if the defendant should not commit any manner of waste, and should do no other thing that should be forfeiture of the copyhold, that then, &c. The defendant pleaded conditions performed; the plaintiff replyed, and alledged waste committed in a shop that fell down during the term for want of reparation: but the defendant in rejoynder alledged, that the shop was ruinous at the time of the lease, and by reason thereof fell down.

Tanfield. It is no waste, as the books are, 42 Ed. 3. 19 Ed. 3. 2 H. 7. 3. a. 12 H. 8. 11. a. If a house be ruinous at the time of the **[93]** lease, and fall during the term, it is no waste: yet the book in 7 H. 6. is otherwise. And in the 12 H. 4. a man lets his house, and it is covenanted that the lessee shall not suffer any voluntary waste, if the timber be so good as it will endure the whole term, although it be not covered, yet is the lessee bound to reserve it during the term.

Godfrey for the plaintiff, and agreed to all the cases aforesaid. But here the defendant is bound by his obligation, and therefore it differs from the case in 42 Ed. 3. 6. and of Perkins 142. where a diversity is between a waste and a covenant; for if a man makes a lease for years, and by sudden chance waste is committed, this shall excuse the lessee: but if he covenant to leave the house in as good a condition as he found it, if the house fall down by tempest, yet he ought to re-edify it. Also in this case it is a waste in law, although the house were ruinous at the beginning of the lease; for in a waste brought in such case, if he pleads nul waste fait, he shall not give such matter in evidence, but it is onely to excuse him. And with him agreed all the Court, and judgment was given for the plaintiff.

Austin against Courtney.

30 Eliz. In B. R. Rot. 165.

Austin and his wife, as daughter and heir of one Webb, brought a writ of errour against Thomas Courtney to reverse a fine levied in a base court by the said Webb to himself.

Cook assigned these errors, 1, because the fine was levied de uno tenemento, which is not good for the generality, for it may be land, or common, or rent. And in 3 Ed. 4. a plea in bar was rejected, because it was pleaded that one was seized de uno tenemento, for this is uncertain. And in 38 H. 6. an action is brought upon the statute of 8 H. 6. for entry into certain tenements, that is not good, for it ought to be brought of so many acres. The second errour was, because Webb the conusor did acknowledge the land to be his right, whereas it ought to be the right of Courtney the conusee. The third errour was, because the fine was levied in a base court, which prescribes to hold pleas, but they cannot levy fines there, for then the

King shall lose his silver 50 Assis. And so was it adjudged between Bambury and Peres, that a fine levied in Chester which had such prescription, is not good; wherefore judgment was given that the fine should be reverst.

TRINIT. 30 ELIZ.

IRELAND AGAINST HIGGINS. ROT. 403, VEL 43.

In an action of the case the plaintiff declared, that whereas a dog came to the hands of the defendant which belonged to the plaintiff, the defendant did assume to deliver the said dog to the plaintiff upon request, and that the plaintiff had requested him, and he did not deliver the dog, ad damnum, &c. and hereupon the defendant demurred.

Leigh for the defendant. Here is no consideration; for when the plaintiff is out of the possession of his dog, he hath lost his interest in **[94]** him, for a dog is feræ naturæ, and therefore when he is out of possession, he hath no remedy. 22 H. 6. 10 H. 7. 16 Ed. 4. and he cited Fynes and Sir John Spencers case in Dyer, where a trespass will not lye for a hawk. Also, by the grant of omnia bona & catalla, dogs do not pass, nor are tithable nor are assets.

Tanfield, contra. Horses, cows, and all cattel which are most profitable for service of man, were at first feræ naturæ, and so were dogs also: but since by use nothing is so familiar and domestick to man than is a dog, and then he cannot be feræ naturæ; and therefore a trespass will lye for a dog, if he declare his dog, for that word does imply it is his domestick dog; and he much relyed on a book, the roll whereof he had seen. Trinit. 15 H. 7. Rot. 35. where a man justified in a trespass of battery in defence of his dog. And in 2 Ed. 2. Avowry 182. a replevin was brought of a ferret. And in 23 Eliz. Leeks case, where one had judgement to recover great damages for a blood-hound. And as to the case of Fines and Spencer, the reason why the plaintiff had not judgement, was, because he did not shew that the hawk was reclaimed, but after he brought a new action, and had great damages. And at last it was adjudged by all the Court, that the action is maintainable, and judgement commanded to be entred, nisi, &c.

TRINIT. 30 ELIZ.

STONE AGAINST WITHEPOOLE. IN B. R. ROT. 771.

In an action of the case the plaintiff declared, that J. S. was indebted to him for velvet and other things to such a value, and was bound in a bond to pay money for them, and that afterwards the defendant (being his executor) did assume and promise to pay the money. The defendant pleaded that the testator was within age at the time of the making the bond, and hereupon the plaintiff demurred.

Egerton Sollicitor for the plaintiff. A contract made by an infant is not voyd, but voydable; and if the infant at his full age had assumed as the defendant hath, it had been good, and by the same reason the executors assumsion is good, 9 Eliz. 13. where the Lord Gray, being heir to the former Lord Gray, although he was not bound to pay the debts of his father upon simple contract, yet in regard he did assume to pay them, he was made chargeable. And in 15 and 16 Eliz. it is a good consideration where an administrator undertakes to pay debts upon a simple contract: but admitting the executor be not chargeable by law, yet in equity and conscience he is chargeable in Chancery; and when he promiseth in consideration that the plaintiff will not sue him, that is a good consideration.

Cooke. The consideration is the ground of every action on the case, and it ought to be either a charge to the plaintiff or a benefit to the defendant. 17 Ed. 4. 5. where a man promised and assumed to a chyrurgean money for curing a poor man: that was a good consideration; for although it is no benefit to the defendant, yet it is a charge to the plaintiff, and where there is no consideration, there can be no good

action; as where a man promiseth a debt that he never owed, this is voyd. And after, viz. 31 Eliz. it seemed to all the ju-[95]-stices, that the consideration was not good, and therefore the contract voyd; but if goods be delivered to an infant to be re-delivered, if afterwards his executor assumeth to re-deliver them, this is good.

Gawdy, in the 13 H. 6. If a man be indebted in a simple contract, and dye, and his executors assume to pay the debt, it is good: but this seems to be contrary to the law, for it is contrary to that which hath been lately adjudged in the Common Pleas. And Egerton cited a case, 10 H. 6. where an infant brought an action of trespass, and submitted himself to an arbitrement, this shall binde him at his full age; and this was agreed by the Court, but differs much from the case at Bar; for when an infant commits a trespass, he is chargeable in an action of trespass, and shall lose damages: but it is not so here. Wherefore judgement was given, that the plaintiff should be barred.

MICH. 30 ELIZ.

STANTON AGAINST CHAMBERLAIN. ROT. 656.

In an action of debt upon a bond, upon non est factum pleaded, the jury found, that the defendant sealed the bond, and cast it on the table, and the plaintiff came and took up the bond, and carried it away without saying any thing; and if this shall amount to a delivery by the defendant to the plaintiff, was the question. And it was resolved by all the justices, that if the jury had found that he had sealed the bond, and cast it on the table towards the plaintiff, to the intent that the plaintiff should take it as his deed, who took the bond and went away, that had been a good delivery; or that the plaintiff, after the sealing and casting on the table, had taken it by the commandment or consent of the defendant: but because it is found that the defendant onely sealed it, and cast it on the table, and the plaintiff took it and went away with it, this is not a sufficient delivery, for it may be that he sealed it to the intent to reserve it to himself untill other things were agreed, and then if the plaintiff take it, and go away with it without the defendants consent, that will not make it the defendants deed. But it was said, that it might be accounted to be the defendants deed, because it is found that he sealed it, and cast it on the table, and the plaintiff took it, &c. and it is not found that the defendant said any thing, and therefore because he did not say any thing, it will amount to his consent, Nam qui tacet consentire videtur. But to this it was answered, that it is not found that the defendant was present when the plaintiff took it, and if the defendant had sealed, and cast the bond on the table when the plaintiff was not there, and then the defendant went away, and then the plaintiff came and took it away, then clearly it is not the deed of the defendant.

HILL. 31 ELIZ.

BERON AGAINST GOODYNE.

In an ejectment the case was, The King was seized of lands in fee, and a stranger intruded, and the King grants this land to J. S. in fee, and the intruder continues possession, and dyes seized: the question was, if this descent shall take away the entry of I. S.

[96] Johnson. It shall not; for none will affirm that an intruder shall gain any thing out of the King, but that the land shall pass to the patentee, and the continuance of the intruder in possession, and his dying seized, shall not take away the entry; for he cannot be a disseisor, because he gained no estate at the beginning; as if a guardian continues possession after the heir is of full age, he is no disseisor, nor shall gain any estate. And 10 Ed. 3. 2. where a tenant of the King dyes, his heir within age, and a stranger enters, and after the heir is of full age dyes seized, this shall not take away the entry of the heir.

Cook contr. By his continuance of possession he shall be accounted a disseisor, and the free-hold out of the patentee, for another estate he cannot have, for tenant

at sufferance he is not, for he comes in at first by a title, as in the 12 Assi. The donees in frank-marriage are divorced, and the husband continues the possession; and so where a lessee continues possession after the death of the tenant for life, these are tenants at sufferance; and the patentee hath a free-hold in law, which is taken away by descent, and denyed there was any such case as was vouched in the 10 Ed. 3. but compared the case to the 21 Ed. 3. 2. where a fine was levyed sur conusans de droit come ceo, &c. if before the conusee enters, a stranger enters, and dyes seized, the entry of the conusee is barr'd. So is it where an advowson is granted to J. S. and his heirs, and a stranger usurps, the grantee hath no remedy. And if a man deviseth land to J. S. and before he enters, a stranger doth enter, and dyes seized, the entry of the disseisee is taken away; and so it is in our case. But a further day was given Cook to shew cause why judgement should not be given against him.

Hillar. 31 Eliz.

Sutton's Case. In C. B. Rot. 533.

In an ejectment, the jury gave a special verdict, that the defendant (nihil habeas in terra) did make a lease thereof to the plaintiff by indenture, according as the plaintiff had declared, and then the defendant entred on the plaintiff; and whether this entry be good, was the question.

Walmesley for the defendant. Jurors are sworn ad veritatem dicendum, and therefore they shall not enquire of estoppels, because it is not in evidence. But the whole Court was against him, who held that the jury might finde a matter that is not shewed in evidence; for by Anderson, in an assize they may finde a release; although it be not given in evidence; and he and Periam held, that the plaintiff ought to have judgement, for that there was a good lease between the parties, and if rent were reserved, an action of debt would lye.

Windham contr. For it is onely an estoppell between the parties: but the Court is at liberty, and are not estopped, when the truth appears to them; and it is a maxim in law, that he who hath nothing in the land cannot make a lease, and then the plaintiff hath no cause of action. And afterwards, viz. 32 Eliz. Anderson and Periam were expresly for the plaintiff; for whereas it hath been said that it was a lease by estoppell, they held it was not so, for that in debt the rent should be recovered. And Anderson said, If I levy a fine of your land to you for years, if you be put out, I shall have an assize: but Windham was of opinion with Walmesley: wherefore Periam said, we will have the opinion of the other justices in the Exchequer Chamber; wherefore, &c.

[97] Trinit. 30 Eliz.

Perryn against Allen. In C. B. Rot. 611. & 612.

In a debt upon a lease for years, it was found that one Gibson was seised of land in lease for thirty years, and he let the land to Perryn for 19. years rendring 10l. rent, and that afterwards, it was articled and agreed between Gibson and one J. S. that Perryn should have and hold the lands which he had, and also other lands which he had, for terme of 3. years rendring a greater rent, to which articles Perryn at another time and place afterwards agreed, but the intent of the articles and agreement betwixt them, was not that the first terme to Perryn should be extinct. That afterwards Perryn letted this land to the defendant Allen for 17. years rendring rent, and then the three years expired, and Gibson grants his term to J. S. who enters, &c. If this agreement amounts to a surrender, was the question.

Hanam, for the plaintiff. It is not; for to a surrender three things are incident. First, an actuall possession in him who surrenders. Secondly, an actuall remainder or reversion in him, to whom the surrender is made. Thirdly, consent and agreement between the parties; but to all these the plaintiff was a stranger, and therefore no surrender. For if I let land to you for so many years as J. S. shall name, if he names

the years, it shall be good from that time, and not before: but if I let land for so many years as my executors shall name, this is not good, for I cannot have executors in my life time, and when I am dead I cannot assent, so in this case there ought to be a mutuall assent between the lessor and lessee.

Harris cont. It is a surrender, for if he concluded and agreed at another time, or accepted a new lease, it is a surrender. 37 H. 6. 22 Ed. 4. 14 H. 7. and then when a stranger does agree that he shall have other lands and pay a greater rent, this is a surrender.

Anderson. If I covenant with you that J. S. shall have my land for ten years, this is only a covenant and no lease, quod Walmesley concessit. And so if I covenant that your executors shall have my land for a term of years after your death, this is no lease. And all the Court held, that this was not a good lease, for the act of a stranger cannot make a surrender of the terme.

Peryam. You at the Bar have forgotten to argue one point materiall in the case, videlicet. If lessee for 20. years makes a lease for ten years if the lessee for ten years may surrender to the lessee for 20. years. And Hanam said privately, that he could not surrender, for one term cannot merge in the other. And Anderson said, that by opinion of them all, that the lessee for 10. years cannot surrender. But to the other point. All the Judges agreed that it was no surrender. And judgment was given for the plaintiff.

DABRIDGECOURT AGAINST SMALLBROOKE.

In an action of the case, the plaintiff declared that he was sheriff of the county of Warwick, and that a writ came down to him to arrest J. S. at the suit of the defendant, who requested the plaintiff to make Russell, who was the defendants friend, his speciall baily, in consideration of which the defendant did assume, that if the said J. S. did escape, that he would take no advantage against the plaintiff, where-
[98]upon he made Russell his bailiff, who arrested the said J. S. who afterwards escapt from him, and that notwithstanding the defendant had charged the plaintiff for this. And a verdict was found for the plaintiff. And in this case it was agreed, that where a sheriff did make a bailiff upon request of any one, it is reason that the party should not charge the sheriff for an escape, by reason of the negligence of such bailiff: for the sheriff hath security from every one of his bailiffs to save him harmeless: wherefore it is great reason that if upon request he makes a speciall bailiff, that the party should not take advantage of such an escape, but that the sheriff may have his action against him again, upon his promise. And judgment was given for the plaintiff.

HILLAR. 31 ELIZ.

BEALE AGAINST CARTER. ROT. 331.

In an action of false imprisonment, the defendant justified the imprisonment for two hours because the plaintiff brought a little infant with him to the church intending to leave it there, and to have the parish keep it: and the defendant (being constable of the parish) because the plaintiff would not carry the child away with him again, carryed the defendant to prison, all the said time, untill he took the child away with him. And hereupon the plaintiff demurred. And it seemed to the justices that it was no good plea: for although the constable at the common law is keeper of the peace, yet this does not belong to his office, but if he had justified as officer, then perhaps it had been good. And afterwards, viz. Hillar. 33 Eliz. the case was argued again, and then Glanvill said, that it was a good justification, for any person may do it. For if I see A. ready to kill B. I ought to hinder him of his purpose. And in the 22 Ass. 50. the defendant justified because the plaintiff was madd and did a great deale of mischief, wherefore he imprisoned him. And in 10 Eliz. which case I have heard in this Court, the constable took a madd man, and put him in prison where

he dyed, and the constable was indicted of this, but was discharged: for the act was legall, and so here in this case, if the infant had dyed for want of meat, it had been murder in the plaintiff. For it was held in 20 Eliz. at Winchester before the Lord Bacon, if one brings an infant to a desert place, where it dyes for want of nourishment, it is murder.

Gawdy. It was ill done of the plaintiff, but that ought to be reformed by due course of law, for a constable cannot imprison at his pleasure, but he may stay the party, and carry him to a justice of peace to be examin'd.

Wray. Then such matter ought to be pleaded. Quod Gaudie concessit.

Fenner. If he had pleaded that he refused to carry the infant away, then it had been a good justification, for a constable is conservator of the peace, but because it was not so pleaded, the plea is naught; but the Judges would not give judgment, for the ill examples sake, and therefore they moved the parties to compound.

[99] PASCH. 31 ELIZ.

SALE AGAINST THE BISHOP OF LICHFIELD. IN C. B.

Sale executor of J. S. who was grantee of the nomination and presentation to the archdeaconary in the county of Derby, brought a quare impedit against the Bishop of Lichfield, and declared of a presentment and disturbance in vita testatoris, & quod ecclesia vacavit & adhuc vacata est. The defendant pleaded plein d'incumbent, before the writ purchased, and judgment was given for the plaintiff. And it was moved, if a quare impedit does lye of an archdeaconary, for it is but a function or dignity, and therefore a quare impedit will not lie of an office of a commissary, but the 24 Ed. 3. 42. is express in the point. And 30 Edw. 3. 21. a qure impedit did lye of a priory. And therefore notwithstanding this exception, judgement was given for the plaintiff. But there were two other doubts in the case. First, if a quare impedit will lie for an executor for disturbance done in vita testatoris, and that by the statute of 4 Ed. 3. 7.

Snigge. The action will lye by the executors, for in all cases where damages are to be recovered, they shall have an action by that statute. 11 H. 7. 2. An action of trespass was brought for taking of goods in the life of the testator, but no action will lie for entrie into land in the life of the testator, for it ought to be such an action as will survive in damages, and may be a damage to the executor 7 H. 42. An ejectement lies for executors, upon an ejectment in the life of the testator. And if an ejectment be maintenable in which a terme shall be recover'd, it shall be also maintenable in a quare impedit, in which a presentment may be recovered.

Drew cont. At the common law executors have no remedy for a personall wrong, quia moritur cum persona: for upon the death of the testator, executors have no remedy for arrears of rent at the common law, but only the statute of 32 H. 8. And it cannot be that the executors in this case are within the statute of 4 Ed. 3. For that statute intends onely to remedy such things as are avaylable to the testator, and are assets to pay debts: and although executors may have a quare impedit, that is intended of a disturbance, fait al eux, but contra, if it be done in vita testatoris.

Walmesley. I conceive no actions will lie. For the statute gives an action for the taking of goods and such like things, but here is no taking, but only a disturbance, which may be done by parol.

Perryam Justice cont. For the statute says that they shall have an action of trespass for a trespass done to their testator, and not for taking goods, so that the taking of goods is but by way of resemblance, and not that they shall have an action of trespass for taking of goods onely.

Windham, and Anderson agreed with Perryman, and whereas it hath been said, that this cannot be assetts. Put the case that the testator had judgment to recover damages, shall not that be assetts? and why may not the damages here recovered be assetts, and why shall not the grant of the advowson be assetts in the hands of the executor as well as in the hands of the issue. And so was the opinion of the Court.

[100] 32 Eliz.

Foster and Wilson against Mapps. In B. R. Rot. 71.

The case on a speciall verdict was thus, Mapps the defendant made a lease of the parsonage of Broncaster by indenture, and covenanted by the same deed, to save the plaintiff harmless and indemnified: and also all the proffits thereof and premisses, against Philip Blount, the parson of Broncaster; and hereupon a writ of covenant was brought against Mapps, and the breach assigned was, that Blount had entred and ejected the plaintiff. And one point was, if this shall be accounted the deed of the defendant, because the defendant delivered his part of the indenture to the plaintiff as his deed, but the plaintiff did not deliver the counterpart to him. But the opinion of the Court was, that this was a good deed of the defendants, and Gawdy said, that the safest way had been to deliver his part as an escroll to be his deed, when the plaintiff delivered the counterpaine: but a great doubt was made in this case, because it was not shewed that Blount entred by a title, and then he shall be taken to have entred by wrong, and so the covenant not broken, for to save harmeless is only from legall harmes, as it is in Swettenhams case Dyer 306. Where the warden of the Fleet suffered a prisoner to escape, and took a bond of him to save him harmeless, and then the warden was sued upon an escape, and thereupon he sued the obligation, and adjudged that the bond was not forfeit, because the partie was not legally in execution, and therefore the warden could not be damnified for the escape.

Padsy cont. The diversitie is where the covenant is generall, and where it is speciall, for in this case it being speciall to save harmeless from Blount he ought to defend against him his entry, be it by good title or by wrong, and so is Catesbies case. Dyer 3. 28. Where the lessor covenanted, that the lessee should injoy his terme sine ejectione vel interruptione alicujus, the lessee brought an action of covenant because a stranger entred, and did not say he had any title, and judgment was given for the plaintiff.

Gawdy. The covenant is broke. For if Blount disturbe him so that he cannot take the proffits, this is a breach of the covenant, for hereby the plaintiff is damnified. 2 Ed. 4. 15. where the condition of a bond was, that the obliger should warrant and defend the obliged for ever, and against all, and the defendant pleaded, that he had such a warrant, and there it was held by Danby to be no plea, because he cannot warrant unless the other be impleaded. And there it was said by Danby and Needham, that if the obligee be outed by a stranger, who hath no title, the obligation is forfeit by reason of this word defend.

Wray agreed, and said, that this case was not like to the case of 26 H. 8. 3. where the lessor covenanted to warrant the land to the lessee, for there he shall not have a covenant, if he be wrongfully outed; but our case is to save harmeless, which is of greater force than to warrant, for to warrant land is only upon the title, but here, be the lessee outed by wrong or by title, yet is the covenant broken, to which the other justices agreed.

Fenner voucht. 18 Ed. 4. 27. where a man is obliged to save J. S. **[101]** harmless against me, if I doe arrest J. S. although wrongfully, the obligation is forfeit, which the other justice denied. And at last judgment was given for the plaintiff.

Pasch. 33 Eliz.

Elmer and his Wife against Thatcher. In C. B. Rot. 1125.

Statut. Westm. 2. *cap.* 4.

In a quod ei deforceat of a third part of an acre of land whereof the wife was tenant in dower: the defendant confesed she was tenant in dower, but shewed how she committed waste, wherefore he brought his action of waste, to which she appeared

and pleaded nothing, for which he had judgment to recover. The plaintiff said that no waste was committed, and the defendant demurred.

Owen for the defendant. A quod ei deforceat, lies not in this case, for such writ is grounded upon a recovery by default in a reall action, but a waste is a meere personal action. And therefore in the 2 H. 4. in a waste against the husband and wife, the wife shall not be received: also it will not lie in this case, because here is no default within the intent of the statute, for the statute intends to relieve defaults after appearance, and therefore all the judgment in this writ is that the recovery was by default, and if there was a default in pleading, it is a default, but not within the statute.

Glanvill cont. No waste is committed, and so the recovery shall not bind, for it appears in the 8 Ed. 4. by West. that this action was provided instead of a writ of right, and there is no question but a writ of right will lie here, and this writ is of the same nature. And Mr. Plowden in his reading said, that this action will lie upon a recovery upon a writ of waste as well as in other actions, for the recovery is not upon the inquiry of the jury, but upon default. And it is also a reall action 7 Ed. 3. 28 Ed. 3. 30. If the husband make default herein, the wife shall be received.

Anderson. There is no question but this action lies upon a recovery in waste, but if this be a default within the statute is a doubt, for if this should be suffer'd, it were very mischievous: for then contempts shall be favoured, which was never the intention of the statute, and therefore it will not lie where there is a default after appearance.

Walmesley, of the same opinion, for this case differs much from the Statute of Gloucester, for this statute gives remedy to a third person upon default of the particular tenant, and therefore upon this statute the intent of the partie, who makes default, is more regarded, than the manner of the default, and therefore it shall be taken largely. But here is default in the party himself, and he shall have no favour against his willfull default, for every nihil dicit, is a confession of it self, for thereupon it is supposed that nothing can be said.

Windham. I hold that a quod ei deforceat will not lie in a writ of waste, for the inquiry of the jury is the cause of the judgment. But he agreed that default within the statute is intended such default, that in it self is the cause of the judgment, but here the judgment is given upon contempt and refusall of the party and therefore no favour.

Perryam. This action cannot be compar'd to a writ of right which is grounded upon the right, and not on the judgment but the form in the quod ei deforceat is set down in the statute which ought to be observed, and the statute gives this action upon a default, and here is no **[102]** default, for it cannot be a default where the partie appears and hath no day in Court, but he doubted much if it lay in a writ of waste, because the damages are the principall: but as the case is here, it will not lie. And to prove that a nihil dicit is a confession he cited Pepys's case in the Comentaries 438. And at last judgment was given that the writ would not lye.

And Cooks 1. Inst. 355.

PASCH. 35 ELIZAB.

JAMES AGAINST PORTMAN.

William James and Thomas James joyntenants for life of a lease made by Portman, William James doth assent, covenant and agree that Thomas James occupy all the land alone, and sow it with his own corn: after the land is sowed Thomas James dyes, William James the survivor grants the corne to Portman, who takes it, and the plaintiff as executor to Thomas brought an action of trespass.

Ewens, for the defendant. One joyntenant cannot make a lease to his companion, no more than one may infeof the other, by reason they have joynt possession 10 Ed. 4. 3. 2 R. 2. Extinguishment 3. Also the words here are not sufficient to make a lease, but admitting this, yet the survivor shall have the corn of that part which belongs to him, for by this lease the joynture is severed, and then the survivor shall have that which grows on his part: for if two joyntenants sowe their land, and one

of them letts his moytie for years; and he, who did not let, dyes, the other shall have the corn as survivor.

Pyne cont. Although one joyntenant cannot infeof another, because he cannot make livery, because he hath possession before, yet may he release to his companion, and so may he make a lease for years, for there is no need of any livery, and by the 22 H. 6. 43. If one joyntenant infeofs another, this shall enure by way of confirmation. And 14 H. 6. 10. One joyntenant may put out his companion by this means, for he may clayme a lease from him, and then a release, and if it be a good lease, then the executors shall have it.

Popham. The action is good, for one joyntenant may make a lease to the other, although he cannot infeof, for a lease is but a contract. And 11 H. 6. 33. one joyntenant commanded the other to occupy all, and in a trespass he was compelled to plead this as a lease, and then if one joyntenant does sow all and dyes, the other shall have the corne by survivor: and it is not as in case where a man hath an estate determinable upon uncertainty, for there his executors shall have the corn, but in our case, the survivor had contracted with his companion, and thereby had bound himself not to meddle with the land, and the other bestowed great costs in manuring and sowing the land, and therefore the executors shall have the corn.

Fenner agreed, but doubted whether one joyntenant could make a lease to the other: but said, that by the contract he had excluded himself from the proffits; and by the 39 Ed. 3. 27. one joyntenant may have an account against the other. And he said, that if I agree that you shall sow my land with me, you shall gain no interest in the land, and yet you shall have the corne. And one joyntenant may distreyn for himself, and as bayly for the other. And the cause was adjourned: and afterwards viz. Hillary 36 Eliz. the case was repeated.

[103] And Gawdy said, that if there be two joyntenants, and one grants to the other that he may sow the land, yet may the other occupie with him, for these words do not transfer any sole interest, but if he sayes that he shall occupy all the land, and shall sow it solely, this does exclude him from having any interest with him.

Popham. Agreed, because this is but a contract, and so of a lease for years.

Gawdy. If one joyntenant sayes to the other, that he will not occupie the land with him, or that he will not put in his cattle, this does not transfer any interest, but that he may occupie with him, and so in this case, if it had not been said that he should occupy solely.

Popham of the same opinion: for where he sayes he will not occupy, the words are in the negative, which will not exclude him of his interest, but in the case at Bar they will, because they are in the affirmative so. That he shall occupy the land solely. And judgment was given for the plaintiff.

PASCH. 3 ELIZ.

WOODWARD AGAINST NELSON. IN B. R.

Woodward, parson of Wotton in consideration of 120l. payd by Bretman, one of his parishioners, did accord and agree with him, that he and his assignes should be discharged of tythes during the time that he should be parson. Bretman made a lease to Nelson, Woodward did libell against him for tythes, and Nelson prayed a prohibition upon the said contract. And if this was sufficient matter for a prohibition was the question, because it was by word only, and without writing, which amounts only to a cause of action upon a promise for Bretman, but no action for his lessees, neither can this amount to a release of tythes, for as tythes cannot be leased without deed, so they cannot be released or discharged without deed.

Gawdy Justice. Tythes cannot be discharg'd without deed, unless by way of contract for a sum of money, and he cited the 21 H. 6. 43.

Fenner: For that year in which the discharge was made, it was good by way of discharge without deed, because the parson for that year had as it were an interest, but such discharge can have no continuance for another year, for default of a deed; and so a promise being no discharge, it is no cause of a prohibition. But Gawdy,

held as afore. And about this time Wray Chief Justice dyed, and Popham succeeded, and the same day he was sworn, Cook moved this case again. And the Court held that the agreement being by parol was not good: and Fenner, then, said that without writing the agreement could not be good between the parties but for one year. And the Court awarded a consultation. But upon search made, no judgment was entred in the roll.

[104] TRINIT. 35 ELIZ.

DR. FOORD AGAINST HOLBORROW. IN B. R. ROT. 367.

In an action of debt upon a bond, the case was, Dr. Drury (to whom the plaintiff was executor) made a lease to Holborrow of the mannour of Golding for years, and Holborrow the lessee entred into a bond, that if he, his executors or assigns, did pay to Anne Goldingham, widow, the sum of 20l. for 17 years, if the said Goldingham should so long live, and so long as Holborrow the lessee, or any claiming by or under the said Holborrow shall or may occupy or enjoy the said mannour of Goldingham; and then Holborrow surrendred his lease to the obligee, prætextu cujus the defendant pleaded, quod non occupavit, nec potuit occupare, &c. wherefore he did not pay the said sum to Anne Goldingham, and the executor of the obligee brought an action of debt upon this obligation.

Johnson for the defendant. The term is gone, for he cannot occupy after the surrender, and also the obligee is a party to the cause why it is not performed, and therefore he shall take no advantage, 4 H. 7. 2. But the whole Court was against him, for he to whom the surrender is made, cometh in quodammodo by him, and is his assignee, for he shall be subject to the charge that was before the surrender; and also the defendant shall be bound by these words in the obligation, viz. so long as he shall or may: and although these words were not inserted, yet he shall pay the annuity: for where the first cause does commence in himself, he shall not have advantage thereby: but otherwise, where he is not party to the first cause. As if two joynt-tenants with warranty make a partition, the warranty is gone, because they are parties to the act which made the extinguishment: but if one makes a feoffment of his part, the warranty as to the other remains, 11 Ed. 4. 8. and in the case at Bar, the obligor made the surrender, and therefore he is party, and the first cause: and there is a diversity when the thing to be done is collateral, and when not: for if a lessee does oblige himself to do a collateral thing, as payment of money, there he ought to do it, although that he surrender: for although the obligee do accept of the surrender, yet no act is done by him to hinder the performance of the condition: but where the obligee does any act to hinder the performance of the condition, the condition is saved: as if the lessee be bound to the lessor to suffer J. S. to enter into a chamber during the lease, and he surrenders to the obligee, who will not suffer J. S. to enter, the obligation is saved, and judgment was given for the plaintiff.

36 ELIZ.

BEDFORD AGAINST HALL. IN B. R.

In an action of covenant, wherein the plaintiff declared, that the defendant did devise and grant to him certain land, with all his goods contained in a certain inventory for 20 years, and said, that in the inventory, amongst other things, were five cows, which the de-**[105]**-fendant seized, and that one J. S. took them away as his proper goods, as indeed they were, and hereupon he brought this action.

Fenner. The action will not lye, for no interest in the cows doth pass to the lessee by this lease, neither was there any right to them in the lessor: as if I demise to you the land of J. S. by these words, demisi & concessi, and you enter, and J. S. re-enters, no covenant lyes against me. And so in the 11 H. 4. a prebend made a lease for years, and resigned, now is the term of the lessee quite destroyed; and if after he be outed by a new prebend, yet he shall have no action of covenant. And so

is it, 9 Eliz. Dyer 257. Lessee for life makes a lease for years, and dyes, the lessee shall not have a covenant if he be outed by him in the reversion, because he is not in as a termor at the time of the disturbance. But if in the principal case the lessor had been possest of the goods, although by a wrong title and the owner had seized them, then a covenant would lye. And so if a disseisor makes a lease, and the disseisee re-enters, the lessee shall have a covenant.

Gawdy. If a man lets lands wherein he hath no estate together with his goods, although the lands will not pass, yet the goods do; and if a man lets goods for a year, and re-takes them within the year, no covenant will lye, for the property was never in the lessee.

Clench. If a man lets anothers goods to me by deed, if I seize them, and the owner re-takes them, a covenant will lye, and so will an action on the case, if it be without deed, 42 Assi. 8. If I be in possession of anothers goods, and sell them, a deceit lyes against me by the vendee; and so is the book of Ass. 42. 8. contra, where the vendor hath not possession at the time of the sale. And if I sell goods by deed which are in my possession, and they are evicted by the right owner, a covenant will lye: contra, if I have not possession at the time of the letting them, and if I let land, and J. S. enter before the lessee, the lessee cannot have a covenant, quod nota. Et adjournetur.

35 Eliz.

Scarret against Tanner. In C. B. Rot. 1458.

In a false imprisonment, the defendant justified, that he was high constable of the hundred of E. in the county of Salop, and that the plaintiff made an affray within the said hundred upon one Warin, who came presently to the defendant, and told him of it, and took his oath that he was in fear of his life: whereupon the defendant came to the plaintiff, and arrested him, and carried him to prison until he could finde sufficient sureties of peace.

Glanvill. A constable cannot arrest one to finde surety of the peace upon a complaint made to him, unless he himself sees the peace broken, 7 Ed. 4.

Kingsmill contr. For he is at common law conservator pacis, 12 H. 7. 18. and how can he keep the peace, if he may not compell them to finde surety. 44 Ed. 3. Barr. 202. If a man that is threatned complain to the constable, he may compell the party to finde surety for his good behaviour, and may justifie the imprisoning him, or putting him in the stocks, 22 Ed. 4. 35. 10 Ed. 4. 18. where a constable in such case may take a bond.

[106] Anderson. I grant that constables are keepers of the peace at the common law, and are to keep the peace as much as in them lyes; and that is, to take men that they finde breaking the peace, and to carry them to a justice of peace to finde surety: but the constable cannot take security, nor recognizance, nor bail, for he is not an officer upon record; and if he do take a bond, how shall he certifie it, and unto what Court?

Walmesley contr. who said, that the constable might take security by bond, although not by recognizance or bail.

Beaumond. A constable may put him that breaks the peace within the stocks, but it must be where the breach of peace is committed in his view, for he hath no authority to take an oath that a man is in fear of his life, and then the foundation of his justification doth fail.

Owen. The oath is not material; for although he cannot take such oath, yet his taking of surety is good; and before justices of peace were made, the peace was preserved by constables; and the statute that creates justices, does not take away the power of constables, and therefore he may justifie. Sed adjournatur.

Pasch. 38 Eliz.

Worsley against Charnock. In C. B.

In an audita quærela the case was thus, The father and son were bound in a statute-merchant to Charnock, who sued out an execution against them, and their lands were severally extended; and they supposing that the statute was not good, because it was not sealed with both their seals, according to the statute, they both brought a joynt audita querela; and whether they could joyn in this action, or not, was the question.

Warburton. They shall not joyn; for in all cases a man must make his complaint according to his grief: and here their grief is several, as if two men be imprisoned, they shall not joyn in a false imprisonment. The same law in a battery, 8 Ed. 4. 18 H. 6. 10 Ed. 4. If J. S. hath goods of divers men, they shall not joyn in a replevin; and 33 H. 6. two men shall not joyn in an audita quærela, unless the land in execution is in them joyntly; and 29 Ed. 3. two joynt-tenants infants alien, they shall have several writs of cum fuit infra ætatem: but he confessed the case in 30 Ed. 3. Fitzherbert, audita quærela, where two men were in execution, and the conusor did release to one, and then to another by another release, yet both shall joyn in an audita quærela; but this is not law: and besides, they cannot recover damages joyntly, by reason of their several vexations; and this action being personal, damages cannot be severed. Vid. 2 Ed. 3. Execution 45. 9 Ed. 4. 31. 12 Ed. 4. 6.

Harris contra. And as to the last reason, the book in the 20 of Elizabeth is, that no damages shall be recovered in an audita quærela, which (if it be law) then is the doubt at an end. And whereas it hath been said, that they shall not joyn because their griefs are several, methinks there is no reason, but that if he that survives shall be charged with the whole, that they shall joyn also in their discharge; for if their charge be joynt, their discharge shall be joynt also. And in the 34 H. 6. and 30 Ed. 3. where an audita quærela may be brought joyntly: and he resembled this to the case of a monstraverunt, where if a tenant **[107]** in antient demesn be distreyned, all the tenants shall joyn, because the grievance to one may be a grievance to all the rest.

Yelverton of the same opinion. The suing of the execution was the cause of the audita quærela, but not the ground, for the ground was the statute-merchant, and therefore it is here brought according to the statute.

Anderson. If two men do me several trespasses, yet I may have a joynt action against them, and the death of one of them shall not abate the writ: but if two are plaintiffs in a personal action, the non-suit of one shall be the non-suit of the other: and in our case the statute was joynt, and also the execution: then if all the writs are so, the audita quærela which is to discharge them, shall be joint also, especially in this writ where they are as it were defendants; and therefore he resembled this case to a writ of errour, or an attaint brought by two joyntly, and one is non-sued, yet this shall not abate the writ, because they are in a manner defendants.

Walmesley contr. The action ought to be brought according to the cause of the wrong, and the wrong begun in suing the execution, and that was several, and therefore the audita quærela ought to be several also: but if this statute had been good, and had been discharged by release or defeasance, then the audita quærela might be brought joyntly, for then the ground of the execution was joint: but here is but a colourable statute, and the cause of the action is not begun before the execution sued.

Owen and Beaumond agreed: and after by assent of Anderson, judgement was given that they ought to have several writs.

Note, Pasch. 36 Eliz. in B. R. & Rot. 323. or 521. between Curteise and Overscot. If A. did recover against B. by two several judgements, whereby B. is in execution, it was adjudged that he shall not have one audita quærela, but two several writs.

PASCH. 37 ELIZ.

SAWER AGAINST HARDY. IN B. R. ROT. 254.

In an ejectment, the case was this; A woman was lessee for forty years, sub hac conditione, si vixerit vidua & inhabitaret super primissos: the woman dyed before the lease expired, and her executors entred, and being outed, they brought this action; and the question was, if the lease were determined by the death of the woman, by limitation, or by condition, or if it yet remain.

Gawdy. It cannot be a condition, because the sentence is imperfect; for if a man makes a lease for life, rendring rent, sub hac conditione, that if the rent be behind, without any further words, this cannot be a condition, by reason of the imperfection of the sentence; and without doubt, if a lease for years be made to a woman, if she so long live, and inhabit the premisses, this is a limitation, so that the term is ended by her death.

Clench. It is neither condition nor limitation; for a condition ought alwayes to be a full and perfect sentence, and not uncertain. As a lease for years, upon condition that the lessee shall pay 18l. at the house of the lessor, this is a full sentence: but a lease made, rendring rent, and if it be behind, (and no more said) this is no condition. And in all cases where these words, quod si, do make a condition, it is re-[108]-quisite that these words, quod tunc, do ensue. Neither can it be a limitation, because the words, quod si, spoyl the sentence. And Popham was also of opinion, that it was neither condition nor limitation: but if the words had been sub conditione quod tamdiu vixerit & inhabitaret, &c. this is a perfect sentence, and by her death, or not inhabiting, the estate might be determined; and he put this difference, that if a lease had been for 20 years, si tamdiu vixerit super præmissos, the lease had been determined by her death: but if a lease had been for 20 years, si tamdiu in habitaret, quamdiu vixerit, vel durante vita super præmissos; there if she dyes within the term, yet the term continues, for in the first case the limitation goes to the interest, and in the other to the time; and judgement was given, that the plaintiff should recover, for that the term continued.

MICHAELM. 37 & 38 ELIZ.

MARK IVES CASE. IN B. R.

In a debt upon a bond the condition was, that if the obligee should go to Rome, and return from thence again before the 5 of July after the date of the bond, that the obligor should pay to him 20l. upon the 20 day of July at Pauls. And it was moved by Williams Serjeant, that if the obligee returned within the time, whether he ought to give notice of his return to the obligor, for otherwise by his secret return he may make a forfeiture of the obligation; for if the obligor of necessity be to tender this money without notice of his return, inconvenience would ensue; for perhaps the obligee is not returned at the time the money is due, and then the tender is in vain, and the law will not compell a man to make a tender, unless it be to some purpose, and therefore the obligee ought to give notice, to the intent that the obligor may know whether the money be due to him or not. And it is like a mortgage upon condition, that if the mortgager does pay 20l. before Michaelmas at Pauls, that then, &c. here the mortgagor ought to give notice at what day before Michaelmas he will tender the money, or otherwise he cannot enter, for the time that the law prescribes to make the tender is the last instant before Michaelmas; and if the mortgager will make his election to tender it before the day, he ought to give the mortgagee notice thereof. And the case of one Gurney was cited by Cook, Adjudge 27 Eliz. where a lease was made for years, and the lessor made another lease for years, to commence after the surrender, determination, &c. of the first lease, and then a private surrender is made to the lessor of the first lease, the second lease shall not begin untill the lessee hath notice of the surrender of the first lease. But Tanfield said, that the case was ruled contrary, and that the lease did begin presently without notice, (ideo quære) and as

to the principal point, the Court was divided. But Fenner said, that if the obligee should give notice, perhaps the obligor will not be found, and therefore good reason that the obligor should make tender to the obligee at his peril.

[109] TRINIT. 36 ELIZ.

ESCOT AGAINST LANRENY. IN B. R.

In an action on the case the plaintiff declared that the Lord Barkley by his indenture, dimisit and ad firmam tradidit totam firmam suam tolnetum & proficuum nundinarum & dierum fœrialium infra manerium & Bergum de Thetbury. for 21 years, and that the defendant had disturbed and hindred him, from taking of divers pieces of wool infra manerium & Burgum, prædict. &c. and after issue joyned, exception was taken to the declaration: because he declared of a demise made by the Lord Barkley, and did not set forth, that the Lord Barkley was seised at the time of the demise 7 H. 7. 3. 34 H. 6. 48. But the exception disallowed by all the Court, because the plaintiff in this action is to recover damages only, and the right or title of land does not come in debate, but contra, if it were in such action where the right of the toll did come in debate, and to prove this Glanvill cited 20 Assis. 3. 47 Ed. 3. and 33 H. 6. and upon this reason he said that the plaintiff of necessity is not bound to set forth the market day, nor the quantity of the toll. 34 H. 6. 48. Where it was pleaded that J. S. made a lease to him and did not shew that he was seised, and yet held good.

Clench took another exception, because he did not set forth that toll was to be payd by common usage, for no toll is due for hens or geese, or for many other things of such nature, and so it might be that toll was not due for wooll.

Fenner was of the same opinion, but Popham contra, who said that the plaintiff had declared that the defendant had disturbed him from the toll of divers pieces of wooll, and by that is implyed, that toll ought to be payd for wooll. And at another day judgment was given for the plaintiff.

PASCH. 36 ELIZ.

SACKFORD AGAINST PHILIPPS. IN CAMERA SCACCARII. ROT. 484.

In a debt, this case was moved by Williams Serjeant. A. is indebted to B. in 10l. upon a bond, and R. did promise to B. that if he would forbear A. that if A. did not pay him, he would, B. for non-payment by A. does recover so much in damages upon the assumpsit against R. If in debt upon this obligation against A. A. may plead this recovery in bar.

Walmsley, He cannot, for he is a stranger to the recovery (ideo quære:) and it was assign'd for errour that it was alledged in the declaration, that the defendant did promise to pay the 10l. before Michaelmas, in consideration the plaintiff would forbeare to sue A. and that he hath forborn & adhuc abstinet, and does not say that he made request as he ought to have done, but the Court held it was well enough, and there is a difference when the defendant does promise to pay generally and at a certain day named, there the plaintiff ought precisely to alledge a request made in certain: but when the defendant promiseth to pay at a day certain, he is bound to pay it at his perill without request, and therefore to alledge quod sæpius requisitus, is sufficient without alledging a speciall request, otherwise it is if the defendant assume to **[110]** pay it upon request, for there it ought to be specially pleaded. Another errour was because the consideration was that the plaintiff should forbeare to sue A. and does not set forth for how long time, for perhaps the forbearance was but for a quarter of an houre.

Peryam. The consideration upon which an assumpsit is grounded ought to be of value, but of what value is it, where the forbearance is but for half an houre?

Fleming. By his promising not to sue, he is ingaged never to sue.

Peryam. There is great difference between a promise not to sue, and a promise

to forbeare to sue, for a promise not to sue excludes him from suing at all, but a promise to forbeare to sue, is only to forbeare for a time; so that notwithstanding such promise he may sue after; and it being not here exprest how long he will forbeare, there is no consideration.

Walmesley. There is a difference when the defendant speaks the words, and when the plaintiff. For if the plaintiff says I will forbeare to sue you, so you will promise to pay me, and upon this the defendant makes a promise accordingly, the plaintiff in this case ought to forbear to sue him for ever. But if the defendant only speaks the words, as here he does, If you will forbeare to sue, I will promise to pay you, and the plaintiff agrees and forbeares a certain time, yet he may have his action afterward, sed adjournatur.

PASCH. 38 ELIZ.

STROUD AGAINST WILLIS. IN B. R. ROT. 66.

In debt upon a bond, the condition was: if the obligor shall well and truly pay the rent, or sum of 37l. yearly at two feasts according to the tenure and true intent of certain articles of agreement intended and made between the obligor and obligee during the terme therein mentioned, that then &c. The defendant pleaded that these articles ut supra, contain that the said Stroud the obligee, dimisit & ad firmam tradidit to the defendant, omnia talia domus tenementa & terras in parochia de Petminster, de & in quibus, the sayd Stroud hath an estate for life by copy according to the custome of the mannor. Habendum to the defendant for 21 years, if Stroud should so long live, rendring to the said Stroud during the said terme 37l. to be paid at the Castle of Canton; and pleaded further that at the time of the making the said articles, the said Stroud had not any estate in any lands, houses &c. in Petminster aforesaid, for the term of his life or by copy. And upon this plea the plaintiff demurred, and judgment was given for the plaintif in the Common Pleas, and now was removed by writ of errour. And in this case were two questions. First, if nothing passe by these articles, and so the reservation of the rent is also voyd. Secondly, if the obligation for payment of the said sum be also voyd; and it was said, that this could not be payable as a rent upon the 14 H. 4, & 4. 20 Ed. 4. 20 H. 6. 23. for no rent is reserved, because there is no land out of which it can come, and then the obligation is also discharged. 2. Admitting the rent is not payable as rent, then whether it be an estoppel to plead (as here is done) against the articles, and therefore, they took a difference where the recitall is generall, and **[111]** where not; as if A. be bound to infeof me of all his lands of the part of his mother, and he hath no lands of the part of his mother: but otherwise if it were to infeof me of Black Acre, for he shall be estopped to say that he had not Black Acre, and so here he shall be estopped to say, that there are no articles: but he may plead that he hath no land by copie: Cook 2. Rep. 33. 6.

Fenner. When a man makes a voyd lease, rendring rent, the reservation is also voyd, because the land is the consideration and recompence for the rent: but where a man reserves rent upon a grant or lease, which grant and lease are good, but the thing out of which the rent is issuing cannot be charged with the rent, there the reservation is good, as where a rent is reserved out of an advowson or menaltie, but in the case at Bar the lease did never begin, and therefore rent shall not, then is it to be considered whether the rent is to be payd by reason of the bond, as a sum in gross or not, and as to that matter the condition of the bond is to pay the rent according to the true meaning of the articles, which is, that if the lessee have not the land, the lessor shall not have the rent, therefore it shall not be paid as a sum in gross.

Popham cont. But he agreed that the reservation was voyd, for if no land do pass, no rent is reserved, and the reservation only does not make any estoppell and he took a difference upon the 14 Ed. 4. A man makes a lease generally, and the lessee is bound to pay the rent in such manner as it was reserved, there such rent ought to be demanded, otherwise the obligation is not forfeit, and the demand ought to be upon the land; but if such lessee for years do oblige himself to pay the rent at a collaterall place out of the land, there he ought to pay it at his perill without any demand, for now he payes it in another nature than as rent; so here if the payment had been limited at a place out

of the land, the obligor is bound to pay it, although nothing were demised to him, for by the bond he hath made it a sum in gross. And it is altered from the nature of rent upon the first reservation, and he is bound also to pay the rent or sum, and if this be any of them, he must pay it: as to the second point: he made this difference. A. is bound to J. S. to release to him all his right which he hath in the land descended to him, on the part of his mother; there, in debt upon this bond, the obligee cannot plead that he hath no right descended to him on the part of his mother, but must release at his perill. But if he binds himself to infeof the obligee of all the land which he hath by descent of his father, there he may plead that he hath no land from his father: for all may be released, although the releasor hath no right: but a feofment cannot be made of land which a man hath not.

Pasch. 38 Elizab.

Holcombe against Rawlins. In B. R. Rot. 401.

In a trespass quare clausum fregit, with a continuando from the 31 Elizab. to the 36. the defendant pleaded that J. S. was seised in fee and made a lease to him &c. The plaintiff replyed, that long time before J. S. was seised, he himself was seised, untill the said J. S. did disseise him; and J. S. being so seised did make the lease to the defendant for years, whereupon the plaintiff reentered.

[112] Tanfield. It appears by the plaintiff's replication that the defendant was in under the title of J. S. viz. the lessee of the disseisor of the plaintif, and therefore he cannot be a trespassor to the plaintiff, notwithstanding his regress. 34 H. 6. 30. 37 H. 6. 35. 2 Edw. 4. 17. 13 H. 7. 15.

Atkinson contra. At the common law the disseisee being out of possession shall not recover any damages, but only against the disseisor, and not against any other that comes to the land afterwards, and for this cause the Statute of Glocester was made. But at the common law when the disseisee re-enters, he is remitted, as if he had not been out of possession at all, and he shall have a trespass against the meane occupiers as in the 4 H. 7. a man was restored to his land by Parliament, as if he had never been out of possession at all, and he shall have a trespass against the occupiers that are in by title, as well as here he had against the Kings patentee.

Gawdy. If a disseisor be disseised, and the first disseisee enter, he shall have a trespass against the second disseisor.

And Popham and Fenner agreed, but Clench cont. But at last adjudged for the plaintiff. vid. Cook. 2. Rep. fol. 57. Lydfords case, to the contrary.

Pasch. 37 Eliza.

Wiseman against Baldwin. In B. R. Rot. 341.

In a writ of errour to reverse a judgment given in the Common Pleas, the case was thus. Richard Baldwin did demise his land in taile upon condition, that the devisee, should pay to J. S. 20l. and if he failed of the payment, that then the land should remain to J. S. and his heires for ever, and whether this be a condition in law, that the heir shall take advantage of, or a limitation of the estate, so that J. S. shall take advantage, was the question.

Gawdy. It is a limitation and not a condition as is apparent in Dyer, Wilfords case 7. 128. and Newis and Scholasticas case in the Comentaries, and there is great diversity between an estate in law, and a devise, in which the intent of the devisor is to be observed, and here if this shall be taken for a condition, the intent of the devisor is defrauded.

Clench agreed. For this should be as a new devise to J. S. and not as a remainder, as a devise to a monk, the remainder to J. S. the remainder is not good, as a remainder, but as a new devise.

Fenner of the same opinion, and said, it had been so adjudged in this Court in an attournies case of Devonshire, and also in Sir Edward Cleeres case.

Gawdy. The received opinion of all learned lawyers hath been such as hath been said, viz. that to the end the intent of the devisor should be observed, it shall be a limitation. Then I put this case. A man deviseth his land to J. S. upon condition, and for non-payment, he devises that his executors shall sell the land, if J. S. faile of the payment, it is cleere that the executors may sell the land.

Godfrey. I agree, because the executors have nothing devised to them, but only an authority given them by the will to sell.

Gawdy. But when the executors have sold, the vendee is in by the devisor, and then it is no other than a devise to one in fee on condition **[113]** of payment, &c. and if he fail, then to another. And the three justices agreed; but because the Chief Justice was absent, it was adjourned to another day, at which time Fenner said, that he had spoken with Owen, one of the Justices of the Common Pleas, who said, he never agreed to the judgment, but in case of a perpetuity. And therefore the judgment in the Common Pleas was reverst.

The Earl of Lincolne against Fisher.

The steward of the leete being in Court, did say to Fisher who was resident within the precinct of the leet, that he must be sworn for the Queen to make presentments at the said Court. To which Fisher replyed, In saying I ought to be sworn, you lie. For which Fisher was fined at the Court 20l. And the earl who had the leet brought his action for the same.

Yelverton. The action will not lie, for he is not finable for such words, for they are no disturbance to the Court, nor hindrance of justice: for this word, you lie, in ancient speaking is no more than to say, you do not say true.

Gawdy agreed that the action would not lie. But Fenner, Clench, and Popham cont. For this is a misdemeanor for which the defendant is finable: for every leet is the Queens Court, and a Court of Justice, to which respect and reverence ought to be given, and these words are in great contempt to the Court, and the authority thereof, which is supreme: and posito, that he should here say to the Judge of a Court when he delivered his opinion in any case, Mr. Judge, you lie, without question he may be fined and imprisoned; and as it is of a Judge here, so is it of a Judge of any inferiour Court, because it is a Court of Justice.

And Popham said, that if any misdemeaned himself in the leet in any outragious manner, the steward may commit him.

And Gawdy changed his opinion. Wherefore the plaintiff had judgment to recover.

Pasch. 36 Eliz.

Allens Case.

A scire facias issued out in the name of the Queen, to shew cause why execution of a debt which is come to the Queen by the attainder of J. S. should not be had: the defendant pleaded that the Queen had granted over this debt by the name of a debt which came to her by the attainder of J. S. and all actions and demands, &c. upon which the plaintiff demurred. And the question was, if the patentee might sue for this in the name of the Queen, without speciall words. And two presidents were cited, that he may. 1 Pasch. 30 Eliz. rot. 191. in the Exchequer, where Greene to whom a debt was due, was attainted and the Queen granted over this debt, and all actions and demands, and a scire facias was sued for him in the name of the Queen, also in the 32 Eliz. rot. 219.

Mabb of London was indebted by bond, and the debt came to the Qu. by the attainder and she granted it to Bones, and all actions and demands, and a scire facias was issued out in the name of the Queen. And the principall case was adjourned: but the patentee had express words to sue in the name of the Queen, although it was not so pleaded.

[114] 43 ELIZ.

PELLING AGAINST LANGDEN. IN B. R. ROT. 438.

In a trespass for breaking his close, and killing 100 conies, the defendant justified, because he had common time out of mind, and because the conies were damage feasant in the place where he killed them. The plaintiff demurr'd, and judgment given for the plaintiff: for conies are beasts of warren, and profitable as deer and are not to be compar'd to foxes and vermine which may be kill'd, but the owner of the soil may keep conies where the common is as well as other cattle, also he may make fish-ponds in the common, and the commoner cannot destroy them Cook 5. Rep. 104. 22 H. 6. 59. & so it was adjudged.

TRINIT. 43 ELIZ.

GRESHAM AGAINST RAGGE. IN B. R. ROT. 1295.

In trespass for entring into a house, the defendant pleaded that the plaintiff was indebted to the defendant in 100l. and that he by the permission of the plaintiffs servant, (the doores being open) did enter to demand his debt: upon which the plaintiff demurred. And adjudged for the plaintiff. For the servant of the plaintiff could not licence any to enter into the house of his Mr. also a man cannot enter into anothers house to demand money, unless the debtor be within the house.

Gawdy. If it had been averred, that the plaintiff had been then in the house, the plea had been good.

HILLAR. 44 ELIZ.

STREETMAN AGAINST EVERSLEY. IN B. R.

In an ejectment, the case was, A lessee for 80. years upon condition, that if the lessee his executors or assignes did not repaire the house within six weeks after warning, that the lease should be void the lessee made a lease for ten years, who suffered J. S. to occupie the house, and then the lessor came to the said occupation of the house, and at the house gave notice, and said, that the house was defective in reparations and did shew in what, and so gave warning to have it repaired, and after for default of reparations he entred, and the defendant as servant to the lessee re-entred: and his entry adjudged lawfull, for notice given to J. S. who was but an occupier of the house, and not lessee or assignee of any interest of the terme, was not sufficient; but it ought to be to the person interessed in the terme, who is liable to reparations. Vid. Cooks 6 Rep. Greens case. Also the notice at the house is not sufficient, but it ought to be to the person of the lessee, and Popham agreed to this.

[115] TRINIT. 1 JACOBI.

SHOPLAND AGAINST RADLEN. IN C. B. ROT. 853.

In a replevin the question was, when a guardian in socage holds a court in his own name, and does grant copies in reversion; if this be a good grant or not, and adjudged to be good against the heir.

Walmesley. Dominus pro tempore of a mannour may hold a court, and make a grant of copyholds, but this is to be understood of perfect lords which a guardian is not, but onely ad commodum hæredis, and is rather a servant to the lord, than dominus pro tempore; and he cannot be called dominus, because he can neither grant nor forfeit his estate, and hath nothing to do to meddle in the mannour, but to

account for the profits: and a writ of ward does not lye for the land, but onely for the body.

Gawdy Chief Justice. Warburton and Daniel Justices to the contrary, who held, that a guardian in socage is dominus pro tempore, and that he hath interest in the land, and may make a lease thereof for years, Commentar. 293. and may avow in his own name, 29 Ed. 3. Avowry 298. But a guardian in socage cannot present to an advowson, because he cannot be accountable. But Daniel Justice said, that the guardian may present where the heir is not of years of discretion, and a guardian in socage shall have a trespass, and a ravishment of ward, 24 Ed. 3. 52. and he hath the ward by reason of looking to him, and therefore he hath interest sufficient to keep court, and admit copyholders, who are not in by him, but by the custome. But a bailiff of a mannour hath no interest, and therefore cannot make grants and copies: but a guardian hath interest provisione legis, although it be such interest as cannot be forfeit, and the heir cannot be at any prejudice, for he shall have an account made to him of such fines; for the heir himself cannot grant them, and the law cannot compell the guardian to occupy them; neither can the court be held in the name of the heir, but the guardian, and therefore he may grant copies. And if a guardian in socage hath such interest that he can make a lease for years and his lessee shall maintain an ejectment a fortiori, he may grant copies. Neither is it any argument at all to say that a guardian in socage hath no interest, because he cannot grant or forfeit his estate; for the reason is, because these things are annexed to his person. And after, Mich. 3 Jacob. it was adjudged that the grant was good, and shall binde the heir. Vid. Keloway, 46. 6.

37 ELIZ.

BROWN AGAINST HERCEY. IN C. B. ROT. 620.

It was found by office, that J. S. who held the mannour of D. of the King, did dye without heir; whereupon W. S. as heir to him, did traverse the said office, and hereupon was at issue with the Queen, if he were heir or not: (and depending this suit) he made a feoffment in fee, with a letter of attorney to make livery, and after it was found for him against the Queen, and judgement given **[116]** against the Queen: but before the writ of amoveas manum, the attorney made livery, and adjudged good, for it cannot be said that the heir at the time of the feoffment had nothing, or that the Queen at the time of the livery was in possession, for by the judgement given, the possession of the Queen was utterly defeated, and possession in the party before any amoveas manum sued out, for that serves but to compell the eschaetor to avoyd the possession, if he hold the land after judgement. Vid. Stanford, prærogat. 78. 10 Ass. 2. 10 Ed. 3. and the difference is where the King is seized by title, and where without title; for when the King is seized by title, and his title is determined, he ought to make livery to him that hath right: but when he is seized without title, and he who hath right hath judgement against him, he may enter without livery, 5 Ed. 5. Quare impedit 34. But it was here said by Owen Justice, that if a man makes a feoffment of White-acre, with a letter of attorney to make livery, and then he purchase White-acre, this is not a good feoffment for White-acre.

MICHAELM. 29 & 30 ELIZ.

KNOWLES AGAINST POWELL. IN SCACCARIO.

The Queen seized in fee, made a lease for years to one who was out-lawed at the time of the lease, rendring rent; and after he was out-lawed again, and before seizure, comes out the general pardon of all goods and chattels forfeited; and in this case it was agreed, that a man out-lawed was capable of a lease from the Queen, as farmer to the Queen. And Manwood said, that the pardon with restitution is sufficient to revive the term forfeited by the second out-lawry; and it was also agreed, that a man out-lawed and pardoned, had property in his goods.

Egerton Sollicitor said, that in the 4 Eliz. it was adjudged in the Common Pleas, that if the Queen made a lease under the Exchequer-seal to begin immediately after forfeiture, surrender, or expiration of a former term, and the lessee is outlawed, that the second lease shall not commence, for it is a Royal forfeiture.

TRINIT. 41 ELIZAB.

FERRARS AGAINST BOROUGH. IN B. R. ROT. 185.

Upon a special verdict the case was thus, A man makes a lease for years, upon condition that if he paid 10l. before Michaelmas, that it should be lawful for him to re-enter; and before Michaelmas, he lets the land to another by indenture for years, and then performed the condition, and entred; the first lessee brought a trespass, and it was adjudged that it does not lye.

[117] TRINIT. 35 ELIZAB.

LAMBERT AGAINST AUSTEN. IN B. R. ROT. 185.

In a replevin the case was thus; A man seized of land in fee, grants a rent-charge out of it to A. for life, with a clause of distress, and then makes a lease to B. for years, and grants the reversion for life to J. S. the rent becomes behind the 15 of Eliz. untill the 18 of Eliz. and the grantee makes the defendant his executor, and dyes, the term of B. ends in the 33 Eliz. and then J. S. enters, and makes a lease to the plaintiff; the executor of A. distreyns for the arrearages, and the plaintiff brings a replevin.

Gawdy and Fenner. This distress is well taken for the arrearages upon the statute of the 32 H. 8. cap. 37. for the rent doth not issue out of the term for years, but out of the free-hold; and upon grant thereof, as Littleton saith, the tenant of the free-hold ought to attorn, and not the termor; and so is it, 9 H. 6. and if an assize be brought for this rent, it ought to be brought against the tenant of the free-hold, and all the tenants of the free-hold ought to be named in a rent-charge, by Cook, 6 Rep. 58. but otherwise for a rent-service, for that is against the termor onely, and a termor cannot give seizin of the rent to maintain an assize, by Cook, 6 Rep. 57. and for the same reason executors shall have an action of debt at the common law for arrearages, because the estate is determined, Cook, 4 Rep. 49. but an avowry is given by this statute, onely so long as the land shall continue in the seisin and possession of the said tenant in demesn. And they much relyed on this word (demesn) which ought to be intended of a free-hold; and of a reversion upon a lease for years, it is pleaded, quod seisitus in dominico suo, &c. and so cannot a tenant for years say; for which reasons it seemed to them that the distress was well taken.

Clench contr. For the termor ought to pay it, for he takes the profits of the land; as if a lease be made to a woman, rendring rent, who takes husband, and dyes, the husband shall pay the rent, by the 10 H. 6. for he hath taken the profits; and by the words of the statute, they are (in the possession of seisin) and seisin refers to the tenant of the free-hold, and possession to the tenant for years; and the words are, (which ought immediatly to pay the rent) and so ought the termor in our case, who is chargeable to the distress of the testator.

Popham Chief Justice, of the same opinion. The distress is not well taken; for he who hath the profits of the land, ought to answer for the rent.

Gawdy. Although the cattel of the lessee be distreynable by the testator, that is onely because they are upon his land; as a strangers cattel may be so distreyned, and therefore this proves not that the lessee should pay the rent. And if a man grants a rent-charge, and lets the land at will afterwards, the rent is behind, and the grantee dyes, and the lease at will determines, without question in that case the lessor is subject to the distress of the executor. And in our case, if the grantee had released to the tenant for life, this had extinguisht the rent, otherwise of a release to tenant for years.

Fenner. If tenant in tail grants a rent-charge, and after [118] makes a lease for 21 years according to the statute, and dyes, the rent by the death of the tenant in tail is determined. To which Gawdy agreed; which proves, that the rent issues out of the free-hold. Vid. Cook, 5 Rep. 118.

HILLAR. 37 ELIZ.

BUTLER AGAINST RUDDISLEY.

In a trespass, the defendant pleaded the free-hold of Edward Devereux, and so justified as his bailiff, without saying (at his commandment) the plaintiff replyed, that the said Edward was seized in fee, and made a lease to him by vertue whereof he was possest absque hoc, that the lessor made the defendant his bailiff post dimissionem; and hereupon the defendant demurred.

Crook. By this lease a free-hold passeth to the plaintiff, and then the plaintiffs traverse is naught, for he hath now traverst that the defendant is bailiff, whereas he ought to traverse the free-hold in the lessor, for that would have destroyed the justification of the defendant. And to prove that the free-hold doth pass, he cited the case of Littleton, where if a lease be made to the husband and wife during coverture, they are joynt-tenants for life. So in the 30 H. 6. a lease to a woman, dum sola vixerit. And 14 Ed. 2. a grant to a man till he be promoted to such a benefice, or dum modo se bene gesserit, all these are free-holds. And it is clear, that a tenant at will cannot assign over. And also an estate at will is an estate at the will of both parties: but here it is at the will of the lessor onely, when he will make a bailiff.

Haughton contr. An estate at will doth pass, and not a free-hold; for here he hath not pleaded that livery was made; and livery shall not be intended in this case, unless it be specially alledged: but if livery had been made, then he agreed that a free-hold conditional had past; and for the pleading of a livery, he took a difference, that where an express estate either in fee or for life be pleaded, there livery shall be intended: but where a free-hold passeth by implication or operation of law, and not by express words, there livery ought to be pleaded, as a lease to one for years, the remainder to another for life, there livery ought to be pleaded. So in the 21 Assi. If a man pleads a feoffment and livery within the view, he must plead livery within the view expresly; and so upon grant of a reversion, attornment ought to be pleaded. And whereas it was said, that it cannot be an estate by will, because it was not the will of both parties. Vid. 9 Ed. 4. 1. and 15 Ed. 4. But Gawdy and Fenner denyed the diversity put by Haughton, for in pleading of an estate for life, all necessary circumstances in pleading shall be intended. And so it was agreed, that an estate for life should pass, for livery shall be intended. Sed adjournatur.

[119] PASCH. 35 ELIZ.

PENDIGATE AGAINST AUDLEY. IN B. R. ROT. 242.

In a writ of errour upon recovery of a debt, the errour was assigned, because the action of debt upon the obligation was brought against the father of the plaintiff, and in the writ he was named the son and heir apparent of the obligor, for this implyes that the father was alive; for if he were dead, then is the plaintiff heir in facto, and not apparent.

Gawdy. It is but surplusage; and in the 11 Ed. 3. the writ was good, although he was not named son and heir omnino. But this was denyed, and agreed, that he ought to be named heir; and judgement was reverst.

HILLARY 37 ELIZ.

TANFIELD AGAINST ROGERS. IN B. R.

In a replevin, the case was thus: Tenant in tail seized of a mannour with 3 acres thereof in demesn, makes a lease of the three acres and also of the mannour, habendum the three acres, and the mannour for 21 years, rendring rent for the 3 acres, and all other the premisses, therewith demised 5l. The question was, if this be a good lease within the statute of the 32 H. 8.

Stephens. This lease is not within the statute, for this lease of 3 acres, and of the mannour whereof they are parcel, is an entire demise, and not several, as in 13 H. 4. Grants 88. A man seized of a mannour, with an advowson appendant, makes feoffment of one acre of the mannour; and then in the same deed he grants the advowson appendant, and not in gross, and yet they are in several clauses. Vid. 48 Ed. 3. 41. 33 H. 8. Dyer 48.

Gawdy and Clench. When the lease is of three acres, and of the mannour, although the mannour comprehends the three acres, yet in construction of law they shall be taken as several demises.

Fenner. I am of the same opinion; and as I remember, in the 10 Assis. is this case; a lease is made of the grist, and also of the mill, reserving by the year 5s. and for the other 10s. they are several leases; and so is it here. Note, that Popham was absent. But after in the same term he declared, that he agreed with the other justices; and judgement was given, that the lease was good for the three acres.

[120] PASCH. 37 ELIZ.

CARUS CASE.

Peter Carus was indicted for drawing his sword in Westminster-hall, the Court then sitting, in resisting the sheriff who was making an arrest; and being found guilty upon his arraignment, it did appear that this fact was done upon the stairs of the Court of Requests, out of the view of the Courts; yet it was held, that being in the hall, it was as much as if it had been in view of the Court. But because the indictment was not good, for it was not coram Regina, as it ought to be, the judgement was only to have perpetual imprisonment, and to pay 1000l. fine to the Queen. But if the indictment had been, as we have seen a president in 1 Ed. 4. then the judgement ought to be, to have his hand cut off, and to forfeit all his land and goods, and to have perpetual imprisonment, 22 Ed. 3. 13. Cromptons Justice, 246.

MICH. 3 JACOB.

WALGRAVE AGAINST SKINNER. IN B. R. ROT. 174.

In a trespass, the plaintiff declared that he was robbed of 20l. and that he pursued the felon with hue and cry to such a town, where he discovered the felon to the defendant, who was constable of the said town; wherefore he apprehended the felon, and found the 20l. about him, which sum the defendant took, and detained in his own possession. The defendant confest the taking the 20l. ut supra; but because the town was of no strength, he carried the 20l. to the next town, and as he was going upon the high-way, he was robb'd of it; and so he concluded that he ought not to be charged in this action.

Johnson for the plaintiff. It appears in 4 H. 7. that the thief hath no property in the money which is found in his possession: and in the 15 Ed. 4. it is resolved, that if A. robs B. and C. robs A. yet C. hath not gained any property; and if the constable takes this out of his possession, he cannot seize it, to any other use than to the use of the King: and therefore if he takes felons goods, and does not keep them safe, the

first owner shall have a trespass against him; for by the 21 H. 7. if a man does carry the parsons tithe to the parsons barn because it is like to perish, yet the parson may have a trespass against him. And by the opinion of Stanford, 44 Assi. if goods are taken from a felon, and he will give sufficient surety, he himself shall have the keeping of them, or else the town, and therefore the constable hath no authority to meddle with them.

Erby contr. For a constable is conservator pacis; and preserving the peace does consist as much in keeping of goods, as of the body of a felon. And here the constable, doubting of the strength of the town by reason of the inhabitants who were riotous, and of ill fame, [121] he thought it the best course to carry them to the next town, and so no default was in him, for his taking and medling with them was lawfull. And 22 Assi. 96. if a felon flying be taken in any village, the bailiff thereof may take the custody of the goods; and I suppose that a constable may keep goods as well as a bailiff, for he is a minister of the law; and if they be taken from him, he is no more chargeable than if goods were taken out of the possession of my servant.

Williams Justice, Pasch. 2 H. 7. Common fame is enough to apprehend any man: but if you arrest a person who is possest of money, and he dye, you are chargeable with the money. And so here, although the taking of the felon by the constable be justifiable, yet he is to keep safe the money at his peril; and because he hath not, he is liable to this action.

Popham. He might have pleaded not guilty; for he said, that if a town hath the possession of my goods, a detinue lyes, and not a trespass: but if a stranger takes them out of their possession, there a trespass lyes; and therefore he conceived in this case, that the plaintiff should have brought a trover and conversion, and not a trespass, quod alii justiciarii concesserunt; and therefore the case was deferred till next term, to be argued upon the general issue.

MICH. 3 JACOB.

JORDEN AGAINST ATWOOD. IN B. R. ROT. 561.

The case upon the whole pleading appeared to be thus, A. seized of a messuage called Bodswich, had a way appendant to it in the land of J. S. in a close called B. Acre; after A. purchased the said close, and infeoffed the plaintiff thereof; and this action was brought by the feoffee against the feoffor for using the said way; and the question was, if the way were extinguisht, or not: and it was argued at the Bar, that unity of possession doth make no extinguishment 3 H. 6. 31. where A. prescribed to have a way to a wood in a place called England; against which was pleaded, that time out of minde J. S. was seized of the said place, and of the said wood, and held no plea. 21 Ed. 3. 2. 11 H. 7. 25. it was argued on the other side that the case of 31 H. 6. was a quære; and because the feoffor had not reserved a way it did pass by the feoffment.

Tanfield, Justice. Unity of possession does not confound a way; and he cited 19 Ed. 3. 21 Ed. 3. 2. A way was appendant to a mill which was allotted to one partner, who assigned over her interest, and the assignee brought an assize of nusance, and unity of possession was pleaded in bar, but not allowed.

Yelverton Justice contr. For the 21 Ed. 3. 2. confirms my opinion; for Brook in his abridgement of the case saith, that the partners have that as in case of a new grant, which proves if they had it as heir it should be gone. And the case of Gutter in 1 H. 7. is onely by reason of the custome. But here the feoffor might have reserved his way upon the feoffment, and it was his folly he did not.

Williams of the same opinion. And he took a difference between the case of Gutter which is preserved by custome, and the case of a [122] way or common which are extinguisht by way of unity of possession, according to the 35 H. 6.

Fenner contr. For the case of a way differs from the case of a common, for unity will extinguish a common, but not a way, for then he shall lose the profit of all the land to which the way is appurtenant, for without the way he cannot use the close, and therefore there is no reason that the law should extinguish it.

Popham accorded, and took a difference between a common appendant, which is of necessity, and a common in gross; for in case of a common appendant, if one tenant of the mannour doth purchase the seigniory, and then grants over the tenancy, the common which he had before shall be still appendant, for it is not extinguished by the unity, but shall pass with the tenancy: but otherwise of a common in gross: and so he said was the same difference in this case; for if the way be a way of ease or pleasure, there it shall be extinguisht by unity: but if it be a way of necessity, there it is otherwise, for without it a man shall lose the benefit of his land or house. And he compared this ad viam regiam, which lyes by my house: yet if I do make a feoffment of the land, I shall have a passage also. And he said, that if a man had three fields adjoyning, and makes a feoffment of the middle field, the feoffee shall have a way to this through the other close, where it shall be most easy and beneficial for him. And at last, because the two justices agreed, although others were of the contrary opinion, judgement was given, quod quærens nil capiat per billam, and that the way is not extinguisht. Vid. 11 H. 4, 5.

MICHAELM. 7 JACOB.

LEIGH AGAINST BURLEY.

Leigh sued Burley and Cradock in the Court of Admiralty, whereupon a prohibition was prayed. The case was thus: Burley, master of a ship, gave money to Cradock to buy sailors cloaths for him; Cradock bought such cloaths for him of Leigh in the parish of Saint Katherines near the Tower in London, whereby Leigh delivered the cloaths to Burley in his ship that was in the Thames adjoyning to Saint Katherines; and because the money was not paid, he sued Burley in the Admiralty Court; and a prohibition was awarded for two causes; 1. because the contract was made on land, and infra corpus comitatus, and therefore the admiral can have no jurisdiction; for the statutes of the 13 and 15 of Rich. 2. and 2 H. 4. cap. 11. are, that the admiral shall not have conusance but of things done super alrum mare. Vid. Cook, 5 Rep. 107. And so was it resolved by the justices; and they said, that the 15 of Richard the 2. is mis-printed, viz. that the admiral shall have jurisdiction to the bridges; for the translator mistook bridges for points, that is to say the lands-end. And Cook said, that the admiral should have no jurisdiction where a man may see from one side to the other: but the coroner of the county shall enquire of felonies committed there; which was held to be good by all the other justices; **[123]** and he gave this difference, that where the place was covered over with saltwater and out of any county or town, there est altum mare: but where it is within any county, there it is not altum mare, but the tryall shall be par vicenerum of the town. Doderidge Serjeant demanded this question. The Isle of Lunday is de corpore comitatus of Devonshire and lyes twenty miles within the sea. Whether is that within the county.

Foster. If the sea there be not of any county, the admirall hath jurisdiction or els not. And note Cook and Foster said, that the statute 25 H. 8. cap. 15. for criminall offences upon the sea is to be intended if felony be super altum mare, for if it be committed in a creek or a place where the admirall hath not jurisdiction, the commissioners have nothing to do to meddle with it. And the prohibition was granted.

MICHAELM. 7 JACOB.

MORES AGAINST CONHAM. IN C. B.

[See *Donald* v. *Suckling*, 1866, L. R. 1 Q. B. 602.]

In an action on the case upon an assumpsit, the plaintiff declared that Lovet was indebted to him in a certain sum, for which he pawnd to the plaintiff certain goods to the value of 100l. and the defendant promised the plaintiff to pay the debt, if he would deliver the pawn, and hereupon the defendant demurred. And two points

were moved, one to the forme, and the other to the matter. First, the plaintiff declared that the assumpsit was pro diversis bonis & Catallis delivered to Lovet without shewing what goods or of what kinde, for this is the consideration of the contract, and therefore ought to be pleaded in certainty. But resolved by the Court that the plea was good: for the goods themselves are not to be recovered in this action but damages for them, and so they are but collaterall to the action, as in 10 Edw. 3. 30. in a rescous: the count was for taking of cattle, without shewing what cattle, and the jury found them to be two horses, and the plaintiff had judgment; where note that a verdict did help an insufficient Court, and 22 Assi. 21 Ed. 3. a trespass was brought for taking away of writings concerning land, without shewing what they were, or the quality of the land: but otherwise in a detinue for charters, for there the writings themselves are to be recovered. The second and great doubt was, when a man doth promise to another that if he will deliver the pawn, he will pay the debt, if this be a sufficient consideration to maintain an assumpsit.

Foster Justice, It is not: for he that hath the pawne hath not such an interest in it as he may deliver it over to another, or make a legall contract for it, and that his delivery being illegall, he cannot by his own wrong raise an action to himself, and a man shall never maintain any action, where the consideration is illegall and not valuable. 9 Ed. 4. In an action on the case the defendant pleaded an accord, and that he delivered the writing to the plaintiff which concern'd the land, and it was held no plea, because the plaintiff having land, the writings belonged to it. And cited Reynolds case: where a man promised another 100l. to solicite his business, and it was holden that no action would lie for **[124]** the money, because the soliciting his business was illegall, he being no man of law. Dier 355, 356.

Cook, Warburton and Daniell cont. who said, that the consideration was good, legall and profitable, and sufficient to maintain an assumpsit: for he who hath goods at pawn hath a speciall property in them, so that he may work such pawn, if it be a horse or oxe, or may take the cowes milk, and may use it in such manner as the owner would: but if he misuseth the pawn, an action lyes, also he hath such interest in the pawn as he may assign over, and the assignee shall be subject to a detinue, if he detaines it upon payment of the money by the owner as in the 2. assise. Land was leased untill he had raised 100l. he hath such interest as is grantable over. And Foster agreed to this, because he had power to satisfie himself out of the profits. And it was agreed by the Court, that if a man takes a distress, he cannot work the distress, for it is only the act of the law that gives power to the distress, for he hath no propertie in the distress, nor possession in jure as in the 21 H. 7. Replevin. A man hath returne irreplevisable, he cannot worke them, for the judgment is to remit them to the pound, ibid. remansurum. vid. 13 R. 2. Brook. 20 H. 7, 1, a. 34 H. 8. Br. pledges 28. 22 Edw. 4, 11. goods pawned shall not be put into execution untill the debt be satisfied. And it was agreed by Cook and Warburton, that when a man hath a speciall interest in a thing by act in law, that he cannot work it, or otherwise use it: but contrary upon a speciall interest by the act of the partie as in case of a pawn.

Daniell. There is difference between pawns, which are chargeable to the parties as cowes and horses, and things that are not chargeable, and also there is a difference between pawnes that will be the worse by usage as clothes, &c. For if the pawn be the worse by usage an action of the case will lie against him that hath them pawned to him: but contra of goods that are not the worse for usage.

Cook. If I deliver goods to you, untill you are promoted to a benefice, you may use them, which Foster denied.

And judgment was given for the plaintiff, and that they may be granted over, and so a good assumpsit will lie.

26 Eliz.

Earl of Northumberlands Case.

This case was privately argued before the Lord Treasurer, because the parties agreed to refer themselves to the opinion of Wray and Anderson. And the case was this, the Earl of Northumberland devised by his will, his jewells to his wife. And dyed

possessed of a collar of esses, and of a garter of gold and of a buckle annexed to his bonnet, and also of many other buttons of gold and pretious stones annexed to his robes, and of many other chains, bracelets and rings of gold and precious stones. The question was if all these should passe by the devise, under the name of jewells. And both justices did resolve that the garter and collar of esses did not pass, because they were not properly jewells but ensignes of honour and state, and that the buckle in his bonnet, and the buttons did not pass, because they were annexed to **[125]** his robes, and were therefore no jewells. But for all the other chaines, rings, braceletts and jewells, they passed by vertue of the said will.

MICHAELM. 40 & 41 ELIZ.

SPERKE AGAINST SPERKE. IN C. R. ROT. 2215.

In an ejectment, the case was this. M. Sperke made a lease of the land in question to William Sperke for 89. years if William should so long live, the remainder after his death to the executors or assignes of the said William for 40. years: afterwards William dyes intestate and administration is committed to Grace Sperke his wife, who entred clayming the 40. years, and the defendant clayming by another lease entred upon him, and he brought this action.

Anderson. Executor is as good a name of purchase as heire is. And I conceive the points in this case are two. First, if the administrator be an assignee. Secondly, if the lease for 40 years, be a chattell vested in the intestate in his life, for if it be, then his administrator shall have it. And as to the first, I conceive that she is not assignee to take these 40 years. For in the 19 Ed. 3. it is there said that administrators are not assignees, for administration is appointed by the Ordinary and assignees must be in by the party himself and not by a stranger, and therefore an administrator cannot be an assignee, as an executor that comes in by the partie, or as a husband for his wife.

Walmesley and Glanvill accorded. But Kingsmill cont. for he said, that although one could not be assignee in deed without the act of the partie, yet one may be assignee in law by the act of the law. And so the opinion of the 3. justices to the first point was, that the administrator could not have it as assignee, and as to the second point, Anderson said, that it could not vest: for if a man have a lease for life, the remainder for 40 years, the remainder is voyd, because there is no person named to whom it is limited: but if a man make a lease for life, and after his death to his lessee for 21 years, that is good, and the executor shall have it as in right of his testator. But where a man makes a lease for years or life, the remainder after his death for 40. years to his executors, the executors shall have it as purchasors, for this word remainder divides it from the testator, and makes the executors purchasors.

Walmesley, Glanvill and Kingsmill cont. and their chief reason was from the intent of the parties, and their intent was that the lessee should have an estate during life, for it is to him for 89 years, if he so long live, and because by common intendment he cannot survive those years, their intent was that his executors should have it after his death, and that the certainty of the time might be known it was limited for 40. years.

And Walmsley said, that the administrator could not have this by purchase, for when a man takes by purchase, he must be named by an apt name of purchase, by which he may be known; as if there be tenant for life, the remainder to the right heirs males of J. S. and J. S. hath issue two sons, and the eldest hath issue a daughter, and J. S. dies, this daughter shall never take any estate, because she is not heir male, she **[126]** hath no name of purchase, and therefore here the administrator cannot take by purchase, for the administrator comes in by the Ordinary, and therefore cannot be an assignee. And at last, judgment was given, that the administrator should hold it, as a thing vested in the intestate.

MICHAELM. 41 & 42 ELIZA.

WHITE AGAINST GERISH. IN C. B. ROT. 366.

In a replevin the defendant avowd for rent. The case was this. Two persons did joyne in leavying a fine to J. S. in fee sur conisans de droit come ceo, &c. J. S. by the same fine renders the lands to one of the conusors in taile, reserving rent and further would quod tenementa predicta remanerent to the other who is the avovee.

Walmesley. The rent shall passe: as if a man grants land for life, and also grants quod tenementa predicta remanebunt to another, these words (quod tenementa predicta) do make a grant of the reversion: and also these renders are as severall fines, and so it shall be taken as a grant in taile rendring rent, and after a grant of the reversion.

Glanvill accorded. Warburton. If a man makes a gift in taile rendring rent, the remainder over in fee, the donor shall have the rent and not he in the remainder.

Walmesley. That is true in a grant, but not in a fine.

Anderson. If a man makes a gift in taile rendring rent, and at the same instant grants the reversion, and the deeds are delivered, accordingly, this shall passe as a reversion. And after it was adjudged to be a grant of the reversion, and that the rent passeth.

CRAWLEYS CASE.

In replevin the case was thus. A rent is granted to two during the life of J. S. to the use of J. S. the grantee dieth, and if the rent were determined was the question.

Walmsley. The rent remains to J. S. for the grantees have an estate during the life of J. S. and by the statute of the 27 H. 8. the use is raised and conjoynd with the possession, whereby the rent it self is carryed to J. S. whereby J. S. hath an absolute estate for his life, and the life of the grantees is not materiall: as if rent be granted to two for the life of J. S. if he does not grant over the rent, their lives are not materiall. And if they grant over and die, the rent shall not cease, but the grantee shall have it during the life of J. S. And here the statute 27 H. 8. vests this in cestuy que vie, otherwise if it were before the Statute of Use, quod fuit concessum per Curiam.

[127] PASCH. 41 ELIZ.

SHAW AGAINST SHERWOOD. ROT. 2504.

The executors of Shaw brought an action of debt for 20l. upon a bill, and the bill was thus, I William Shaw have received of Thomas Pret 40l. to the use of Robert Shaw and Elizabeth Shaw, equally to be divided; which said sum I acknowledge my self to have received to the use aforesaid, and the same to re-deliver again at such time as shall be most fit for the profit and commodity of the said Robert Shaw and Elizabeth.

Walmesley. Two points are here; first, if this be a debt to cestuy que use, or to him who gave it. Secondly, if it be divided, so that each of them shall have an action for 20l. And as to the first, he held, that it was a debt to him for whose use the money was delivered; and as to the second, that they shall have a debt as of several debts, by reason of these words, equally to be divided.

Kingsmill. Here is no obligation, for the words are not obligatory, but onely an acknowledgement of the receipt. Glanvill accorded.

Walmesley. When he acknowledged the receipt to both their uses, without question such receiver is a debtor. And agreed by the Court, that admitting it was a debt, that then it shall be a divided debt, and not joynt. Quod nota.

LANE AGAINST COTTON.

In debt upon a bond, on condition to pay 20l. within a month after, the obligee had a son, that did or could speak the Lords Prayer in English, that he could be understood; the plaintiff pleaded, that he had a son, qui loqui potuit Præcationem Domini, ut intelligi potuerit; and the defendant demurr'd, because it was pleaded that he had a son qui loqui potuit, for that is a secret ability that cannot be known.

Kingsmill. The plea is good, and shall be tryed, as in case of a writ of non compos mentis.

Glanvill accorded; for it may be proved by the testimony of those who have heard him speak; and if he ever spoke it, it is good evidence that he had ability to speak.

Walmesley contr. Because it is a secret thing, it cannot be tryed.

Kingsmill. A man is bound in a bond to give me 20l. when the river of Ware is navigable, it is a good plea to say that the river is navigable, without saying that some have navigated upon it.

Hern Serjeant cited a case adjudged in a quare impedit by the patron against the bishop, who had pleaded that the parishioners were Welshmen, and that they could not understand English, and **[128]** that the clerk he presented could not understand Welsh; and the patron pleaded, that the clerk could speak Welsh; and upon demurr it was adjudged a good issue, and that such matter might be tryed.

Anderson. The issue is good, and it is at the election of the party to plead quod loqui potuit, vel loquutus est. And if I am obliged to you to give you a 100l. when I am able to go to Pauls, this may be tryed, although in facto I never went to Pauls; and if I am able, I shall pay the money. And he cited Broughtons case, where in maintenance the defendant pleaded that he was peritus in legibus Angliæ, and that he was retained to be of councel, and adjudged no good plea, for he should alledge that he was student for a certain time, and was elected by the Benchers to be a barrester. And judgement was given for the plaintiff.

MICHAELM. 41 & 42 ELIZ.

SWAN AGAINST GATELAND. ROT. 3267, OR 3667.

In a ravishment of ward, the plaintiff demurred, that T. B. was seized of land in socage, and dyed, and J. B. his son is of the age of two years, and that the guardianship belongs to him, because he is next friend ex parte matris J. B. viz. the brother of E. B. the infants mother. The defendant pleaded, that E. B. the infants mother was his mother also, and that he was begotten by one Gateland on the said E. B. and the said Gateland dyed, and the said E. B. did marry the said T. B. and had issue the infant, and so concluded, quod erat propinquior amicus absque hoc, that the plaintiff is propinquior amicus; and upon this was a demurr.

Hern for the plaintiff. The question is, whether the uncle shall be guardian in socage, or the brother of the half blood, and he said, the uncle should have the wardship, because there is a more natural affection between the uncle and the infant, than between the infant and the brother of the half blood; and if there be not love, he cannot be the procheine amy, although in judgement of law he be the next of kin. 31 Ed. 3. Gawdy 157. In a writ of ward, the plaintiff declared that he was next of kin of the plaintiff the mother of the infant, and it was pleaded against him, that the infants mother was alive; but he replyed, that the mother had made a charter of feoffment to the disherison of the infant, and that she was attaint of treason. And in 15 Eliz. the brother who claimed the wardship of his younger brother, was also within age, and therefore it was ruled that the uncle should have the wardship, because alterum nequit regere qui seipsum nequit. And 5 Ed. 6. the brother of the half blood is next of kin, to whom administration shall be given before the mother; for the statute of 27 H. 8. 15. sayes, that the next of kin shall have it, and the brother of the half blood is the next of kin: but guardianship shall be given by the law to the nearest friend and that is the uncle.

Williams contr. For although the brother be but of the half blood, yet he shall have the wardship, for the brother is the next of kin, to whom the inheritance cannot descend; and the 31 Ed. 1. does not **[129]** gainsay this, for the mother was denyed the wardship, because she was attaint of treason; for the law will not suffer that the infant shall be in ward to any, who may be suspected to do wrong to the infants land, or to his person, and therefore he shall not be in ward to any that may inherit him, for there is a suspicion that he may kill the infant. And 5 Ed. 6. Brook, Administration 47. it is agreed that the brother of the half blood is next of kin, and that is the cause of the nearness of love; and it cannot be intended that there should not be love between persons so nearly allyed. And 30 Assi. 47. a remainder was limited propinquioribus de languine, and there it is agreed that the brother is next of blood.

Warburton contr. The uncle shall have the wardship for two causes, for there is not such natural love between two brothers of the half blood, as is between the uncle and the infant of the whole blood. Also, the statute sayes, that he shall be in custody parentum hæredis, and therefore he ought to be in custody of those who are of most antient degree, who are the parents: but one brother cannot be parent to the other.

Walmesley contr. For the brother is the procheine amy; and so hath it been ruled in the time of the Lord Dyer, in 7 Eliz. in C. B. for he ought to be in ward to him that is next of blood, and most remote in succession. And the 5 Ed. 6. proves, that he is next of kin, and such nearness must needs procure love: and although it sometimes happens that there is not such love, yet this cannot alter the law that awayes intends amity; and although the Statute of Marlebridge speaks of parents, that is intended of such as are of full age, and of sound memory; for if he be not, then some other that is the next of kin shall have the wardship; and he told Warburton, that he would shew him a report of such a case, where it was ruled accordingly before the Lord Dyer.

HILLAR. 43 ELIZ.

PECK AGAINST CHARNELL. IN C. B. ROT. 1703.

In an ejectment upon a special verdict, the case was this; John Burly seized in fee of land, doth devise it to his wife for life, the remainder to William Burly in tail, the remainder to his next heir male, being of his sirname in fee, and dyes, and then his wife does intermarry with William Burly, who had the remainder in tail, and then they levyed a fine come ceo, &c. to J. S. and by the same fine J. S. rendred to the wife for life, the remainder to the husband in fee, and then a common recovery was had against the husband and wife, and that was to the uses contained in the fine: then the wife dyes, and the husband dyes without issue, and the right heir male of the sirname of the devisors enters, and makes a lease to the plaintiff, who being outed by the lessee of William Burly, brought the action.

Williams. Here are two points; first, if this be a discontinuance by the wife; secondly, if the recovery barrs him in the remainder. **[130]** And as to the first point, when woman tenant for life, and he in the remainder in tail being her husband, do joyn in a fine, this shall not be a discontinuance of the estate tail; for by Littleton, discontinuance cannot be by way of grant, although it be in case of a fine, but ought to be by livery. And as to the second point, Knivetons case, B. 252. is express in the point, that notwithstanding the common recovery, yet the entry of him in the remainder is legal; for as to the point of recovery, a base fee doth pass to the conusee of the fine, which is rendred back again to the woman for life, and her husband in fee; and by the common law there was no remedy for him in the reversion against a recovery had against tenant for life, 7 H. 7. 12. 5. Ed. 4. 2. untill the statute of Westminster the 2. which gives to him a writ of ad terminum qui præteriit, and by the statute of the 23 of H. 8. he may enter: but now the question is, whether this recovery will bar him in the remainder of his entry, because the recovery was of another estate, and not against his tenant for life. But I conceive that the wife is not in her former or antient estate, but takes hereby a new estate, for if tenant for

life grants his estate to J. S. and his heirs, and J. S. grants a rent, and then re-grants an estate to the tenant for life, the tenant for life shall be liable for the rent, Dyer 252.

Harris contr. For by the rendring of the estate by the fine, she shall be in her antient state; and he cited the case of Peter Cary here adjudged, who being tenant in T. the remainder to the Earl of Devonshire, was attainted, and then the King pardon'd him, and gave him his land again, and then he suffered a common recovery, and thereby barred the remainder in the Earl of Devonshire.

But Anderson was against this case, and said, that by the render the woman was in her antient estate, and so the remainder discontinued, and the entry of him in the remainder taken away.

Warburton. The fine does make no discontinuance, for they give away but that which they may lawfully do, and so is Bredons case, Cook, 1 Rep. 67. and as to the common recovery, it is out of the statute of the 32 H. 8. because she remains party to the fine; and by the render upon the fine, they shall be as in by a new estate, and then the recompence shall not be to the antient estate and therefore he in the remainder is not barred nor impeached by this fine, but he may enter within five years.

Kingsmill accorded; for it is plain, that by the render to the husband and wife, they are in a new estate, and the recompence shall go as to that, and not to the antient estate: but contr. if it had been by way of voucher.

Walmesley accorded: but notwithstanding the fine, and recovery, the entry of him in the remainder is good, and as to the woman, it is clear, that there is no discontinuance to him in the remainder in fee, for he in the remainder in tail cannot discontinue, because he is seized by force of the estate tail; as the 4 H. 7. 17. Tenant in dower, and he in the reversion in tail, joyn in a fine, this is no discontinuance of the estate tail because he was never seized, and therefore it is a forfeiture in the tenant for life, although he in the remainder joyn'd with him, by the 41 Ed. 3. but otherwise if tenant for life, and he in remainder in fee, joyn in a fine. Vid. Bredons case, 1 Rep. 76.

Anderson. I conceive he in the remainder may enter, for all passeth from the tenant for life, and it is her feoffment, and the confirmation of the other, and so the estate tail being spent, he in the remainder **[131]** shall enter for forfeiture, and the recovery shall be no bar, because it was of another estate: and also this title of entry for forfeiture shall not be barr'd by the common recovery, no more than if a feoffee upon condition does suffer a common recovery, yet may the feoffor enter for the condition broken: and judgement was given for the plaintiff: so that his remainder was neither discontinued by the fine, nor his entry taken away by the recovery.

43 Eliz.

Hall against Wood. In C. B.

In an action on the case for a trover, and conversion of 40l. on not guilty pleaded, it was found for the plaintiff.

Walmesley. How can an action lye for a trover of money, if it be not within a bag? for this writ supposeth a loss; and when the money was lost, how doth it appear that the money found is the same money that was lost?

Davies. There are many presidents in the Kings Bench to prove that this action will well lye for corn and money, and I have been of counsel in many of those cases.

Warburton. If the money were lost in view of a third person, upon such trover the action will lye, for there it may be proved that it was the money of the plaintiff. And Walmesley agreed. And note, that a president was shewn, tempore 40 & 41 Eliz. inter Holloway and Higgs, which was thus; a master delivered to his servant 30 quarters of corn to be sold, and the servant sold them, and converted the money, and the master brought his action on the case for the trover and conversion against the servant, who pleaded, not guilty, and it was found against him; and two things were moved in arrest of judgement; first, that the master was never possessed of the money, and therefore could not lose it; secondly, because the money cannot be known,

and so non constat whether it was the money of the masters, or no. But notwithstanding this case, judgement was given for the plaintiff, because the possession of the servant was the possession of the master; and when the servant converts this to his own use, by this the master loseth the property, and is also a conversion in the servant.

MICH. 42 & 43 ELIZ.

LEEKE AGAINST THE BISHOP OF COVENTRY. IN C. B. ROT. 3579.

In a quære impedit the case was thus; Langford and Bussy were patrons of an advowson, to which they and their ministers use to present by turn. Langford presented according to his turn, and his clerk dyed, and then Bussy presented in his turn also, and his clerk was deprived, after which Langford grants his advowson in fee to Leeke the plaintiff, and then the bishop without any notice does collate Dr. Babington, who dyes; after whose death the question was, if Leeke should present, or Bussy; and judgement was given for the plaintiff, because that notwithstanding the church was voyd by deprivation, yet the patron may transpose his advowson over.

[132] BETHELL AGAINST SIR EDWARD STANHOP.

In debt against Sir Edward Stanhop, as executor to Francis Vaughan, he pleaded that he is not administrator; and the said Vaughan gave 40l. to his daughter within age, with power of revocation upon the payment of 20s. and it was found that this was done to defraud creditors, and then he dyed possest of the goods, and the defendant sold these goods, which made him executor in his own wrong, and afterwards takes letters of administration.

Warburton. I conceive the plaintiff ought to have judgement, for the Statute of 21 Eliz. of Fraudulent Conveyances, annuls this gift of the intestate, because he did it to defraud his creditors, and then when he dyed it was assets in the hands of the administrator. And if a testator have goods wrongfully taken from him out of his possession, these are not assets to the executors or administrators: but if they be taken out of the possession of the administrators or executors, they shall be assets, for they may take them again: but for goods taken from the testator, they have but an action. But here the administrator may take the goods which were given by the intestate to defraud creditors, for the gift was voyd, and therefore they shall be accounted assets. And as to the action, it is well brought; for when a man does administer as executor, and then takes letters of administration, it is at the election of the plaintiff to sue him as executor or administrator, 9 Ed. 4. 33. 21 H. 6. 8. 2 Rich. 2. 20. 18 Ed. 4.

Walmesley agreed; for the statute of the 27 Eliz. hath made voyd the testators gift, and sublata causa tollitur effectus, and the gift being taken away, the property is also taken away from the donee, and setled in the donor, as to any creditor: to which the other justices agreed; and judgement was given for the plaintiff.

TRINIT. 43 ELIZ.

GEORGE BROOKS CASE. IN C. B. ROT. 1822.

Gibson recovered in a debt against Brook, as executor to J. S. 60l. and 6l. damages, and upon a scire facias to the sheriff, he returns no assets, and then upon the estate which was in London, which the defendant had wasted and sold, a fieri facias was awarded to the Sheriff of London, with a commission to the Sheriff of London, to enquire if he had assets at the day of the writ, &c. and by the inquest it was found that he had assets at the day of the writ purchased, &c. and that he had wasted the estate, which was thus return'd by the sheriff, against which the defendant took issue that he had not assets; and upon this was a demurr.

Walmesley. A man may averr against the return of a sheriff, if the return be a matter collateral; as if upon a capias the sheriff returns a rescous, there may be an averment against this, 4 Eliz. 212. a. But if it be in pursuance of the writ, as non est inventus, there no averment shall be taken against this: but here the return is the saying of the inquest, and not his own saying.

[133] Warburton. I conceive he shall have an averment and traverse, or else he shall be without remedy, for he cannot have an action on the case against the sheriff, because he returns that which was found by the inquest, and so not like where the sheriff returns falsly without such inquest; and no attachment lyes, because it is but an inquest of office; and after it was moved at another day, and a president shewn, 33 Eliz. in B. R. between Westner and Whitenore, and there it was adjudged that such return of the sheriff was traversable: and Anderson and Kingsmill agreed to it; wherefore judgement was given for the defendant, and that the issue was well taken.

DAY AGAINST FYNN.

In an ejectment, the plaintiff declared of a lease for years of a house and 30 acres of land in D. and that J. S. did let to him the said messuage, and 30 acres by the name of his house in B. and ten acres of land there, sive plus, sive minus, it was moved in arrest of judgement, because that 30 acres cannot pass by the name of 10 acres, sive plus, sive minus, and so the plaintiff hath not conveyed to him 30 acres; for when 10 acres are leased to him, sive plus, sive minus, these words ought to have a reasonable construction, to pass a reasonable quantity, either more or less, and not twenty or thirty acres more.

Yelverton agreed, for the word 10 acres, sive plus, sive minus, ought to be intended of a reasonable quantity, more or less by a quarter of an acre, or two or three at the most: but if it be 3 acres less than 10. the lessee must be content with it. Quod Fenner & Crook concesserunt; and judgement was staid.

SMITH AGAINST JONES.

In an action of the case upon an assumpsit, the case was; that the wife of Jones was executrix to J. S. and had assets to satisfie all debts and legacies. The woman dyes, and the goods remained in the hand of her husband, who was the defendant; and Smith the plaintiff being a legatee, demanded his debt of the husband, who said to him, forbear till Michaelmas, and I will pay you; and if this was sufficient cause of action, was the question on demurrer.

Davies. The promise is voyd, because it is after the death of the wife.

Yelverton. The action will lye, because he hath the goods in his possession, and therefore is chargeable, and must answer for them, and therefore there is a good consideration. And he cited Godfreys case, who laid claim to a copyhold, and the copyholder in possession said to him, If the opinion of the Lord Cook be, that Godfrey hath a good title to it, I will surrender it to him; and because he did not surrender to him, Godfrey brought an action on the case, and it was adjudged that the staying of the suit was a sufficient consideration to have an action on the case.

[134] Yelverton. If the promise had been to pay this legacy in consideration he would not sue him, then it had been good.

Williams. If there be no cause of suit, there is no assumpsit, and here is no just cause, for he cannot be sued for legacies.

Flemming of the same opinion, for the husband cannot be sued by the plaintiff, and although perhaps the legatee may sue him in the Spirituall Court, yet that is only for the temporall administration. And afterwards judgment was given for the defendant.

MICHAELM. 9 JACOB.

KEMPE AND JAMES AGAINST LAURENCE. IN C. B. ROT. 3648.

In a scire facias the case was thus, Gant having two daughters made his wife executrix, untill his daughters came to the age of 21 years, or should be married, and then the executorship should cease, and that then his daughter should be his executors; and the woman did recover a debt upon a bond made to the testator, after which the daughters marryed the plaintiffs, and they brought the scire facias upon the said judgment against the defendants as terre-tenants, and the sheriff return'd the defendants terre-tenants, and no others, and upon Dyer of the scire facias the defendants pleaded, that H. was seised of those lands die Judicii reddit, and made a lease for years to them: judgment, &c.

Nichols. The daughters shall have this judgment as executors, for they are in privity and in by the testator, and are not like an administrator who comes in by the Ordinary after the death of the executor. 6 H. 8. 7. Cook. 5. Rep. Brudnells case: and the daughters are executors and subject to debts of the testator. And as to the plea he said, that forasmuch as the defendants are returned terre-tenants, they cannot plead that they are but tenants for years, and that their lessor is not warned: for the scire facias is a personall action to have execution, but of the goods: but in a reall action it is a good plea, because the lessor himself cannot plead in discharge of such action 8 H. 6. 32. And note that Michaelm. 43 & 44 Eliz. Rot. 834 judgment in the very same point was given accordingly.

TRINIT. 9 JACOB.

INFORMATION AGAINST WEST. IN C. B. ROT. 1246.

In an information upon the statute ofthe 5 of Ed. 6. cap. 14. for buying of wheate-meale, and converting it into starch. It was resolved by three of the justices (Cook being against it) that this is not within the statute: but they agreed, that if one bought corn and thereof made meale or oat-meale, and sold it, that this was within the statute, for that is usuall, and is no alteration, and therefore remaines the same corn, but starch is altered by a trade or science, which **[135]** is a mysterie, and so it is not the same thing that was sold. But Cook Chief Justice contra. And cited one Franklinghams case Michaelm. 39 & 40 Eliza. in B. R. where one bought barley, and because it was of such quantity that he could not make malt of it in his own house, he made malt thereof in anothers house by his own servants. And it was resolved.

First. That the conversion of corn into malt, in his own house, with an intent to sell it was within the statute, unless there be a saving for it.

Secondly. Forasmuch as it was in anothers house, he is out of the proviso, and so within the penalty of the statute. And in Pasch. 42 Eliz. between Reynolds and Gerret that if a miller buyes corne, and grinds it and sells it within his house, this is within the statute. And in the Checquer Chamber in a writ of errour there between Baron and Brise, adjudged there that a coster-monger, who buyes pippins to sell them again was out of this statute, because they are necessary victuall. And divers exceptions were taken to the information: viz. where he saith ligamen Anglicè starch, whereas there is no such word, but it is ligumen, and the Anglicè will not help this mistake. Cook 10. Rep. 134. and this exception was taken by Justice Winch.

But Warburton Justice cont. for starch is a thing newly devised, and there is no Latin word for it, and therefore the Anglicè there is good.

Foster Justice took an exception, because the information concluded contra formam statuti, whereas it ought to have been contra formam statutorum, for this statute was of force until the 8 Elizab. and then was determined untill the 13th of Elizabeth, and then it was revived, so there are two statutes; but 'twas agreed, that where a statute continued de tempore in tempus, and was never discontinued, nor determined, there it shall be said contra formam statuti, and this diversity

hath been twice adjudged upon this very statute. viz. 9 Eliz. in Palmers case, and in the 35 Eliz.

Warburton, cont. for the information doth intend only the statute of 3 Ed. 6, and 14. and he did recite the words thereof in his information: also this statute only makes the offence and declares the manner of it, and no other statute makes any addition to it, or increaseth the penalty, but only revives it to endure in perpetuum. But if a statute doth prohibit a thing, and another statute gives a penalty, there, upon information upon the penalty, both statutes ought to be recited and to conclude contra formam statutorum, vid. Commentar, 206. Morgans case. And so the Statute of Usury, 37 H. 8. is revived the 13th Eliz. and an addition made to it, there such inclusion ought to be contra formam statutorum, but where the statute is only revived, it is otherwise: as the Statute of Perjury 5 Eliz. was continued untill the 14 Eliz. and then it was determined, and 27 Eliz. was revived, yet all informations upon that statute, are contra formam statuti 5 Elizab. Cook. This is no good exception and cited Talbot and Sheldens case. Hillar. 33 Eliz. who were indited for recusancy contra formam statuti 23 Eliz. and in a writ of error, the judgment was reversed because the penalty was demanded: for the 10th Eliz. made the offence, and the 23 Eliz. gave the penalty, but if the information be for the offence only, there it had been good. See the new Book of Entries 182. but if there be divers statutes in the point of information contra formam statuti is good, because the best shall be taken for the King. Vid. 5 H. 7. 17. 8 Ed. 3. 47. a.

[136] PASCH. 10 JACOB.

WALLER AGAINST THE DEANE AND CHAPTER OF NORWICH.

In an action of covenant the plaintiff declared on a lease made from the deane, the case was thus. The deane in the 38 Eliz. had made a lease for 99 years, to one Themilthorpe, and then in the 42 Eliz. made a lease to the plaintiff for three lives, rendring rent, with a letter of attorney to make livery, and a covenant to save the plaintiff harmelesse against Themilthorpe, afterwards the attorney makes livery sc. after Michaelmas which was a rent day, and he being disturbed by Themilthorpe, brought this covenant. And two points were moved in the case.

First. Inasmuch as the lease was voyd to Walter, whether that the covenant was voyd also.

Secondly. If the livery made after the rent day be void.

Hoghton Serjeant. If the covenant depended on the interest of the lease, as a covenant to repay the thing devised, or to pay rent, these had been voyd, because the lease it self is voyd, for they do immediatly depend upon the lease, but where the covenant is for a thing collaterall, as a covenant that the lessor is owner at the time of the lease, or that the lessee shall enjoy it; or shall be discharged and saved harmeless, these covenants being collaterall to the lease and interest are good, although the lease be voyd, and the 43 Ed. 3. proves this: where a lease was made by a baron and feme, a covenant by them shall not binde the wife, contra where the covenant concernes the interest, as payment of rent, &c. Also the covenant was broken immediatly upon the sealing of the lease to the plaintiff. And as to the second point, he held it was a good livery, because no time was limited in the letter of attorney.

Dodderidge Serjeant. The covenant is voyd, because the lease is voyd, but contra, if it had been a covenant to enjoy for three lives, and he relyed much on the difference between tempus annorum and terminum annorum in Cook 1. Rep. 124.

Nichols cont. The covenant is good, and yet in force, for when an estate is created in which is implyed a covenant in law, there if the estate be voyd, the covenant is voyd also, but when there is an express covenant in deed, there it is otherwise, although the lease be voyd or voydable, as if he covenant that the lessee shall enjoy during the terme, and the lessee resign, yet is the covenant good although the terme is gone. And as to the second point. The livery is good, for untill the livery be made, the lessor shall retaine his land, and no rent is due. vid. Commentat.

423. for by intendment the possession is better than the rent. And Cook agreed to this. And the justices agreed with Nicholls.

[137] TRINIT. 10.

JACOB BARNES CASE.

Tenant for life the reversion in the lessor, a formedon is brought against the tenant for life, who prays in ayde of him in the remainder for life, without him in the reversion.

Warburton, I conceive he shall have the ayde 7 H. 4. 2. where ayde is prayed against him in the remainder and reversion, and he cited a manuscript 11 R. 2. direct in the point that the ayde would lye. But the other justices cont. for the tenant for life hath as high an estate as he in the remainder, and may plead all that the other may, but if there be tenant for life, the remainder in taile, there he shall have ayde of the tenant in taile. 23 H. 6. 6. 11 Edw. 3. 16. If there be tenant for life, the remainder for life the remainder in fee, tenant for life shall have ayde of them both, for else he in the remainder shall not come in to plead. 11 E. 3. ayde 32. Where it is resolved, that tenant for life shall have ayde of the reversioner for life.

HILLAR. 28 ELIZ.

WATKINS AGAINST ASTWICK.

A man makes a feoffment on condition that if he, his heirs or executors do pay the rent of 100l. before such a day, that he may re-enter, the feoffer dyes, his heire within age, the mother (*without any notice* of the son) requests J. S. that he would pay the money for her son. And all this was found by speciall verdict, but it was not found *of what age the son* was.

Clinch. If the jury had found that the son was of the age of 17 years, the payment had been good.

Wray. If a bond be upon condition that the obligor or his heirs should pay 100l. and the obligor dyes, his heire within age, I conceive payment by the guardion, or by some other friend is good. And afterwards all the justices agreed, that if the infant were within the age of 14. years, the tender of the money by his mother had been good, but contra, if he had been more than 14 years, and because no age was proved here, but that he was within age, it shall not be intended that he was within the age of 14 years, and therefore they advised the party to begin de novo, and that it may be found that the infant was within the age of 14. years.

[138] TRINIT. 25 ELIZ.

MORIS AGAINST PAGET. IN C. B. ROT. 2215.

In a replevin, a speciall verdict was found, that Sir Francis Ascough was seised of the mannor of Castor in Lincolne, which mannor extended itself into four towns viz. Castor, North Kelsey, Dale, & Sale: and that there were demesne lands and freeholders in each of the said towns, and that Moris the plaintiff held the land where &c. by fealty and suit of court to the mannor of Castor, and the lands did lie in one of the towns viz. in North Kelsey: and Ascough being so seised, sold to the defendant totum illud manerium sive dominium de North Kelsey cum pertinentiis in North Kelsey, ac omnia ac singula messuagia, redditus, Herriot, and all other things used or reputed as parcell thereof, with all courts &c. to have and to hold to the vendee and his heirs: and Moris the plaintiff and other freeholders in North Kelsey, did attorne to the vendee. The question was, if the vendee had the mannor of North Kelsey, or not.

Peryam, He has not; yet by the feoffment and attornment all the tenants and services are conveyed to him: but not as a mannor: for a mannor is made and incorporate by continuance of time, and this entire mannor of Castor cannot be divided no more than other liberties; as if the King grant to three partners, who have three mannors, a leet or warren, and one of them makes a feofment, the feofee shall not have the leet, and he cited Dyer 362. a. and he sayd, if I grant my mannor of C. except certain demesn lands and services, the feoffee shall have the mannor, and I shall have the lands and services in grosse: and so if I have a mannor that extends into two towns, and I grant my mannour to you in one town, you shall have no mannor, but the lands and services in gross.

Windham Justice cont. For where he grants his mannor of North Kelsey in North Kelsey, there it shall be construed his mannor in reputation.

Anderson agreed, for although a mannor cannot be created at this day, yet it is not so intire but it may be divided.

HILLAR. 30 ELIZAB.

SIR THOMAS HOWARDS CASE.

A man makes a lease for years the 10th of May, and then the lessor bargains and sells this to another by deed enroll'd, bearing date the 10th of Aprill, and it was entred to be conveyed the 10th of Aprill before, but in truth it was delivered and acknowledged and enrolled afterwards: and it was held that the bargaine was without remedy at the common law, for he cannot plead that it was acknowledged or delivered after the date of the day of acknowledging it, and so was the opinion of Rhodes.

Peryam and Windham, Anderson being absent: for he cannot aver, that it was inrolled or acknowledged at another day then it is record-**[139]**-ed, because it is contrary to the record, for it is entred, that it was acknowledged the 10 of Aprill, and then if such a plea should be admitted, it would shake most of the assurances in England.

Note, Shuttleworth put this case. A man makes a lease, rendring rent at two feasts, and if the rent be behind at any of the said feasts or 40 dayes after, and no distress to be found, that the lessor shall re-enter, the lessor comes upon the ground the last day of the 40. and demands his rent, and because no distress was found on the land at the time of his demand, he entred. But it was averred that always before this day there was sufficient distress, and the question was, if his entry were good.

Fenner and Rhodes said they had seen a report of the same case. 8 Eliz. that the distress ought to be on the land on the last day, yea at the last instant of the day, which is a legall time to make a demand, or else the lessor may enter.

Walmsley. The same case was resolved a year agoe in the Kings Bench between Ward and Ware. But if it were, (and no distress to be found at any time within forty dayes) there if there be a distress found at any time, it is sufficient. Vid. 1. Inst. 202. a.

28 ELIZ.

WOOD AGAINST ASH.

[See *Westropp* v. *Elligott*, 1884, 9 App. Cas. 842.]

In a replevin, the case was thus. Puttenham made a lease of land with a stock of sheep for 20 years rendring rent, and the lessee doth covenant to render back to him at the expiration of the lease 1000 sheepe of the age of three or four years, and that the lessor grants all his chattels, and this stock of sheepe to Elizabeth Vavasor the defendants now wife: but in truth, the sheepe of the old stock were all spent, and others supplyed, part by increase, and part by buying of other sheepe.

Walmesley, for the defendant. The grant made by the lessor is good; for the generall propertie does remain in him, although that the lessee hath a speciall propertie.

To which it was answered, that if the ancient stock of sheepe were still, it had been good ; but it was not, and therefore the grant is void.

Walmesley. Although the first stock was changed, yet the new stock does supply it, and is in place thereof, and shall be in the same condition as the other stock is, and therefore the lessor shall have propertie in it. But the whole Court was against him : for they said, that the increase of the stock of sheepe should be to the lessee, and the lessor shall never have them at the end of the terme : but they agreed, that if the lease were of the stock with lambs, calves, and piggs, there the increase belongs to the lessor. And all the Court took this difference, sc. when a lease is made of dead goods, and when of living ; for when the lease is of dead goods, and any thing is added to them for reparations or otherwise, the lessor shall have this addition at the end of the terme, because it belongs to the principle : but in case of a stock of cattle, which hath an increase, as calves and lambs, there these things are severed from the principle, and lessor shall never have them, for then the lessor shall have the rent, and the lessee shall have no profit.

[140] TRINIT. 29.

WISEMAN AGAINST ROLFE. IN C. B. ROT. 1454.

In a writ of right the case was thus. A man seised of land in fee makes his will, and gives to D. his wife such land for life, the remainder to T. his son and heires of his body, and also gives to T. his son his land in B. and also his land in C. and also he gives his land called Odyum to the seed of his son habendum all the demised premisses to his T. son and the heires males of his body. The question was if T. should have an estate in taile in B. and C. or if the last words shall relate only to that which was last named.

Fenner for the plaintiff. For the last clause is a new clause, and shall not be preferred to the first, for it begins with a verbe viz. I give my land called Odyum, and therefore the limitation afterward shall be referred only to this. And 10 H. 7. 8. There was a grant by dedi custodiam parci & arbores vento prostrat. The grantee shall have the trees by this clause, and 14 Eliz. a man deviseth thus. I give my mannour of C. to my second son ; item I give my mannor of S. to my second son to have and to hold to him, and to his heirs. And by Dyer, Welsh and Weston he had an estate but for life, but Brown cont. for if a lease be made to A. B. and C. successively, it is adjudged that they are joyntenants, but if it be to them as they are named, they shall have it one after the other : and if a devise be to one and his heirs, and after to another for life, the law will conster that the estate for life is to precede, for that words of relation in wills shall be taken strictly, as if a devise be to A. and his heirs of his body, and he does devise other land in forma prædicta, this shall be but for life.

Walmesley cont. and said that this limitation did go to all, whereof no limitation was made before ; for the rules of reason are uncertain, and therefore such matters shall be expounded according to the best sense that may be, and here the sense is most naturall to refer it to all, and the word all imports this : and the case of the fourth of Elizabeth (under favour) accords with this viz. that the devisee shall have fee in both. But if the devise had been, I devise D. to my son Thomas, and also to him and his heirs the mannor of S. there he shall have D. but for life. And if a man devise to his 4 sons A. B. C. and D. to have to the persons last named to them and their heirs, there all shall have fee. 19 Ed. 4. In a precipe of a house and an acre of land in three severall towns, and that the defendant ibidem ingressus est, and did not say into the house and land, and yet it was held good.

Periam and Rhodes. He shall have an estate taile in all, and the relation shall be to all. Anderson doubted at first, but agreed afterwards and judgement was given accordingly.

[141] 32 & 33 ELIZ.

MATHEWSON AGAINST TROTT. IN C. B. ROT. 1904.

Upon a speciall verdict, the case was this. A man seised of land in soccage devised it to his yonger son, and died seised, the elder son enters and dies seised, and his heir enters, and the yonger son enters upon him, the question was, if his entry be taken away by this descent.

Walmesley. It is not, and he compar'd this case, to a title of entry for a condition broken, or a conusee of a fine upon grant and render &c. in which cases no descent shall take away entry.

Anderson. The devisee hath interest presently, and the land does not descend; for the devise prevents the descent, and the freehold is presently in the devisee, and the statute 32 H. 8. which gives power to devise lands, does make a title in the devisee as a title of entry for condition of mortmaine, and the devisee shall not have an ex gravi querela upon this statute, but he must enter.

Walmesley. The devisee hath not a freehold presently, for if it were so, the devisee at the common law ought not to sue an ex gravi querela: but certainly if the freehold be in the devisee, his entry is taken away. And afterwards judgment was given by Anderson that descent does not take away the entry of the devisee, but delivered no reason for it.

HILLAR. 33 ELIZ.

MOSGRAVE AGAINST AGDEN. ROT. 2529.

In an action of the case on a trover and conversion of six barrells of butter, the count was that they came to the hands of the defendant, and after the trover they were impared, and decayed, ratione negligentis custodiæ. And the Court held cleerly that the action would not lie, for he who finds goods, is not bound to preserve them from putrefaction, but it was agreed, that if the goods were used, and by usage made worse, the action would lie.

44 ELIZ.

AYER AGAINST JOYNER. IN C. B. ROT. 2529.

In a second deliverance, it was said by the Court, that if lessee for years does assign over his terme, and yet continues possession, that he hath but a naked possession, and no interest nor estate, but the estate and interest does remain in the grantee, so that he may grant it over.

And Walmesley said, that if the lessee makes waste, the lessor may have an action of waste against him: and there is a case that if a man makes a lease, and the lessee waves the possession, and a stranger commits waste, the lessor shall have an action of waste against the lessee, but the principall question was upon the pleading. **[142]** Taylor being lessee for years, 9 Elizabeth did grant and assigne this to Ayer the plaintiff. The defendant pleaded, that before the grant made to Ayer sc. 8 Elizabeth Taylor did grant and assign his estate to the defendant, without traversing the gift made to the plaintiff.

Williams. There needs no traverse, for being granted the 8 Elizab. it is impossible it should be granted 9 Eliz. 2 Edw. 6. and 1 H. 5.

Anderson. He ought to travers, for it is impossible to confesse and avoyd a grant by confession that was granted to another before, for if it were so, the second grant is voyd, and so being so, confest, here ought to be a travers.

Walmesley cont. in 32 H. 6. it is sufficient to say, that at another day, &c. there was another arbitrement, &c. for by that the first arbitrement is voyd in law. And

it is a good plea in a will, that after that, there was another will made, without traversing, and there is difference between lands and chattells: for land may be gotten out of a man by wrong, and therefore it may be that after the feoffment the feoffor entred and it disseised the feoffee, and did infeoffe another, but it cannot be so here of a terme for years, for no man can take it away from the lessee by wrong.

Glanvill and Kingsmill cont. There must be a traverse, for there ought to be a confession before there can be an avoydance, but here he does not confess the grant, but pleads matter that denies it being granted. And at last Anderson gave judgment that he ought to travers.

42 ELIZ.

RUDD AGAINST TOPSEY. IN C. B. ROT. 135.

In a quare impedit, the jury found that Edward Capell was seised of an advowson in fee, and did let it to the defendant for years, and during the lease he presented the defendant, and the doubt was whether this were a surrender or an extinguishment. And it was held by all the justices, that this could not be a surrender, but is cleerly an extinguishment: for if a man does present to his own church as proctor to another, by this he looseth his advowson. Nat. Br. 25. 17 Ed. 33. 24 H. 6.

HILLAR. 42 & 43 ELIZ.

FORREST AGAINST BALLARD. ROT. 2480.

An audita querela was brought upon a statute, which was acknowledged before a maior, who had no power to take it.

Anderson. An audita querela will not lie upon a voyd statute.

But Kingsmill, Walmesley and Warburton cont. and Walmesley cited Na. Br. 102. where an audita querela was brought upon a forg'd statute, and there it would lie upon a statute made by duress: 20 Ed. 3. 28.

[143] TRINIT. 40 ELIZ.

GOODRICK AGAINST COOPER. IN C. B. ROT. 1259.

In a replevin the defendant justified for rent granted to the master and schollers of Emanuell Colledge in Cambridge. And the jury found, that one Spendelose being seised of the land where &c. by his deed did grant to the said master and fellowes, a rent ch. of 40l. per annum for ever: and that Spendlose did seale his part of the indenture, and delivered it to the use of the master and fellowes to one J. S. to deliver it accordingly, but there was no deed to shew their receit thereof: and then they sealed the other part but they made no attorney to deliver it, and it was found that the rent was payd for divers years after.

Walmesley. Although no letter of attorney were made, yet it is good, for by their sealing of the counterpart there is a sufficient agreement to the grant. As if a reversion be granted to a corporation by deed, although they cannot accept of this, but by attorney, yet if they bring a waste, this is a sufficient agreement to vest it in them. Quod alii justiciarii concesserunt, and judgment was given for the avowant.

MICHAELM. 43 & 44 ELIZ.

CLAYGATE AGAINST BATCHELOR. IN C. B. ROT. 3217.

In debt upon a bond of thirty pound, the condition was, that if Robert Batchelor, son to the defendant, did use the trade of haberdasher as journeyman servant, or

apprentice, or as a master, within the county of Kent, within the Cities of Canterbury and Rochester, within four years after the date, that then, if he pay twenty pound upon request, the obligation to be voyd. And all the justices agreed that the condition was against law, and then all is voyd, for it is against the liberty of a free-man, and against the statute of Magna Carta cap. 20. and is against the commonwealth. 2 H. 5. & 5. And Anderson said, that he might aswell bind himself, that he would not go to church. And judgment was given against the plaintiff.

[144] MICHAELM. 43 & 44 ELIZ.

DOGGET AGAINST DOWELL. IN C. B. ROT. 654.

In an action on the case upon an assumpsit, the plaintiff declared, that at the request of the defendant he had lent to him 30l. the 10th day of May 5 Eliz. and the defendant in consideration thereof, viz. the second day of May aforesaid did promise and assume upon himself, that he at the end of the yeare would lend the plaintiff other thirty pounds for a year, or give to him five pound. It was said, that the consideration is good, for although the promise was made at another day, yet is it in pursuance thereof, so that in law it shall be accounted all at one time, and is not like to the case in Dyer 372. where the master promised one who was bayle for his servant, that he would save him harmless, this is no consideration, for the bailment was of his own will, and was executed before the assumpsit, but if the master had first requested and afterwards assumed, there it is good; and so was it adjudged in the case of one Sydenham against Worthington, Trinit. 27 Eliz. Rot. 748. where the request was before, and the promise after, and there it was a good assumpsit.

Warburton agreed. And it is like as if I should say to you, do such a thing, and I will give you five pound, this is no good contract.

But all the justices on the contrary; for when at the first day the plaintiff did lend to the defendant thirty pound that was absolute, and the speaking on the second day cannot have such reference to the first agreement, that it shall be accounted all one.

Anderson. If I say to one: In consideration you will serve me, for a year, I will give you five pound, here is no cause of action, for the consideration is precedent and not mutuall, and so judgment was entred for the defendant.

HILLAR. 41 ELIZ.

WENTWORTH AGAINST WRIGHT. ROT. 2529.

In a quare impedit, two points were moved 1. If the parson be made bishop, whether the patron should present or the King by his prerogative.

Williams. The King shall for before the statute the Pope should present, and the reason was, because the bishop had received his presentment gratis from the Pope: and by the same reason, the King now shall present, for there is no reason the patron should, for by his precedent presentment he hath dismist himself untill resignation or death, as if a man lets land for another mans life, he shall not have the land during the life of cestuy que vie, & great mischief would be, if it should not be so, for els all the presentments, that the King hath made, shal be usurpations. **[145]** The second matter was, that no presentment is pleaded against the King by the patron, for it is pleaded that the parson was admitted and instituted, but not that he was inducted (but the Court held it good notwithstanding that omission.) But as to the first point, the Court asked Williams, if he could shew presidents that the King should have such presentment, for they said, that the usage by the Pope is no argument at all, for that he used to usurpe many things.

Walmesley. I conceive this custome began by the Popes usurpation, but he said,

there is a book in the time of Edw. 2. where this point is argued and adjudged, that the patron shall present and not the King.

Williams shewed eight or nine presidents in the time of H. 8. that the King used to present in such case, but all of them were between spirituall persons. And the Court said, they did not regard those presidents, for all spirituall persons were the Popes servants vid. 6 Elizab. 72. 8.

South against Whitewit.

In a prohibition, the case was thus, The wife of Whitewit had spoken scandalous words of South, and therefore she was excommunicated by the High Commissioners, and by letters missive a pursevant came at twelve of the clock at night, and broke the house of Whitewit and tooke the body of Whitewits wife, who was rescued: wherefore Whitewit her husband was called before the Commissioners, and hereupon Whitewit prayed a prohibition. And the question was, if a pursevant could break a house by such commission or not. And it was agreed, that by the common law, neither the Pope, nor any other spirituall Judge had any thing to do with the body and goods of any one, for only the sword spirituall belongs unto them.

Walmesley: At the common law, after excommunication a capias excommunicatum was awarded, and I conceive this writ is of force at this day, and is not taken away by the statute of 5 Eliz.

Kingsmill agreed, for this statute gives power onely to correct the spirituall law, and to take away the authority of the Pope, but gives the same means to execute it as before, and he further said, that the statute that did erect the Court of Wards, doth appoint a seale belonging to it, and other process according to the course of the common law: and therefore by the same reason, if this statute of 5 Eliz. intended to give them such authoritie, they would have appointed a seale also, and a course according to the common law, but as the course is here used, a man may be robb'd in his house by a beggerly pursevant which is no officer known by the law. And so was the opinion of the justices.

[146] Pasch. 40 Eliz.

Goosey against Pot. In C. B.

In a replevin the case was thus; Two hundreds were adjoyning together to two several mannours of two several persons, and the avowant was seized of one of them, and he prescribed that all the tenants of the other hundred have used to make suit to the leet within his hundred; and also that the lord of the other hundred used to appear, or to pay him 4s. pro anno futuro; and if it were not paid, the defendant prescribed, that he and all those, whose estates he hath, have used to distreyn any inhabitant within the hundred for the same; and therefore for 4s. not paid, he did avow the distress within the mannour of the plaintiff, who was one of the inhabitants.

Williams. A man may prescribe by a que estate in a hundred, for a man may have it by disseisin, and there are divers presidents which the prothonotaries have shewed me to warrant this in a replevin, for the seisin is the matter of the title. And to this Littletons rule may be added, that of all things which lye in grant, and whereof a man cannot be disseised against his will, a man shall not plead a que estate.

Kingsmill. A que estate cannot be pleaded of a hundred, unless it be appendant to the mannour; and a second matter was moved in this case, viz. that he prescribed to distreyn the cattle of a stranger for the offence of the lord.

Williams. It is not good, by the 41 Ed. 3. but by the 47 Ed. 3. for suit and service, the cattle of the lord may be distreyned on any land within the hundred.

Anderson. I do agree to the case of my Lord Dyer, that the cattle of a stranger cannot be taken for a herriot.

Walmesley. In the 12 of H. 7. it is said by Fineux, that a lord of a mannour may inlarge his services by prescription, and so the cattle of a stranger may be taken:

but for a personal matter, as for amercement in default of suit, no stranger may be distreyned. And afterwards agreed by all the justices, that the strangers cattle could not be distreyned.

HOLT AGAINST LISTER.

In a replevin the case was thus, he in the reversion after tenant in dower, grants it over to the use of himself for life, the remainder to his next son in tail, the remainder to the use of himself in fee, and after this he levyes a fine to the plaintiff and his heirs of land which he claimeth de hæreditate sua, after the death of the tenant in dower. The plaintiff brought a quid juris clamat against the tenant in dower, and upon non sum informatus, judgement was given that the tenant should attorn, and now he prayed that she should not attorn, for if she attorns, she will forfeit her estate.

Walmesley. If he in the remainder for life grants over by fine, it is no forfeiture, for he gives no more right than he hath; and so hath it been adjudged in the time of my Lord Dyer.

[147] Glanvill. I agree to that: but in this case he grants that which he hath de hæreditate sua, and this recital will make a forfeiture; and then if the tenant in dower attorn, this is a forfeiture.

Anderson. This attornment is no forfeiture, because it is by judgement of the Court.

Walmesley. I agree, for the grant it self is no forfeiture, unless it be by reason of the recital, but the attornment shall have relation onely to the substance of the grant, and it was much disputed between Walmsley and Glanvill, if lessee for life of a rent grants this in fee by fine, if this be a forfeiture; and Walmesley vouched a judgement, that it was no forfeiture; and Glanvill voucht 31 Ed. 3. Grant 60. to the contrary, and 15 Ed. 4. 9. by Littleton. If lessor for life of a rent grants this by fine in fee it is a forfeiture, by reason of the estoppell, otherwise if it were by deed. Vid. 1. H. 7. 12.

MICH. 32 & 33 ELIZ.

MARSHES CASE. IN B. R. ROT. 1011.

Marsh and his wife brought a writ of errour as executors to Nicholson to reverse an outlawry upon an indictment of felony pronounc'd against the testator.

Altham of Grayes-Inne. The sole point was, whether the executors may have a writ of errour, and I hold that they may; for if there be no heir, it is great reason that the executors should have it, for otherwise the erroneous judgement cannot be at all reverst; and every one shall have a writ of errour that is damaged by the erroneous judgement, and executors have right to the personal estate to have errour: for if a man recovers damages in a writ of cosenage, and the land also, and dyes, his heir shall have execution for the land, and the executors execution for the damages, by the 19 Ed. 4. 5. 43 Ed. 3. 13 Ed. 4. 2. If a man does recover my villain by a false verdict, the heir shall have an attaint for the villany, and the executors for the damages, and a writ of errour shall be given to him to whom the right of the thing lost doth descend, as it was adjudged in the case of Sir Arthur Henningham, and he cited two presidents in the point, 1 Trinity, 11 H. 8. Rot. 3. where an administrator brought a writ of errour to reverse a judgement given in an exigent. Vid. 2 Rep. 41. a.

Cook contr. In Natura Brevium, 21 M. he sayes, an executor shall have a writ of errour upon a judgment given in debt against the testator, and the heir shall have error to reverse outlawry in felony, and to restore him in his blood, and he said that it was part of the punishment in felony to have the blood corrupted, & sic filius portat iniquitatem patris; and by reason of the attainder, he cannot inherit any ancestor; wherefore he having the damage, it is reason that he should reverse it. And although executors shall have a writ of errour for chattels personal, yet they shall not have one when they are mixt with things real, 5 H. 7. 15. 18 Ed. 4. If

writings be in a box, the heir shall have the box, because real things are more regarded than personal.

[148] Nevertheless in this case the writ of errour is in a real action, for the law sayes, that it is in the same nature as in original action, whereupon it is brought; as if errour be brought to reverse a judgement given in a personal action, the writ of errour is personal; and so in like manner is it real, if the first action be real, 47 Ed. 3. 35. 35 H. 6. 19, & 23. And although the first action be mixt, yet the law does rather respect the reality, 30 H. 6. Barr. 59. where two brought an assize, and one did release, and there it was said, that although this were a mixt action, yet it shall be according to the most worthy, and that is the reality: and 16 Assi. 14. divers disseisors being barr'd in an assize, did bring a writ of attaint for the damages, and summons and severance was suffered, for damages were joyned with the reality: and Stanford, 184. If a man be indicted before a coroner, quod fugam fecit, if he after reverse the indictment, yet he shall have his goods, for de minimis non curat lex: but note, that the justices said, that the fugam fecit was the cause of forfeiture of the goods, and not the felony. And as to the presidents, he agreed to the case of the 18 H. 7. for an executor shall have a writ of errour to reverse judgment given in an exigent, for there nothing but the goods are forfeit, 30 H. 6. Forfeiture 31. and for the president in 11 H. 8. it cannot be proved that the outlawry was for felony. Vid. Rep. fol. 3.

33 Eliz.

Lilly against Taylor. In B. R. Rot. 467.

Marsh seized of the land in question, did devise this to Rose Lilly for life; and if she fortun'd to marry, and after her decease should have any heirs of her body lawfully begotten, then that heir should have the land, and the heirs of the body of such heir; and for default of such issue, the land shall revert to Philip Marsh, his son and his heirs, and the question was, if the husband of Rose shall be tenant by the curtesy, or not; and so if Rose had estate tail, or for life onely.

Godfrey. She hath estate but for life; and he cited a case adjudged in Benlowes Reports, 40 Eliz. where lands are devised to A. for life, and after his decease to the male children of his body, and it was adjudged that the male children have an estate tail by purchase, and nothing by descent, and so A. had nothing but for life.

Gawdy agreed, for she hath but for life, and when she dyes, her issue shall have it.

Popham agreed, if the words were, that if she had issue, that he should have it.

But Clench held, that she had an estate in tail executed, and that her husband shall be tenant by the curtesy.

Fenner. The issue is as a purchaser, for the devisor intended that Rose should not have a greater estate than for life. And also it was agreed by all the justices, that a devise to a man and his heir shall be accounted a fee-simple, for that the word, heir, is collective: and so is the 29 Assi. where land was given to a man, and to the heir of his **[149]** body, & uno hæredi ejusdem hæredis, this is an estate tail.

Popham. He shall be tenant by the curtesy; and he agreed, that heir of the body was a good name of purchase; but if a frank-tenement be limited to his ancestor, and by the same deed it is also limited to his heir, the heir shall be in by descent. But Fenner on the contrary.

Pasch. 38 Eliz.

Bolton against Bolton. Rot. 882. & 582.

Tenant for life being impleaded, doth pray in aid of him in the reversion, who joyn and lose, &c. and the tenant for life brings a writ of errour, and the record is removed, and he in the remainder brings a writ of errour also, de recordo quod coram vobis residet; and the question was, upon which writ of errour the judgement should

be reverst: and it was objected, that if it should be reverst by the tenant for life, that he in the remainder should be restored.

But Gawdy, Fenner, and Clench contr. who held, that it should be reverst at his suit who first brings the writ, as in case of interpleader, it shall be alwayes upon the first writ. And notwithstanding the removing of the record by the tenant for life at the next term, the Court said, it was at their discretion to reverse this at suit of any of the parties, as they pleased: and because they observed some indirect practices by him in the remainder, it was reverst at suit of tenant for life.

PASCH. 5 JACOB.

SIR HENRY DIMMOCKS CASE. IN THE COURT OF WARDS.

Tenant of the King by knights service, bargains and sells his land to Sir Henry Dimmock and his heirs, and Sir Henry Dimmock dyes, his heir within age, and then the deed is inrolled; the question was, if the King should have premier seisin.

Trist. The King shall not, because Sir Henry did not dye within his homage, but the land was in the bargainor; as if there be a bargainee of the reversion, and the tenant makes waste, the bargainee shall not have waste, unless the deed be inrolled before the waste committed, 3 Jacobi. Bellingham against Alsop. Bargainee before inrolment sells the land over, and it was adjudged that the second bargain was void, 10 Eliz. Mockets case. Disseisee releaseth to the bargainee of the disseisor before inrolment, and adjudged voyd, 5 Eliz. in Popham's case it was said, that the Statute of Inrolments had altered the common law; for now by the delivery of the deed, no use is raised untill it be inrolled. But all the justices held, that the heir **[150]** should be in ward, and pray premier seisin if he were of full age; for the statute sayes, that no use shall be, unless the deed be inrolled: but if it be inrolled, it passeth ab initio, and then the bargainee shall be tenant ab initio. But it was also agreed by all the justices, that the wife of Sir Henry shall not be indowed, and that rent paid to the bargainor at the rent-day incurr'd after the bargain is good, and the bargainee hath no remedy, because it is a thing executed.

TRINIT. 12 JACOBI.

CUDDINGTON AGAINST WILKIN. IN C. B. ROT. 924.

[S. C. Hob. 67, 81. See *Leyman* v. *Latimer*, 1877-78, 3 Ex. D. 20, 356. *Hay* v. *Justices of the Tower Division of London*, 1890, 24 Q. B. D. 565. *Monson* v. *Tussauds, Limited* [1894], 1 Q. B. 687.]

In an action of the case for calling the plaintiff thief, the defendant justified, because the plaintiff had stollen sheep, 37 Eliz. the plaintiff replyed protestando, that he had not stollen sheep, and pleaded the general pardon, 7 Jacobi, upon which the defendant demurred, and adjudged for the plaintiff, for the pardon had so purged and abolished the offence, that now he was no thief, 1 Ed. 3. Corone 15. 2 Ed. 3. Corone 81. 1 Assi. 3. So if one call another villain after he is infranchised. And in one Baxters case, in Banco Regis, it was adjudged, that where a man was accused for perjury, and acquitted by trial, if he be afterwards called perjur'd, he shall have his action on the case. And judgment was given for the plaintiff.

SEAMAN AGAINST CUPPLEDICK.

In a trespass of assault and battery, the defendant justified in defence of his servant, scil. that the plaintiff had assaulted his servant, and would have beaten him, &c. and the plaintiff demurr'd.

Yelverton. The bar is good, for the master may defend his servant, or otherwise he may lose his service, 19 H. 6. 60. a.

Crook Justice. The lord may justifie in defence of his villain, for he is his inheritance.

Williams contr. The master cannot justifie, but the servant may justifie in defence of his master, for he owes duty to his master, 9 Ed. 4. 48.

Yelverton. The master may maintain a plea personal for his servant, 21 H. 7. and shall have an action for beating his servant; and also a man may justifie in defence of his cattle.

Cook. A man may use force in defence of his goods, if another will take them; and so if a man will strike your cattle, you may justifie in defence of them; and so a man may defend his son or servant, but he cannot break the peace for them: but if another does assault the **[151]** servant, the master may defend him and strike the other, if he will not let him alone.

Williams. It hath been adjudged in Banhams case, that a man cannot justify a batterie in defence of his soil, a fortiori he cannot in defence of his servant. vid. 19 H. 6. 31. 9 Ed. 4. 48.

Trinit. 12 Jacob.

Drury against Waller.

In an action on the case upon a trover and conversion of 200l. delivered by the plaintiff to the defendant; and upon not guilty pleaded, the question was, if denyall by the defendant to pay it upon request, would beare this action. And the case of Isaac was urged, who brought an action of trover, &c. for 200l. in a bag, and by verdict it was found that demand was made thereof, and a deniall to pay it. And by Dodderidge it was a conversion.

Crooke accorded, but Haughton doubted the case. And Man Prothonotarie said, that he remembred a president in the case, where it was resolved, that in such case deniall of a horse was a conversion.

Haughton. I remember an action of trover was brought for a trunk, and it was ruled there, that if one hath timber in my land, and he demands liberty, to carry it off my land, and I deny it, this is not a sufficient conversion.

Dodridge. There is great difference in the cases, for a horse or money cannot be known, if they be used, but timber may. Et adjournatur.

Michaelm. 8 Jacobi.

Alfo and Dennis against Henning. In B. R. Rot. 969.

In an action of covenant, the case was thus. Thomas Tavener by indenture primo Jacobi, did demise land to one Salisburie for 7. years: and by the same indenture Salisburie did covenant, grant, condescend and agree with Taverner his heirs and assignes, that he, his executors and administrators should pay to Taverner his heirs and assigne 75l. per annum. And after Taverner demised the same land, to Mary Taverner for life, and he demised the reversion for 40. years to the plaintiff, if he so long lived, and the tenant attorned, and for rent due at the Feast of St. Michaell he brought his action of covenant. And the first question was, if this were a sum in gross, because the lessee covenanted to pay this as a rent. And resolved by Cook Chief Justice, and the Court, that this is a good reservation of rent, for it is by indenture, and their intention was to have it as a rent, and the words of the indenture shall be accounted to be his, who may most properly speak them. 26 H. 8. 2. 10 Eliz. 275. 22 H. 6. 58. 28 H. 8. 6. And the case between **[152]** Whitchett and Fox in replevin this terme, where a man made a lease for 99. years rendring rent, and the lessee covenanted by the same deed with the lessor, that he would not alien without his assent upon paine of forfeiture, and after he aliened, and the lessor entred.

And it was held by the Court that this was a condition, although the plaintiff did covenant: for being by indenture, they shall be the words of both, and the words sub pœna forisfacturæ are the words of the lessor. The second point was, if the assignee for 40 years, may have a covenant, and it was held he might, for it is for payment of rent, and if the lessee covenants to do any thing upon the land, as to build or repaire a house, there a covenant will lie for the assignee, by the common law, but if it do not by the common law, yet it is cleere that it will lie by the statute of the 32 H. 8. And the Court held, that an assignee of part of the reversion might take advantage of the condition or covenants, so that he hath part of the reversion of all the thing demised. And Cook, Chief Justice said, that the opinion of Mourson 14 Eliz. 309. a. is good law.

PASCH. 36 ELIZ.

BUTLER AGAINST ARCHER.

If two joyntenants be of land holden by herriot service, and one dies, the other shall not pay herriot service, for there is no change of the tenant, but the survivor continues tenant of the whole land. But if a man seised of land in fee, makes a feofment to the use of himself and his wife, and the heires of their two bodyes begotten, the remainder to the right heires of the husband, and the husband dyes, a herriot shall be paid, for the ancient use of the reversion was never out of the husband.

MICHAELM. 29 & 30 ELIZAB.

STEPHENS CASE. IN C. B.

In an ejectment, the case was, Sir William Beale made a lease by indenture to William Pile and Philip his wife, et primogenito proli habendum to them and the longer liver of them successively during their lives, and then the husband and wife had issue a daughter. And it was holden by three of the justices, that the daughter had no estate, for that she was not in esse, at the time of the grant.

[153] MICHAELM. 30 & 31 ELIZ.

LEWIN AGAINST MANDY. IN C. B. ROT. 2529.

In a replevin the defendant avowed for 20l. rent, which was pleaded to be granted by Lovelace and Rut and by fine to Stukeley and his heires, who being seized thereof, did recite that he with 7 others were plaintiffs in a writ of covenant against Lovelace and Rutland, upon which a fine was levyed, by which fine the said Lovelace and Rutland amongst other things, did grant a rent of 20l. out of the mannor of D. and other lands to the said Stukely, who granted it to Hoveden, under whom the defendant claymes in taile. The question was if this were a good grant, because there are many misrecitalls in the indenture: for whereas he recited that in the writ of covenant for the fine Lovelace and Rutland were defendants, in truth they were plaintiffs, and Stukely and the others defendants, and whereas he recited that the said grant was made to him, it was made to him and his heires, also he said, that the said rent charge amongst other things was granted, whereas nothing but the 20l. rent was granted, and that only out of the mannor of D. and not out of other lands.

Anderson. If a man recites that he hath a rent of 10l. of the grant of J. S. whereas he hath this of the grant of J. D. yet is the grant good. And at last it was adjudged that the grant was good.

Note that Fenner at this time said, that it had been resolved by Anderson and Gawdy and other justices very lately, that if the Kings tenant dies, his heir within age, yet the heir at full age before livery sued may bargain and sell by deed inrolled,

or make a lease for years and it is good: but if he makes a feoffment or leavie a fine sur conusance de droit come ceo, &c. this is voyd, because it cannot be without intrusion upon the King.

TRINIT. 39 ELIZ.

OLDFEILD AGAINST WILMORE. IN C. B. ROT. 2715.

In debt upon a bond to performe the award of J. S. who did award that the defendant should pay 10l. or cause two strangers to be bound for the payment thereof, the defendant pleaded performance, the plaintiff replyed that he had not payed the money, and the defendant demurred.

Walmesley for the plaintiff. For although the award be in the disjunctive, yet forasmuch as it is voyd as to one part, now upon the matter it is single, and on the non payment of the ten pound is forfeit 17 Ed. 4. 5.

Windham and Rhodes, held that the plaintiff should have pleaded so much of the award as was for it is a thing intire, and the law will **[154]** adjudge that one is only to be done, because the other is contrary to the law.

Anderson and Peryam. The plea is good, for a man shall not be compelled to shew a voyd matter, and although the defendant had caused the two strangers to be bound, the obligation is broken, for as to this arbitrement, it is meerely voyd, and at another day the plaintiff had judgment.

GOODRIDGE AGAINST WARBURTON.

In an ejectment, the jury gave a speciall verdict, that Francis was seised of the land in tayle, and suffered a recovery to the use of him and his heirs, and afterwards did devise the same lands to his wife Margery untill his daughter Prudence came to the age of 19 years, and then that Prudence should have the land to her and the heirs of her body, upon condition to pay twelve pound per annum to the said Margaret during her life in recompence of her dower, and if she failed of payment, then Margaret should enter, and hold the land during her life, and afterwards, it shall go to Prudence as before. And after this John Francis the heire did reverse this recovery, by a writ of error, and entred upon Margaret, and she brought her writ of dower, and was indowed of the third part, and then she levyed a fine of that third part to the said John Francis, and he infeoft Tyndall, who made the lease to Goldsing, and then Margaret marryed Warburton, and Prudence came to the age of 19 years, the rent of twelve pound is not payd, and Warburton and his wife entred, and Goldsing brought this action.

Walmesley. By the recovery of the third part in the writ of dower, the rent of twelve pound, which was in recompence thereof is gone. For at the common law, if a woman recover in dower, she hath waived that which was assigned to her in lieu of her dower, as in case of dower ad ostium ecclesiæ, and 10 Edw. 4. If the husband discontinues the land of his wife, and she brings a writ of dower, she is concluded to have a cui in vita.

Shuttleworth cont. By this recovery the estate taile is revived, yet as this case it is, not materiall, for because he entred without a suit, he is a disseisor, and that was agreed by all at the Bar and the Bench. And he cited 26 H. 8. 3d. 4th H. 7. 11. And I conceive that the dower will not conclude her of the twelve pound per annum, for it is not a rent, and the title to have the land for her joynture for non-payment the rent was not in esse at the time of the recovery of her dower, but afterwards, as if a lease be made to a woman who marries the lessor, who dies within the terme, and the wife enters, this shall not conclude her dower, after the lease is expired by the eleventh of H. 4. Also the twelve pound is not appointed to be issuing out of the land, and so it cannot be a joynture, and therefore, the wife is at large to have the twelve pound, and her dower also. But the Court held, that she could not have her joynture, for by the recovery of the dower her joynture is barred, for the rent

was given her in recompence of her dower, so that it cannot be intended that she shall have rent & dower also, wherefore it was adjudged that her entry on the land was not good.

[155] 30 & 31 Eliz.

The King against the Bishop of Canterbury and Hudson. Rot. 1832.

In a quare impedit, Hudson the incumbent did plead, that King Edw. the 4th did grant the rape of Hastings, et bona & catalla fellonum fugitivorum & ategat of all residents and non-residents within the said rape to the Earl of Huntington. And pleaded that John Ashborne was seized of the mannor of Ashborne, and of the advowson appending to it, and held the same of the Earl of Huntington as of his rape of Hastings, and that the said John Ashborne, was outlawed, during which, the incumbent of the said church dyed, and the earl presented the said Hudson.

Shut. I conceive this avoydance does not belong to the earl by reason of this grant, for by the same patent libertie is given to the said earl & his heirs to put himself into possession, and of such things as he cannot put himself into possession, they will not passe, and here this is a thing in action, which by these words will not passe. 19 H. 6. 42. by the grant, de catalla fellonum obligations do not passe.

Walmesley. Stanford in his prerogative, saith, that by the words, bona & catalla the King shall have the presentation to the church of him that is outlawed or attaint, and by the same reason he may grant it by such a name, and although the party cannot seise such a thing, yet it shall passe 39 H. 3. 35. Rent for years shall passe by the grant of bona & catalla.

Periam. It will passe by these words, for it is an ancient grant, for in that time the patents, of the King were not so specially penned, as now they are.

Anderson. I conceive the avoydance will not passe by these words, for within this word bona moveables are contained both dead and living, and avoydance is no chattell nor right of chattell. Quod Peryam negavit, &c.

Mich. 37 & 38 Eliz.

Townsend against Whales.

In an ejectment, the jury found that J. S. was seized of land in possession, and also in reversion for terme of life, and made a devise by these words, that his executors take the profit of all his lands and tenements free and copy, for ten years for the payment of his debts, and legacies, and after the end of the said ten years, that all the aforesaid lands and tenements with their appurtenances, should be sold by his executors or one of them, and the silver to be bestowed in the performance of his will, or by the executors of his executors, or any of them, and then one of the executors dyed within the ten years, and the two surviving executors did grant all, aswell in possession as in reversion to House, who made a lease to the plaintiff. And two points were resolved.

[156] 1. That the executors may grant the reversion (34 H. 6.) for by these words (free and copy) his intent appears, that all should be granted.

2. That although one of the executors died, yet the other two executors may sell.

Anderson. If such devise had been at the common law, and one executor had refused the two others could not sell, but if one die, the survivors may sell the land, for there the authority doth survive. Which difference the other justices agreed to. And at another day Anderson said, there was difference, where the devise is, that executors should sell his and the money divided between them, there if one die, the others shall not sell, but otherwise here, because the money is the performance of his will.

Walmesley. The sale by the two executors is good, for it is said; the executors or any of them &c. And Beaumond agreed, wherefore judgment was given for the plaintiff. Note that there were two verdicts in this case, and the first only found,

that the executors should sell after the ten years, and that one dyed, and the other two did sell within the ten years, and the opinion of the Court was that the sale was voyd but in the 39 and 40 Eliz. all the whole will was found and judgment given ut supra.

THE EARLE OF RUTLANDS CASE.

Roger Earl of Rutland, and John Manors and others executors to John late Earl of Rutland executor to Edward Earl of Rutland, brought an action on the case against Isabell Countess of Rutland, and declared for divers jèwells and goods, &c. that came to the hands of John Earl of Rutland as executor to the said Edward, and the said John the 10 of July 29 Eliz. did casually loose them, which after came to the hands of the defendant, & licet sæpius requisita, she would not deliver them to the said John in his life time, nor to the said plaintiffs after his death, but knowing the goods did belong to the plaintiffs in D. in the county of Notingham converted them to her proper use. And a verdict for the plaintiff. And it was moved often in arrest of judgment, but all the justices agreed, that the action of trover and conversion would lie by the executors upon the statute of the 4 Ed. 3. upon a conversion in vita testatoris, and so hath it been adjudged in the Kings Bench, and although the statute mentions onely a writ of trespass, that is only put for example. Also they all agreed, that the sole cause of action is the conversion, for if there were no conversion, they shall be put to their detinue, therefore the great doubt did arise because the day and time of the conversion was not shewed, for perhaps it was after the writ and before the declaration: and also if it was in vita testatoris they should have this action by the 4th of Ed. 3. But at length Walmesley said, that all Justices of the Common Pleas, and of Serjeants Inne in Fleet-street (besides Peryam Chief Baron) were of opinion that judgment should be given for the plaintiffs, for that some of them held, that the day of the conversiou is not materiall to be shewn, and others that of necessity as this case is, it shall be intended that the conversion was in the plaintiffs time, wherefore judgment was entred for the plaintiffs, but a writ of errour was brought, and the case much debated.

[157] MICHAELM. 38 & 39 ELIZ.

CAREW AGAINST WARREN. IN C. B. ROT. 1945.

Gunter tenant in taile of lands in antient demesn made a lease for 60. years to J. S. and for security thereof levied a fine to Lee and Loveland, who rendred to Gunter in fee, who devised the reversion to his wife for life the remainder in fee and dyed. And then the Lord of Andover, (which is an ancient mannor) by an ostensum est nobis, returned in the Common Bench against Lee and Lovelace, upon a scire facias awarded against them, and two nihils return'd, the fine was reversed.

Anderson. The scire facias is not well awarded, for it ought to be brought as well against those in possession, as the conusors, and this appears by the 21 Ed. 3. 56. by which they in possession and those in remainder ought to be made privy.

Walmesley agreed, for the freehold, which is in me shall not be taken from me without making me privie, no lesse, then if A. bring a precipe against B. of my land and recover, for I shall have an assise upon this. Also another matter is in the case, for the land now in question is alledged to be parcell of the mannor of Andover, and therefore cannot be ancient demesne. But no judgment was at this time given, because there were but two justices.

HALLING AGAINST COMAND.

In an action of covenant, the case was thus. Comand the defendant did covenant with the plaintiff, that at the costs and charges of the plaintiff he would assure certaine land for the joynture of the plaintiffs wife before Michaelmas. And the

plaintiff declared that no assurance was made, nor tender before the said Michaelmas. And hereupon the defendant demurred, for that the charges should have been offered before the assurance, 3 H. 74. 23 Eliz. Dyer. Anderson in the 35 & 36 Eliz. Foster did covenant with Franke to make an assurance at the costs and charges of Franke, and Franke brought a covenant, and Foster demurred because no charges were tendred to him, & it was adjudge against Foster, for Franke could not have cognizance what manner of assurance should be made, and so could not tell what charges to tender, and therefore he ought first to shew him what manner of assurance he should make, and according to that he ought to tender reasonable charges.

Walmesley. But the chargee ought to precede the assurance, but the declaring of what manner of assurance should be made ought first to be done. Beaumond of the same opinion.

[158] MICHAELM. 38 ELIZ.

DAMPORT AGAINST SYMPSON.

In an action on the case, the plaintiff declared that he had given to one Spilman certain jewells to traffique with them beyond the seas, and that he had not sold them, but had delivered them to the defendant, who had spoild them, whereupon the plaintiff brought an action against the said Spilman, and upon not guilty pleaded they were at issue: and the now defendant at that evidence did depose upon his oath, that the jewells were worth but 200l. whereas they were worth 800l. by reason whereof the jury gave indeed but 200l. damages, and for this false oath he brought this action; and the jury upon not guilty pleaded, found for the plaintiff, and assessed 300l. damages. And now it was moved in arrest of judgment that the action would not lie, no more than against those who informe a justice of peace of fellony upon his oath against J. S. 20 H. 7. 11. Also the party grieved hath his remedy in the Star-Chamber. And Walmesley said that for perjury there was no remedy, and so is it in the 7th Eliza. Dyer 243. a. for it is not to be thought that a Christian would be perjur'd, and in the 2d H. 6. 5. a conspiracy will not lye against indictors, who informe their company of their oath. Wherefore, it was adjudg'd that this action did not lie. Note that Anderson was against this judgment: but Walmesley Owen and Beumond were against him.

REPORTS and CASES, taken in the time of QUEEN ELIZABETH, KING JAMES, and KING CHARLES; Collected and Reported by that Learned Lawyer WILLIAM NOY, sometimes Reader of the Honourable Societie of Lincolnes-Inne, since Attourney Generall to the late KING CHARLES. Conteining most Excellent matter of Exceptions to all manner of Declarations, Pleadings, and Demurrers, that there is scarce one Action in a Probability of being brought, but here it is throughly examined and Exactly laid. The Second Edition Corrected and Amended. 1669.

[1] THOMSON AGAINST WARNER.

Formeden en descender of the mannor of Iffield in Sussex, the tenant pleads common recovery with voucher by the auncestor of the demandant, in 35 H. 8. and they were at issue upon null teil record, for now it appears that the record is Iffield, but it was urged by the demandant that the record was Iffield until that matter came in question, and for that it was to be presumed that it was corrupted, and prays that it may be amended, and that surmise was proved. But of the tenants part, an indenture which leads the use of the recovery was shewed, which recites the roll of the recovery, and in that it was called Iffield, and it was advised to the Court, that the record should remain as now it is; for it was hard, to defeat the estate of a man upon such a trifle, for which judgment was given against the demandant, and by Walmesly, a common recovery not being; but a common conveyance need not pursue such a strict form as other writs founded upon a title.

FARMER AGAINST DOWNES.

Two joyntenants acknowledge a statute, and their several lands are taken in execution, and after upon the invalidity of the statute, they joyntly bring an audita querela, and adjudge that the writ shall abate, for they ought to have several writs, for the wrong done to one (by an execution of his lands) is not a tort to the other.

1915: 1 KB. 865. J.

HASTINGS AGAINST BLAKE.

In debt the defendant said that he is attainted of fellony, that the attainder yet continues, and demands judgment if he shall be put to answer, and adjudged that he

shall answer, and may be taken in execution, and that shall not be prejudicial to the King, for notwithstanding the execution of the party, the King may have him executed when he will.

2. Men attaint or outlawed shall be put to answer in any action against them, because it is to their prejudice; but in an action brought by them they shall not be answered because, it is to their benefit.

3. They shall be put to answer, by reason of the possibility of their being pardoned. Note that this judgment was much against the opinion of Walmesly, who said it was in vain to put any man to answer in an action real or personal, who hath in truth nothing to be taken in execution.

MARTIN AGAINST WENTWORTH. 38 ELIZ.

Debt upon a lease for 35 years to commence at the Annunciation of our Blessed Virgin last past, and the lease was made, 26 Junii, 26 Eliz. rendring a rent of 40l. annually during the first ten years (vid.) 5 **[2]** Octob. and the last day of March by equal portions; and after the end of the said ten years 46l. 13s. 4d. annually the 5 Oct. and the last of March, by even and equal portions, the first day of payment to begin the 5 of Oct. next. Adjudged that the new reservation to commence at the annuntiation 36 Eliz. although that the term, as to the interest doth not commence until the making of it, yet in respect of the number of years, it shall be accounted of the annunciation of the 36 Eliz.

2. The words of the first payment to be made the 5 of October next, shall refer to the first reservation, and by the manner of the reservation it is impossible for the lessor to have 10 times 40l.

The lord brought trespass against a copyholder for cutting of elmes the defendant prescribes to cut and dispose all the trees upon his tenancy, &c. adjudged to be an ill prescription; but otherwise of a copyholder of inheritance, 2 E. 4. ne poient succider bois sauns licence. Note there it is vouched, that a custome that the wife of a copyhold for life may hold durante viduitate, and agreed to be good. And Taunton Dean custome, that if a copyholder in fee maries a wife, if the wife survives she shall have the fee, et sic è converso; and agreed to be good, and Yelmester custome, that copyholder for life in extremis may nominate his successor to have the copyhold, paying a reasonable fine to be agreed upon by the lord, or if that fail to be assess'd by the hommagee, and a good custom. T. 2 Jac. C. 3. intral H. 45. Eliz. rot. 156. Powel against Pencock, that such a copyholder for life according to Yelmester custome may prescribe to cut trees, &c. but otherwise of an ordinary copyholder for life.

HOLLINGWORTH AGAINST PARKEHURST.

H. brings an audita querela against P. and sues him upon a recognisance for a statute staple acknowledged before Poph. Chief Justice where it was made upon an usurious contract, and it was agreed, that if there be a communication and an agreement after the forfeiture of a recoguizance, and the second defeasance is for more than 10l. in the hundred, according to the principal debt, yet it is not within the 13. Eliz. ca. 11. of usury, but it had been otherwise before the forfeiture. And by Glanvil and Walmsly, Anderson being absent, that although that the second defeasance bears date the same day of the payment of the first defeasance, yet it is not within the statute, for it is not for the forbearance of the first principal but of that penalty, also when the conusor perceives that he was not able to save the forfeiture, it was adjudged that the first contract was not usurious.

WARBERTONS CASE.

A tenant in tayle, the remainder to B. in fee of lands held of the Queen; B. dies, his heir of full age; A. leases to W. who being ousted brings an ejectione firm and it

was prayed that proceedings in the case might be staid, Regina in consulta, because the primer seisin is due, but by Walmsly and Glanvil, that it is not due: and yet Glanvil said that the Court of Wards would have ward for such reversion, which seemed to him to be hard law, but Serjeant Harris said that it hath been adjudged in the Court of Wards to have ward for a lease for years. (See Cook on Let. 46.)

KETTLENSHERT AGAINST CHATTERTON.

K. recovers in debt against A. and the money was brought into Court, Yelverton, the Queens serjeant moved that the money **[3]** might be retaind there to the use of the Queen: for the defendant stood fined in the Star-chamber, it was ruled that that was no cause.

H. 2 Jac. B. R.

A. after many legacies devises the residue of all his goods to one Taylor, and makes Trott his executor and dies, Trott after accounts before the Ordinary, &c. pays the residue to Taylor, and thereupon has an acquittance from the said Taylor. Trot dies, and Taylor sues his executor in the Court of Requests, to accompt de novo, the executor pleads the acquittance, and the plaintiff thereupon demurred; Cook Atturney General prays a prohibition, and the Court said, that an executor shall not be compelled to account in any Court, although the Court of Conscience; but by the Court it was agreed, that an executor of an executor may be sued for a legacy given by the first testator.

FOX AGAINST LEE.

Pas. 3 Jac. B. R.

In debt upon an escape, the plaintiff counts upon a recovery, &c. and that Lee then sheriff took the party, and afterwards extra custod. suam ad largum ire permittit, without saying, extra custod predict. in executione predict existent & remanent, and it was ruled that it was good enough, for it shall be intended all one custody. ve Dyer 66.

CRAB AGAINST BALES.

A custome, that a copyholder for life may nominate one or two that shall have the copyhold lands after his death for a fine to be assessed by the homage, if they cannot agree with the lord, adjudged to be good. H. 6. Jac. C. B. 13. Rot. 2613. Raubus against Mason.

PRINGE VERSUS CHILD.

Intr. T. 2 Jac. B. R. rot. 520.

P. the vicar of Eaton in the county of Oxon. sues C. the parson impropriate in the Spiritual Court in Oxford, pro minutis decimis. C. sues a prohibition against the vicar upon a surmise of a prescription. P. comes and pleads the first endowment made anno Dom. 1310. by which the minute tithes were allotted to the vicar. C. demurs, and adjudged for the plaintiff, for the parson cannot prescribe against the first endowment.

SIR RICH. CHAMPION AGAINST ROBERT HILL.

Pas. 3 Jac. B. R.

In debt upon the 2 E. 6. for not setting out of tythes, the plaintiff declares, that the defendant was seised of the lands in question within that parish, and that the

tythes did belong to the parson and vicar (viz.) two parts to the parson, and the third part to the vicar or their farmers, payable in specie, for forty years last past, that the plaintiff was farmer proprietory of the tithes to the parson, and vicar spectant, and shews the value of the tithes due, and demands the treble value, the defendant pleads nihil debet per pat. and it was found for the plaintiff. It was now moved in arrest of judgement, because the plaintiff ought to have brought two actions, as the parson and vicar ought for their several parts, but resolved that the action is well brought, for it is a personal and one entire debt for one wrong. 32.

[4] BAVAGE AGAINST CLARK.

Intr. H. 45 Eliz. B. R. rot. 5.

Debt upon an obligation, the defendant pleads, non est factum, and at the Nisi Prius, relicta verificatione, cognovit actionem, judgement that the plaintiff shall recover, and the defendant in misericordia, and not, quod capiatur, and by the Court that rule good. That it is so used in both the B. R. & C. B. contrary is Dyer 67. ve 33. H. 6. 54. 34 H. 6. 20. 44 E. 3. 42, 45 E. 3. 10.

WILLIAMS AGAINST COOKE.

Intr. H. 2 Ja. rot. 290.

In trespasse the defendant pleads not guilty, and he is found guilty for the entry, &c. in one moiety, and not for the other, and it was moved in arrest of judgement, that now it shall be intended that they were tenants in common, entred that trespass lies not, 10 H. 7. 27. 8 E. 4. 8. 18 E. 4. 11. and by the Court that shall be a good plea in abatement of the writ, but it had been so found by the jury, the plaintiff should have judgement, and so 'twas here adjudged, ve infera.

RUDS VERSUS GIME.

R. brought error upon a recovery in the chamber, and in the return of the record and proceedings appears that the first express was summons consuet. &c. without saying talis habetur consuetudo, &c. where there ought to have been an attachment, and not a summons, and for that it was reversed, and the certificate nought, another error was assigned, the judgement there was, that the defendant be in misericordia, & quod capiatur Gawdy, that is no error but only a surplusage, ve. 93. 3. 6. pl. 13. but Fenner was on the contrary opinion. P. 5. Jac. B. R. Banks against Pebleton, upon error, it is adjudged there to be error, also M. 4. Jac. R. B.

HITCHAM AGAINST MURCHAM.

H. brings an assault and battery in one writ against two by several precipes, and recovers, and it was ruled by the Court that he shall have but one execution, because it appears to the Court that it is one and the same trespass, but if he had sued them by several writs, and had recovered against them, if he had execution and satisfaction against one, the other hath no remedy by plea, &c. but by an audita querela, but if after execution against one, he sues the other in an assault and battery, then he may plead that, and so it was agreed. T. 3. Jac. intrator, H. 2. Jac. B. R. rot. 1055. inter Brown & Wetton in trover, and so also M. 4. Jac.

THORE AGAINST THOMAS.

After confession of wast the plaintiff had a writ of enquiry of dammages, and it was found a penny by the Court that no judgement should be entered. And by Anderson

if judgement had been entered it had been error, for the value of wast shall be to 40d. at the least; 42 E. 3. 13. (Cook. Litt. 54.)

[5] TURTHERS CASE.

Entr. T. 40 Eliz. C. B. rot. 529.

Parson exchanges his gleab-land and dies, the successor enters into the exchanged land and takes the profits, yet the successor is bound by his time, & adjurnatur, it is clear that the exchange should not have been good, if it had been made after 13 Eliz. But the exchange in our case was made before.

ALLERSON AGAINST EDEN.

The Bishop of Norwich seized of three mannors and of a rectory, grants the said rectory to Maunton, &c. and because the Queen had a rent, &c. of thirty three pounds out of the rectory he covenants and grants with N. his heirs and assigns, that if, &c. he be destreyned, &c. for that rent, &c. that then it should be lawful for N. &c. to destreyn for so much in the three mannors, which after were granted to Wood-house, N. afterwards grants the rectory with such a clause of distress in the same mannors to B. and adjudged that N. might lawfully grant that over as well with a nomine pœnæ, although it be not annual; and the distress by B. adjudged lawful.

ALBANY AGAINST MANNY.

In debt, agreed that if A. be out-lawed in debt, and obtains a release of the party of that debt, and after by Act of Parliament all out-laries are pardoned. When the party is satisfied, then the out-lary is discharged, for the release is a satisfaction in law. (9 Rep. 52. b.)

LICHFIELD AGAINST SANDERS.

In wast, it was said by Anderson and Walmsly, that if the issue be joined upon a collateral point, as if the party entred as devisee or executor, yet the jurors ought to have the view of the place, for the damages given, although that the wast be confessed: for the issue is tried by the verdict, but otherwise if by demurrer; but Glanvil was of a contrary opinion, for it is not sufficient to come and view any part of the land in question as in an assize, but the jurors ought to have the view of every parcel, for the assessing of dammages, 34 H. 6. 45. a. And if any of the parties disswade the jurors from making a view, it is punishable in the Star-chamber, for hindering the course of justice.

BUTLER AGAINST MONNINGS.

A. seised of three acres, grants a rent-charge out of them to M. and after enfeoffs I. S. of two acres. M. covenants with I. S. and grants that he will not charge them two acres, for the said rent with any distresses after; and B. the terre-tenant of the other acre, being distreyned, brings a replevin; and the question was, if the covenant and grant by M. be a release of the rent; Glanvil, that it is a release, Anderson on the contrary opinion; but by the Court, if it be a release, the terre-tenant of the other acre may plead that, for by that the rent is extinguisht.

Note, that if a man marry the wife of a tradesman, during her widowhood, she cannot use that trade if she had not been an apprentice [6] to it, &c. but of the trades excepted in the statute, as tanners, &c. Lege statute.

Note by the Court, that process out of the Court of Requests is not sufficient warranty to imprison any man, and Glanvil advised Heale for his clyent to bring false imprisonment.

Heale moved this case. A. convicted of fellony, and discharged by his clergy, takes a wife, and they bring an accompt upon a cause before the conviction for goods of the wife. And by the Court it is good; for those goods could not be forfeit by the conviction, vide Cook, lib. 246. for false imprisonment brought after pardon for outlary, 29 Assize 63.

WINDHAMS CASE.

8 Rep. 34. a. Dyer a. 19.

If tenant in tail makes a lease for years, according to the 32 H. 8. that that shall bind the issue of the tenant in tail, but not those in the remainder.

Note, by the justices upon pleading of a conveyance by bargain and sale actual entry ought to be pleaded, and that possession, per 27 H. 8. de usibus is not sufficient.

WHIDDONS CASE.

Whiddon brought an annuity, and declares of a grant by deed, the defendant said it was delivered to the plaintiff as an escrow upon certain conditions, to be his deed, and shews the conditions not to be performed. And adjudged upon the demurrer sans agreement per le plt. that a deed cannot be averred as an escrow to the same parties.

WIMBERLY AGAINST THOMPSON.

An action upon the case how as the plaintiff being possest of a fountain of silver to the value of 400l. and delivers it to one to transport over seas, and sell it; and in the account it appears that the factor afterwards melted the fountain and converted it to his own use, for which the plaintiff brought his action upon the case and they were at issue, and it was moreover alledged, that where in truth he was damnified to the value of 400l. yet there made oath, that the said fountain was but the value of £280. And by reason of the said oath, it was adjudged that the plaintiff nil capiat per bre.

First an oath of every one shall be taken as a certain truth, and for that reason the statute of 3 and 22 H. 7. which gives power to punish perjuries in the Star-chamber, were made, for no punishment was for perjury at the common law, be 7 & 8 Eliz. 242.

By that action the intent of the jury shall come in issue, as when they will give in damage that which cannot be tryed, for they are sworn to keep their own counsel.

If this action lye, all testimonies would be terrified to speak the truth.

[7] 4. No president can be produced of such an action, which is a great argument that it would not lye.

5. If that action may lye, the plaintiff may have it upon any wager of law, which is unreasonable, and against law.

Williams against Roberts.

Where an execution shall be de bonis propriis.

Williams brought debt against Roberts as executor, and had judgement de bonis testatoris, and a fieri fac. was awarded, the sheriff returns nulla bona, upon which the plaintiff surmises that the defendant had wasted the goods, and praies a scire fac. against him to shew cause why he should not have execution de bonis propriis, and it was awarded that he should have no such execution, until the sheriff had returned a devastavit. Yet the 9th H. 7. Executors 9. an executor pleads plene administravit, which is found against him, and there a special fieri fac. of the goods of the deceased, and if it can appear that they are wasted, then de bonis propriis, and so it was adjudged.

But there was found by the verdict that he had assetts, but here it doth not appear if he hath assetts or not, so there is a diversity between the cases. Also by the devastavit the judgement shall be altered (that execution shall be de bonis propriis) which cannot be without a return of the sheriff, ergo.

Johnson against Heydon.

For lands in Northpreton in the county of Somerset, upon a special verdict found not to be comprised in a fine, it was ruled by the Court, that a mannor in reputation, which is not a mannor in truth, do's not pass by the name of a manner in a fine, or by a common recovery; for they are grounded upon original writs which ought to be certain, and not to be taken by intendment. But otherwise it is of a grant or feoffment, for there the intent of the parties shall help it.

March against Curtis.

A. leases for years, rendring a rent upon condition that the lessee shall not parcel out the land nor any part thereof from the house, &c. the lessee grants all his term in the house and part of the land, and afterwards he leases the part reserved for half a year, the rent is in arrear and he demands, after which he accepts a rent due, at another day, after the title of entry, and afterwards he enters, and his entry adjudged lawful.

First, The condition is broken; for although that by the assignment of the term, the land is not parcelled from the house, but rather the house from the land: yet the intent. For the separation of it from the house is the substance of the condition.

Secondly, The acceptance doth not take away his entry, for the condition is for a collateral thing, otherwise it is of a condition of reentry for non-payment of rent according to Pemaul's case in Cooks Reports.

[8] Martin against Vaux.

Consideration to forbear a debt, a good assumpsit.

An action upon the case, and declares, that with his testator, &c. he delivered certain wares to I. T. and I. H. &c. ad compotum inde reddend. by I. T. and after that, &c. I. T. goeth over seas, and the testator dieth, and that after, &c. I. T. sent into England 100 kintals of wood, &c. to satisfie the plaintiff of his account, which wood came to the hand of the defendant, who delivers parcel of it to the plaintiff in satisfaction of part of the account, &c. and the defendant, super se assumpsit, that if

the plaintiff would forbear the said I. T. for the residue untill his return into England, which he hoped to be within three months or thereabouts, that then the defendant would satisfie the plaintiff all that should appear to be due upon the account. By virtue of which he hath forborn three months, and that 3000l. was due and in arrear upon the said account, which the defendant hath not paid, per quod actio, &c. And upon the non assumpsit it was found against the defendant, &c. and in arrest of judgement, divers exceptions were taken to the declaration.

First, Because he said the testator delivered certain wares to I. T. and does not shew what they were in certain; disallowed by the Court, because in that action the wares are not demanded, but the action is only grounded upon the assumpsit, so the 20th Assize 3. in trespasse the plaintiff declares for the taking of charters, and not shews what; and adjudged good enough. Because in the action of trespass, the plaintiff only demands damages, and not the charters themselves, ve. 47 E. 3. 3. Tho. Pains case, that if an account be brought for the very wares, there they must shew the certainty. So note the diversity.

Secondly, It was alleadged that the wares were delivered to two, ad compotum inde reddend. by one, therefore not good, for both are accomptable by reason of a joint delivery. The Court was of the contrary opinion, because it was the folly of I. T. so to accept the goods upon such delivery, by which he only is chargable.

Thirdly, The assumpsit is not good, because the forbearance is not any recompence to the defendant but to I. T. so no consideration. The Court on the contrary, and especially also because the defendant took into his hands the said wood: and so was chargable to the plaintiff in an account, before the assumpsit, but otherwise it had been doubtful.

Fourthly, It is not alleadged certainly for what time he hath promised to forbear the account, ergo the declaration nought. The Court on the contrary, for he hath averred in fact that he did forbear three months, which is sufficient; quere the case of Smith and Andrews, that if the plaintiff will forbear, ad pauculum tempus.

Fifthly, It is said that the defendant assumes all that shall be due upon the account, and the plaintiff after alleadges that 3000l. was due upon the account, which is not good, because he do's not alleadge, that a writ of account was brought, and that auditors were assign'd, and that so he was found in arrearages 3000l. The Court on the contrary; for the word account is a proper word to merchants, for when they deliver wares to their factors to render account, those wares are called the account, and so by usual speaking amongst them, it is said that the account delivered to such a factor it amounts to the same thing, &c. So judgement was given for the plaintiff.

[9] PAUL BANNINGS CASE. ADJUDGED P. 37 ELIZ.

An action upon the case for stopping a cross way.

In an action on the case, and declares, that where the plaintiff being seized of an house in D. in the county of L. and shows the estate, &c. and prescribes to have a cross way in, by, and through a certain way in sale in the county aforesaid, unto such a close in D. in the said county, and that the defendant made a hedge in the close of D. in the said county, and did stop up his cross way, per quod actio accrevit, and upon non culp. it was found for the plaintiff, and in arrest of judgement exceptions were taken to the declaration.

First, Because to prescribe to have a cross path in a certain way, that shall be intended a common cross way, that being in common right, prescription is gone. The Court on the contrary. For though a man cannot prescribe in a common cross way, yet to have a way in, by, and through that common cross way, is otherways, for that is cross, thwart, and through the cross way, and then notwithstanding, that

being in the high way, may continue his course without prescription, yet it may be that the cross way be inclosed and hedged on both sides, and for that, to prescribe to pass, cross, and repass through is a good prescription.

Secondly, The crossing and going through the cross way is only shewing the continuance of the cross way, unto such a close, to which the plaintiff claims way, ergo bon. There the declaration is not good, because the village nor the county where B. acre lyes, and to which the way should lead is alleadg'd. Court on the contrary. Because the village and the county is alleadg'd where the nusans was done, for that only is the cause of the declaration, to which he hath pleaded not guilty, and upon that the issue is joyn'd, and then the visne shall come, but if the issue had been joyn'd upon the prescription of the cross way, or the right of that, the visne should have come from both villages, (viz.) where the house is, and out of the village where the close lyes, to which the cross way leads, and then the plea had been ill for the incertainty of the village or county where B. acre lyes.

WHITE AGAINST WEST.

The case was argued by Herne Serjeant, who took divers exceptions to the pleadings.

First for that it was pleaded, that Sir Henry Bloncker being seiz'd of divers lands held in chivalrie, devises these lands out of which the rent in question is issuing, leaving a third part according to the statute, to descend to his heir, and did not say that it was the third part in value, which otherwise might be taken the third part in quantity, as the third acre, which is not the purpose of the statute by which he ought to have pleaded, that it was the third part in value, left to the heir by descent.

Secondly, Gerish in right of whom the avowry is made, intitles him by Bloncker, by bargain and sale, and said, pretextu quorum he was seis'd, and did not say, moreover virtute stat. 27 H. 8, as he ought.

Thirdly, for that he pleads, that Gerish was seis'd in his demeasn as of fee, and so being seis'd, a præcipe was brought against I. S. I. N. tenants of the land, by which a common recovery was had: the which is a contrariety in himself, they are terre-tenants and at the same time. Gerish is seis'd of his demeasn as of fee, the which demeasn is ever an actual possession. And for the matter in law he mov'd, how that the rent is **[10]** gone for the avowry is for a rent service, and that cannot be, for by the recovery the tenure is destroyed. Warberton Serjeant argued to the contrary, and first answered the exceptions.

And to the first, he said it was well enough pleaded; for where he said that he left the third part to descend, it answers to the words of the statute, and if it be not sufficient in value but only in quantity, that belongs to another to shew. As in the 4 Assize, upon an appersciament of rent, it is sufficient to make the rate according to the quantity, if it be not shewed of the other part, and differs in value.

To the second exception, for that it is not pleaded virtute statut. but only prætextu quorum, he answered, that that is also a general demurrer, and then that being but a defect in form, the Statute of Jeofayles helpes, and if it will not, yet that pleading seemes to be good enough, for that the statute is a general law, of which the Court shall take notice without any pleader, and so good enough the one way or the other.

To the third exception, that there is a repugnancy in the pleading, I hold that there is not any, for it is that Gerish was seized, &c. until after a præcipe was brought against I. S. and I. N. terre-tenants, by which it shall be intended that after they came lawfully to the tenancy. For another exception which hath been taken, that there is a doubleness in the plea, for that that he pleads, quod concessit reversionem & reddit: prædict. To that I say, that it is not double, although that the rent passeth as incident to the reversion, for that the rent is only responsable, is in question, and the reversion goes by the recovery; and as to the matter in law, it seems that the rent is not gone by that recovery, for the tenant in tayl may take of me my rent, the which is proved by a case in Littleton Seignor M. and tenant, where if the lord purchase the tenancy, the mesualty is extinct by the inconveniency, which shall not be 48 E. 3. Avowry, it is held, that if a discontinuance be of an estate tayl, that yet

the donor may distreyn for the rent, and by a common recovery against the donee, the rent is not taken from the donor; for he against whom the præcipe was brought, was not tenant of the rent but the donor; and for the rent the præcipe shall be against the pernor. And for that 33 Assize of Rent, it was maintained against the pernor without naming the terre-tenant, and for the recompence in value it is not gone, in respect of the rent. In Hunt and Capells case it was adjudged, that a rent granted out of a remainder in tayl, was taken away by the common recovery, but if tenant in tayl in possession grants a rent-charge, and after suffers a common recovery, that rent remaines. For at this day a common recovery is but a common conveyance. And although that is ejus en le post, yet it is in a manner ejus en le per, and it is to the use of the tenant, if no use be declared to the contrary, and he that recovers shall take the advantage of the condition by stat. 23 H. 8. and upon the judgment to have in value, and he that was in reversion to have no rent. And upon the extent the tenant shall have the lesser in value, in regard of the rent recoup, with which it shall not be charged, and upon the extent the sheriff cannot assign a rent in value, as in 22 E. 4. in a writ of dower, the sheriff cannot assign a rent in recompence of dower, nor no other can assign a rent, but he that is owner of the land. And to the intent that no injury nor inconvenience shall be to any of the parties, after the estate-tayl is determined, he in the reversion shall have the extent, for that, that the land given in value, is not of so great a value, as that which he hath lost, and so concludes, that the rent remain, and pray'd judgement for the plaintiff to distreyn for it. Et adjournatur.

[11] Action for Slander.

Thompson an atturney of the Common Bench brought an action on the case for these words spoken to one of his clyents, John Thompson is a paltry fellow, for he doth deal on both sides, and deceives them which put him in trust. And after verdict it was mov'd by Heale to have judgement for the plaintiff, to which the Court assented, if other matter be not shew'd to the contrary.

WEEKS AGAINST TYBALD.

Entr. M. 2 Jac. B. R. rot. 364.

In an assumpsit the plaintiff alleges, that whereas there was a communication of marriage between the plaintiff and the daughter of the defendant, that the defendant upon speech between the father of the plaintiff and the defendant, for free liberty to the plaintiff to come to the house of the defendant to woo his daughter, the defendant then and there affirm'd and publish't that he would give 100l. to him that should marry his daughter with his consent, &c. By the Court the action doth not lye, for asseruit et publicavit doth not make words that include a promise.

It is not aver'd nor declar'd to whom the words were spoken, and it is not reason that the defendant should be bound by such general words spoken to excite sutors.

BROOKE AGAINST SMITH.

Entr. H. 2 Jac. B. R. rot. 1169.

In debt against an executor, the plaintiff recovers, and a fieri fac. de bonis testat. and upon that the sheriff returns, that the defendant had not any goods of the testators tempore judicii, nor after; the plaintiff comes to the Court, and surmises that the defendant had wasted the goods, and prays a writ to the sheriff to inquire. But after the very matter being mov'd at the Court, by the Court a supsedeas was granted, for it was out of the Court and without president, Justice Williams being only of the contrary, and cites the 9 H. 6. 57. that he may have a special writ, and also the case between Haworth and Peele.

SOMERFIELD AGAINST STANTON.

S. brought an assize of nusance against St. (and recovered) for diverting of a water-course; and after he brings a writ of rediss. out of the Chancery, and the rediss. found before the sheriff by the enquest, and damages assest, and the sheriff levyed double damages, and commits the partie, &c. during the pleasure of the King, and abates the nusance, and St. is remov'd, by habeas corp. and the whole matter returned, and the defendant St. was fined three pound six shillings eight pence to the King, and was delivered, &c.

HARRIS'S CASE.

An annuity was brought against H. parson of Gistenthorp in Essex, and he praid ayd of the King as patron, and it was agreed by the Court to be ill, because he did not pray ayd also of the Ordinary. For it had been no difference if a common person had been patron: so also if there be two patrons, the parson ought to pray ayd of both of them. Dyer 26 P. 31 E. 1. C. B. rot. 77. the prior of Hunt against the parson of Oxford, praid ayd both of the Ordinary and patron. T. 23 E. 1 rot. 79. C. B.

[12] SIR GEORGE WALGRACES CASE.

Note by Popham and Williams that a plea of tender of amends, is not good where the trespass was voluntary, as for battery or breaking his close, or putting cattle into his grounds.

Mic. 3 Jac. B. R.

Note, that it hath been many times adjudged, that a trover lies for money although it be not in a bagg, but otherwise of detinue; for by that the plaintiff shall have judgment to recover the thing it self, if, &c. and if not then damages, and therefore the thing ought to be known, 40 Eliz. B. R. Holliday against Higgs. The master delivers corn to his servant to sell, who does accordingly, and converts the mony: the master brought an action of trover for the money, and adjudged to be well brought.

CHADRON AGAINST HARRIS.

If the Ecclesiasticall Court proceed in a matter that is meer spiritual, and pertinent to their Court, according to the civil law, although their proceedings are against the rules of the common law, yet a prohibition does not lye, as if they refuse a single witness to prove a will, for the conusans of that belongs to them. And agreed also, that if a man makes a will, but appoints no executor, that that is no will but is void. But if the Ordinary commits the administration with that annexed, the legatory to whom any legacy is devised by such will, may sue the administrator for their legacies in the Spiritual Court. Note P. 4 Ja. B. R. Peeps case, a prohibition was denied where they in the Spiritual Court refused a single witness in proof of payment of a legacy.

GAGE AGAINST PEACOCK.

Lessee for years of the mannor of Totteridge in the county of Hartford by the Bishop of Ely, and confirm'd, &c. the bishop is despos'd, and the successor by deed indented reciting the lease, grants to the said lessee the office of baily of the same mannor, for twenty one years, with the fees; and there was great arguing if that were not a surrender. See the 21 H. 7. 5. Lessee for years grants a rent-charge out of the lands of the lessor, that that was a surrender, but it was denied for law. See Dyer 200. that a baily had more authority than the keeper of a park, 39 H. 6.

30. Office of a baily goes by lease, Brook Offices 47. Forrestership determined by being a justice in eyre of the forrest. N. B. 264. B. the office of a coroner determined by being a sheriff. It was agreed by the justices, that if A. leases his mannor rendring a rent, and after makes B. baily to receive the rent, B. shall be charged as receiver, and not as baily, because the rent is certain. And if lessee for years of a mannor be afterwards made baily, it was adjudged to be no surrender.

First, because the office of a baily hath not an interest in the land, but an authority only.

For that it hath not any part of the thing demised; and judgment accordingly.

[13] Blackaspers Case.

A. B. and C. joyntenants for years, A. grants his part to B. B. and C. make a leese to W. for years, who is ousted, and brings an ejectione firm. and counts of a demise made to him by B. and C. And the question was now if W. ought to have brought two actions, for B. was tenant in common with C. of the third part. Popham and Fenner that the writ and count is good. For tenants in common may joyne in an action, upon 8 H. 6. cap. 9. and one writ of waste lyes upon several leases. 44 E. 3. 34. Waste 70. Br.7 8. but Williams and Yelverton were of the contrary opinion, because that action is in the realty. But it was by all agreed that it had been good policy for W. to have made a lease to another, and that lessee might have an ejectione firm. without doubt well enough. (Ve. case intr. Chapman & Hill.)

Stockwood against Sare.

Intr. T. 1 Jac. B. R. rot. 282.

A. devises a house to his wife in recompence of a rent which he had formerly granted to his wife, and that she shall have the occupation of B. acre until Mich. next ensuing, paying 40s. to Nich. his son. And after devises all his lands, tenements, and hereditaments (except the land before specified and given to his wife) to N. my son in tayle, which was in May, and the devisor dyes four dayes before, for by the exception of the land before specified and given, nothing by that passeth to Nich. although that the estate of the wife had been but for one day. But otherwise it had been if he had said, except the estate before specified and given; for then the reversion should have passed, so as to B. acre by Popham, if the devisor had lived till after Mich. yet it should not have passed to the son, because the intent of the devisor appears to the contrary, although that the wife had not any interest in B. acre.

Draper against Rastal.

Intr. P. 44 Eliz. B. R. rot. 5, 7.

In the debt for 34l. 10s. the plaintiff declares that he sold certain to the defendant for 66l. Flemish, which amounts to 39l. 10s. and upon nihil debet it was found for the plaintiff, and well, although the action was brought in the debet and detinet, and not in the detinet onely, see 34 H. 3. 12. 6 E. 3. 40. But if it had been brought in the detinet only, it might have been for the 66l. Flemish as well as the other, and so judgment was entred.

That it may be brought in the debet and detinet for the Flemish, if it be a current coyn, as by proclamation. (H. 29 Jac. B. R. 1394. Ward against Regrein.)

Ampson against Stockburn & Ux.

A. brought debt against two upon an obligation of the wife dum sola fuit, and they plead non est factum of the wife, and the issue was found against them: and by

Popham, being only in the Court, that the capias shall be only against the wife. See 9 E. 4. 24. E. to the contrary.

Note, by Popham and Williams, that an executor in his own wrong shall be sued for legacies, as well as the lawful executor, but Yelverton doubted it.

[14] CROSSE AGAINST ABBOT, AND OTHERS.

M. 3 Jac. B. R.

Copyholder in fee brought a trespass, and prescribes to have the topings of trees for fireboot and hedgeboot, the defendant justifies, by sale for the lord of the mannor. And the prescription for fault in the plea, of that, viz. to cut ramos aliquarum arborum, which is uncertain, for it may be taken for some of any trees, was rull'd to be nought. But otherwise it had been well, if omnium arborum. And Cook said, that such a copyholder may have an action against the same lord, if he cuts the trees: for by that he destroys the very thing in which the tenant prescribes. Note well 47 E. 3. 22. and 4 E. 2. Trespass 233. 2 H. 4. 11. that a tenant in common may have an action of trespass against his companion, because he destroys the same thing given them in their tenancy in common. And he that hath common of estovers shall have an action upon the case against the owner of the land for distraining the trees. But such prescriptions as in the first case hath been good for a copyholder by life.

WHITLOCK AGAINST CHARTWELL.

Intr. T. 2 Jac. B. R. rot. 696.

M. and E. joyntenants for life, M. covenants conditioneth and agreeeth with B. to have the one moyety of the lands after the death of E. for 60 years, if M. so long live, and likewise M. demises, grants, and to farm letts the other moyety to B. after the decease of M. for 60 years. And adjudged, that the first moyety passeth by the covenant, &c. as the lease of that part which appertains to M. and that then the lease of the other moyety of the companion was void. See Br. Leases 6. 10 E. 4. 48. 20 H. 7. 26. Dyer 150. That a covenant shall amount to a lease. Bartons and Habins case 37 and 38 Eliz. B. R. that a joyntenant may lease his moyety for years, to commence after his death, or the death of his companion; and that in that case it was adjudged, that if a joyntenant covenants to stand seis'd to the use, &c. of the moyety of his companion after his death, that no use shall rise, because 'tis not but a bare possibility.

DRAKE AGAINST DOYLYE.

Intr. T. 2 Jac. B. R. rot. 189.

In trespass it was adjudged, that a prescription to enclose against the land of another is extinct, by the unity of possession: because during the unity the prescription fail'd and ceas'd. By Popham and Fenner that if the owner, having both lands, enfeoffs another of the close which in the bank and hedge is, the feoffee is bound to maintain the fence against the other land, in which the ditch is: for the bank and hedge pass by the feoffment. But Yelverton and Williams were of the contrary opinion, that they are bound at their perils the one against the other to repair. And by Williams, and not denyed by any, that if I bargain and sell an acre of land, that is in the middle of my lands, there the vendee shall have a way to it over my lands. So it is adjudged, T. 5 Jac. B. R. Quere. That if a stranger hath land adjoyning to any part of that acre, if the vendee is not then bound to purchase a way of me, or of the stranger, or make himself a trespasser

[15] PARREY AGAINST CHAUNCEY.

Intr. M. 2 Ja. B. R. rot. 346.

Prescription by a parishioner to pay the tenth part of corn for modus decimandi, for the hay also that grows upon the head-lands, is not good, because the tenth part is due for the corn. But such prescription for the corn and after-rakings is good, with an averment that they are sparsæ manus voluntarie. So prescription of the tenth part of hay, and the after-grasse. See H. 15 Jac. C. B. by Hubbard Chief Justice, prescription to make up the first crop is good, modus decimandi for the after crop, and note M. 29, 30 El. B. R. rot. 250. Bayard against Adams, prescription as in the first case is good. But note that judgment was given against the party, because he had not well pleaded the prescription.

RANDAL AGAINST ROBERTS.

In a replevin adjudged, that if A. be seised of lands in Sokefee, and of gavilkind land, grants a rent-charge out of them, to B. in fee, and B. dies, having issue three sons, that the eldest son shall have all the rent, see Br. Rents 10. and 13. which seems to the contrary.

BARNEHURST AGAINST YELVERTON.

An administrator recovers in debt against A. the administration is revok't, yet the administrator sued A. and took him in execution, a supersedeas was awarded because the execution erronice emanavit, for he cannot sue him to execution after the administration is revok't. And if in such a case A. had escaped, the gaoler might well plead that in discharge.

BOTT AGAINST SIR EDWARD BRABALON.

Bott sues a prohibition against Sir Edward B. and suggests, that the defendant is parson impropriate of W. acre in Warwick, and that there time out of it, &c. there hath been a curat or an incumbent by the appointment of the said rector, who administers the sacraments, &c. and that the custome of that parish time out of, &c. was that the curat should have all tenths renewing within that parish, except decimas granorum which were paid to the parson, and that every parishioner who had so paid the tenths to the curate, was discharged against the parson. And that notwithstanding that, &c. Sir Edward had sued him, &c. and now he prays a prohibition and had it; but after that surmise was adjudged insufficient without argument by the Court, and a consultation granted, for such curat cannot prescribe against his master, that may remove him at his pleasure, and for that it was not good prescription for the parishioners.

WISEMAN AGAINST WAPPTHORPE.

P. 4 JAC. B. R.

A. makes his wife executrix, and devises a legacie to Wap. and dies, the wife takes upon her the executorship, and takes Wiseman to husband, and Wappthorpe sues the wife in the Spiritual Court for the legacy, without naming of the husband, and the husband and wife **[16]** prays a prohibition, because the baron is not named; nor that plea allowed in the Spiritual Court, and the remedy was to appeal over.

GOODWIN AGAINST THE DEAN AND CHAPTER OF WELLS.

Goodwin being vicar sues them, being parson of a church, for a pension, in the Spiritual Court, and they pray a prohibition, and it was denied; for that pension is a spiritual thing, for which the vicar may sue in the Spiritual Court. Note, that they entitle themselves to that parsonage by a grant of H. 8. who had it by 31 H. 8. of dissolutions.

Note, that lessee for years rendring a rent payable at a place out of the land leased, and was bound upon condition to pay the rent secundum form. & effect. indenturæ prædict. And held by the Court that the lessee ought to pay the rent at his peril without demand. And according to that judgement was then affirmed.

TAYLER AGAINST CHAREY AND HIS WIFE.

In an assumpsit the plaintiff declares, that the wife, dum sola fuit, in consideration of an horse and saddle given to her by the plt. promised to pay 4l. to the plaintiff upon the Feast of the Annunciation next ensuing, vel circiter illius temporis, and alleadged that she hath not paid it at the day, nor by the space of 40 days after. And that she had taken to husband one Charey, which hath and still doth deny to pay the same, &c. Notwithstanding the incertainty of circiter, judgement was given for the plaintiff. For it appears that the 4l. was not paid when the suit was commenced. Note well 3 E. 4. 5. 2. for circa festum.

RANDAL AGAINST WALL.

Intr. H. 2 Ja. B. R. rot. 649.

R. an infant acknowledges a recognisance of a statute staple to Wall, and R. brought an audita querela in C. B. and there adjudged by inspection of the Court within age, and scire fac. awarded against W. and upon a nihil returned judgment given, that the recognisance shall be null'd. W. now brings error in the R. B. because there ought to have been two nihils returned, and also because a scire fac. was awarded, where it ought to have been a venire fac. And for these errors the judgement in the C. B. was reversed. But at the same time hanging the error in B. R. Randal comes to full age, and now again he brings an audita querela in B. R. and prays the benefit of the first inspection, and upon that it was demurred, and by the whole Court, that he could not have an audita querela again upon that inspection. For the Judges ought to judge upon their own inspection, yet at that time no judgement was given nor entred.

BIRKS AGAINST SIMSON.

Co. Litt. 131. b.

A. devises his land to B. his cousin, and publishes that will, and after upon communication with some of the friends of the said B. A. said, If she will not come to me, and live, &c. she shall not have one penny worth of my goods and lands. And at another time spoke words to the same purpose: but never makes any mention of his will, or revocation of that, nor called any to testifie that, but only spoke that in communication, as abovesaid. And adjudged to be no revocation. And Sir John Jeffrys case was voucht, that A. having made his will privately, **[17]** and being sick he was requested by his friends to make his will, or if he would make any, he answered no, yet adjudged no revocation. And another case was voucht, that A. had made his

will and left it at Fulham, and being sick in London, he said to some present there, My will at Fulham shall not stand. And that was adjudged a good revocation. See Dyer.

WILLIAMS'S CASE.

I. brought a habeas corpus for he was committed to the Gatehouse by the High Commissioners, because before that time, he had been sentenced and enjoyned penance for incontinency, and was fined to the King, and that he should pay costs. And for not performing all, he was committed. And by the Court, the High Commissioners cannot imprison any man for a fine imposed, nor take an obligation for it to the use of the King, but they ought to estreat it into the Exchequer; but for the pennance or ecclesiastical censure lawfully made, they may commit the party to prison untill he conform himself to their sentence.

TRYE AGAINST BURGH.

Intr. H. 3 Jac. B. R. rot. 649. 8. rep. 41.

Adjudged that a baily of a court baron upon judgement there given, and a levari fac. awarded, cannot sell the goods, and so levy the moneys, without special custome. See 4 H. 6. 17. 38 E. 3. 3. That he may deliver the goods to the recoveror. That the lord may sell a distress taken for a fine.

STOCK AGAINST POPE.

T. 4 Jac. B. R.

In an ejectione firm. the case was thus. A. seized of lands in the village of S. and also of lands in the village of W. and both those villages were in the parish of S. A. bargains and sells all his land in S. and covenants to levy a fine accordingly. And adjudg'd that nothing of the land in W. passeth by the bargain and sale, for S. in that case shall be intended the village of S. and not of the parish. For a præcipe of lands of S. shall be intended of the village and not of the parish. See 39 H. 6. 14. Br. Tresp. 11. (11 Rep. 25. b.)

BREERTONS CASE.

In an account against B. judgment was given quod computet, and before the auditors he makes an uncertain account, and was committed till he had made a full and perfect account, and after B. was delivered by priviledge of Parliament; process was pray'd to retake B. and to bring him again into the Court, and it was thought not to be within the statute of 10 Jac. because B. was not in execution, not for any certain duty. And by the Court a new cap. ad comput. shall not issue, for then all that was done before the first auditors will be annulled, as 1 E. 5. 1. B. But a special writ shall issue reciting all the matter, and to bring him again into Court, and being there he shall be committed to prison by the Court, there to remain, until, &c. ut supra, which was done accordingly.

[18] TANFIELD AGAINST GREEN.

In an assumpsit the plaintiff declares, that in consideration that he would seal and deliver a release to I. S. &c. the defendant would pay to him 5l. and averrs, that he had made the release, &c. and by the appointment of the defendant, had delivered it to B. to the use of I. S. And 'twas adjudged that he had not well persued and performed the consideration but otherwise if it had been by the appointment of I. S. himself. ve. 8 H. 7. 13. a.

Note by Fenner and Tanfield Just. and Kemp secondary, that if A. be bayle for B. in an action in the Upper-Bench, and judgement is there given against B. B. sues error in the Exchequer Chamber, and there the judgment is affirmed, and costs assessed: A. the bail in Upper-Bench remains, and shall be charged for the judgement there, but not for the costs assest in the Exchequer Chamber upon the writ of error.

HIGGINS CASE.

Higgins brought an action of trespass against B. quare vi & armis insultum fecit upon the wife of the plaintiff, & ipsam verberavit, &c. dans ei plagam mortal. whereof she languisht for six months, and dyed, ad grave damnum, &c. By the Court that action will not lie, for the King only is to punish felony, except the party brings an appeal. And by Tanfield also, that it will not lie as the case is, because the wife is dead, and that she ought to have joyned in the action, but otherwise of a servant. 44 Ass. 13. 43 E. 3. 23. which seems to the contrary, ve. 6 E. 3. 36.

THE KING AGAINST THE BISHOP OF WINCHESTER, &C.

Intr. P. 2 Jac. rot. 1331. 6 rep. 30.

By Popham, Tanfield and Yelverton in a quare impedit, that double usurpation does not put the King out of possession. Yet judgement in such a point in the Common Pleas hath been reversed.

SIR HUGH WROTS CASE.

The Dean and Chapter of Wells lease to B. land for 21 years, rendring 4l. rent, to be paid quarterly, &c. B. assigns the moity for years to I. S. paying the half of all such rents as are payable to the dean and chapter. It was said by the Court, that the assignee I. S. must pay to B. the rent quarterly. For such shall intend the quality, as well as the quantity.

VILLAGE OF ST. ANDREWS AGAINST THE ARCHBISHOP OF YORK, AND COUNTESS OF SHREWSBURY.

Intr. M. 15 Jac. C. B. rot. 32.

The plaintiffs brought a quare impedit against the defendants, and after brought an assize of darreitte presentment for the same church. The quare impedit is return'd. It was said by the Court that the assize of dar. &c. shall abate. See by Hubbard, but if he had brought another quare impedit, it had been well. And so it was resolved in the Earl of Bedfords case, and by Hutton that the statute of W. 2. cap. 5. proves it, (viz.) quod habeant ass. &c. vel, quare impedit, but not both. ve. 8 E. 3. 17.

[19] REVEL AGAINST GRAY.

In an action of debt, for 5l. against the husband and wife, the plaintiff declares that the wife dum sola fuit ought him 40s. and that the husband ought to rest upon accompt. And judgment upon that was arrested; for the wife shall not be sued for the debt of her husband.

TRASSELL AGAINST MORRIS.

In the argument of Trassell and Morris's case, the case of the weaver of Newberry upon by a by-law there made was vouch'd, and of Sawyer against Wilkinson S. brought an ox-hide to Leadenhall in London to sell it, and W. distreyns it, damage feasant, and justifies as servant to the maior, to which that place appertained for the incorporation. Adjudg'd that the distress is not lawfull, for it was brought there to be sold pro bono publico, for goods brought to a market and exposed to sale shall not be distreyn'd. And the case of the University of Oxford was vouch'd upon a by-law: that if any scholar was indicted he should be tryed per medietatem scholarium. ve. 2 R. 3. 11. a Clerk of a Court tryed per medietatem clericorum.

GIBBS AGAINST JENKINS.

Intr. T. 15 Jac. B. rot. 1654.

An action on the case was brought for words in Welsh, which signified in English to bear or carry, &c. The words were d'y deyy d. congest which was used for stealing. And judgment was arrested, for the words shall be taken in mitiori sensu.

SPENCERS CASE.

It was said by Hutton, that by the civill law the parishioner ought to give notice to the parson when the tythes are set forth. But it was adjudged, that the common law doth not so oblige a man.

YELVERTON AGAINST YELVERTON.

Hill. 35. l. rot. 272.

A man covenants that the assurance of all his lands which he shall purchase afterward, shall be to the use of A. his son in tayl, and that he and his heirs and all, &c. will stand seised to the use of his son in tayl.

First, It was moved that when the covenanter after by bargain and sale purchaseth other lands, if that purchase upon the assurance of that shall be to the uses mentioned in the former deed. And adjudged not, because the second limitation of the use upon the purchase is exprest to be, to the use of the bargainee and his heirs; and by that the first declaration is controld, and an use cannot be derived out of an use, and also because the feoffor ought to declare the uses, and not the feoffee. As by Popham; If a man purchase lands, and upon the livery, to him made, he declares that it shall be to the use of I. S. that shall be void, because none but the donor can limit the uses. But now a feoffment to A. to enfeoff B. to the use of C. and B. is enfeoff't without limitation of any use: yet it shall be to the use of C. So A. covenants with B. that if he purchases lands before Michaelmas, that he will levy a fine of that land to the use of I. S. now if he purchase land and levies a fine to him without expressing any **[20]** use, or without a consideration; notwithstanding that the law sayes, that that shall be to the use of the conusor, yet with an averment, it shall be taken to be to the use mentioned in the first covenant. But if another use had been express'd in the fine, that should have controlled the first declaration of the use.

2. A. covenants to stand seis'd of all lands which he shall purchase, clearly, as he purchased the same, &c. yet no use shall be raised by that covenant, because at the time of the covenant made, he had not any authority or disposition in the land, &c. Fenner. Lessee for life covenants, after Mich. to stand seis'd to the use of I. S. and his heirs in fee, before Mich. he purchases the reversion; no use shall be rais'd as to the fee, because he had nothing in the fee at the time of the covenant making. So

tenant for life, and he in reversion levy a fine, and both declare several uses; it shall enure according to their several interests. So A. covenants to stand seis'd of the land of I. S. to the use of B. that is void, and so shall be, although he purchase it afterwards.

PELL AGAINST TOWERS.

Pell brought a replevin against Towers, and others, who justifie the taking as bayliffs to the Lord Greevill, for an amerciament at the court baron of one that was tenant of the mannor, for three several defaults: the first 2s. the second 20s. the third 40s. Yelverton takes exception to the avowrye.

1. First, for that he pleads that Sir Foulk Greevill had a mannor, and he, &c. and he had us'd time out of mind, &c. to keep a court baron, and so prescribes to have a court baron, the which is incident to every mannor of common right, &c.

2. For that that he prescribes to distrain for an amerciament in any place within the mannor, although that it be out of the tenancy of him that hath offended. Walmesly took another exception, which is:

He prescribes to have a court baron, and to hold it before his steward, which is not good, but it shall be held before the sutors, for the steward is not Judge. All the three justices agreed to the first exception, for a man shall not prescribe in that, which the law of common right gives. Anderson by the way observed, that the amerciament was grievous, which should be secundum quantitatem delicti, and if it be otherwise, a writ de moderata misericordia lyes. Walmesly to the other point said, sometimes pleas are held before the sutors and the bayliffs and lord. But that is as I intend upon this difference: when a plea is held per breve it is coram Ballivo & sectatoribus, but when without a writ it is coram sectatoribus only; and in a court baron of common right pleas shall be held to the value of 40s. and to more by prescription, and then it is a Court of Record, and if there be error it shall be redrest by a writ of error, and not by a writ of false judgment.

2. As to the second exception taken by Yelverton, it was disallowed by Walmesly; for there is a difference between a distress for services and a distress for amerciaments, for not doing the services: for the first is by common right maintainable, the second against common right by prescription. And then for such amerciaments you must distrain the tenants own beasts, and not the beasts of a stranger found upon the land, as for services you may. And the reason of that as I conceive is, for that it is for a personal crime. And moreover he said you may add any thing to a court baron by prescription; as to sell goods taken in execution upon a judgment. Affirm'd now here, whereas otherwise it hath been held that you could not. And the rule of the Court was, that **[21]** if better cause were not shewn to the contrary, judgement should be entred for the plaintiff.

BATEMAN AGAINST THE HUNDRED OF

An action upon the Statute of Hue & Cry.

Stanton Bateman brought an action against the Hundred of in the county of Glouc. upon the Statute of Hue and Cry, and upon the general issue pleaded, it was found by the verdict that he was robb'd, and that he took his oath before Mr. Seamer, a justice of peace, that he did not know the parties: and because the jury did not find moreover, that the oath was that he did not know the parties which robbed him, nor any of them, according to the letter of the statute, it was moved that the plaintiff should not recover. Walmsly was of opinion that it is well enough found, and sufficient; for an oath shall be taken simply, and they need not observe that precise form as in pleading they ought. Warberton for the defendant, and because that the oath is not precise according to the statute, it may be he swore in that manner upon subtilty; for upon such an uncertain deposition a man cannot be impeacht of perjury. Kingsmill likewise said, that upon that default the action may well fail. Anderson of the same opinion, for that the statute is the ground of the action, the which ought to be observed. Walmsly said, when he shewed that two

men did rob him, and that he did not know them, that amounts to as much by common intendment, that he did not know any of them, then if it amounts to as much, it is sufficient enough. Anders. If it be of the same sense, see the statute, but that it self denotes a difference between the cases, for it prescribes that he ought to shew, that he did not know them, or any of them. Walm. That's only proper where there were three or more that robb'd him but where there are but two, it is not apt nor proper speaking to say them, or any of them, but, or either of them. And in this case it may be it was the cunning of the justice that examined him, who peradventure lived within the same hundred that should be charged, to ease himself and his neighbours. But if the oath was in another manner, and that can be proved, although the justice certifies in another manner, yet the proof shall be allowed. To which Kingsmill agreed, and the Court urged the defendants to give to the plaintiff 40s. and so to make an end, which motion both parties agreed to.

BANDALS CASE.

In Judicial acts the Sheriff cannot make a Deputy.

Bandal brought a writ of dower against her son, to be endowed of certain lands, which her husband father of the tenant dyed seized of; the writ issued to the sheriff to enquire of the damages, and the sheriff makes a warrant to one Wallis to take the enquest. Anderson and Walmsly were of opinion that the law was not so, as that he can make a deputy in that case, because it is a judicial act, the which the sheriff ought to do in person, and differs from that where they serve prosess as a servant.

An action of debt was brought upon an obligation, the condition of which was to perform all covenants comprised within certain indentures bearing even date with the obligation (and in truth the obligation and the indenture were both without date). The Court said, that they ought to have averred a date of the obligation, and averred also that the indentures bore the same date with the obligation.

[22] SIR JOHN PASCAL AGAINST CLARK.

Intr. T. 15 Jac. C. B. rot. 2051.

It was said by the Court upon evidence, that if the patron present one to the advowson, having taken an obligation of the presentee, that he shall resign when the obligee will after three months warning, that that is simony within the 21 Eliz. cap. 16.

HARRISON AGAINST MASSAM.

In dower of lands in three villages Allens case was cited 14 Jac. Com. Pleas, that a summons and proclamation at the church of one of them is good; and that the summons must be 14 days before the return of the writ. But in the case between Gray and Rowland, that want of a summons in dower is not error, but that otherwise no grand cape shall be awarded by the statute 31 Eliz. cap. 3.

SPARK AGAINST RICHARDS.

Tr. 15 Jac. C. B. rot. 1968.

The sheriff upon a levari fac. levies 100l. and before the return, the plaintiff receives the money, and made a release to the sheriff, and he returns that he hath levied an hundred pounds. It was said by the Court that an action of debt upon such

a return lyes against the sheriff. But in our case, he was discharged by pleading of the said release. And so it was adjudged in London and in the Common Pleas. A. delivers money to B. to pay it to C. for the debt of A. A. himself afterwards payd the debt, and afterwards B. pays the money to C. And it was rul'd, that an action of debt lies against C. for the last money, for the last payment was upon a tacit. condit. if the debt was not payd before, ve. 1 E. 5. 2. a.

PARKINSON AGAINST POWEL.

The plaintiff in an action upon the case brought in the county of Middlesex declares, that he had recovered against one A. in an action of debt, and had a cap. ut legat. and that he had delivered it to the defendant being sheriff, &c. and that the defendant was often in the company of the said A. after, within his baylywick, and that yet he had return'd non est inventus. Judgement was given for the plaintiff, and that the action is well brought in Middlesex where the Common Bench is, notwithstanding that the ground of the offence was in Denbigh. [7 rep. 1. a.]

STONE AGAINST ROBERTS.

M. 15 Jac. C. B. rot. 635.

An action upon the case was brought for words, Thou art a witch and an inchanter; by the Court, the action does not lye, but otherwise it had been if he had added, and hast bewitched I. S. &c. although that I. S. be not dead. For by that the defendant manifested his intent to be of such witchcraft which is punishable by 32 H. 8. ca. 8. 1 Jac. 12. See the case between Edwards and his wife against Osely. Thou art a witch, and I'le prove thee to be a witch, adjudged actionable. [H. 4 Jac.]

FORTESCUE AGAINST JONES.

Lord and tenant by fealty and rent, the tenant at the day tenders the rent upon the land, and afterwards the lord at another day demands it, and destreyns, and adjudged good, and recovers damages in the **[23]** avowry; for the rent was a thing in demand and not in render, as homage, there, that if the lord one time refused he should not distreyn untill he had demanded it of the person of the tenant, 21 E. 4. 7. 17 E. 44. and other books were cited, where a tender is not requisite but to save the penalty. 16 H. 7. 14. 22 H. 6. 26. 17 Dyer, 29 Plowd. 3. 70. 21 H. 6. A distress judged to be tortious, by a tender at the same time the distress taken. A distress it self is a sufficient demand. 7. rep. 28.

JENKINS AGAINST JENKINS.

In an action of waste for cutting of trees the defendant justifies, &c. that they were to make a fence with pale. And by Hubbards, that it was good without shewing that the fence was made of pale, &c. and now in decay. Note, where hedge-boot, or pale-boot are granted to be taken reasonably, and where certain loads or trees are granted annually for that purpose, here it is not necessary to shew that the fence is in decay. And note, that for fire-boot it is not necessary at the time of the cutting to shew the necessity, and so for reparation. For it is reason and good husbandry to cut them in some convenient time beforehand. And note the difference, because that which is allowed certainly at some years may not be sufficient.

ARCHBOLD AGAINST COOK.

MICH. 15 Jac. 1. R. rot. 556.

In a recordari fac. loquel. the case was thus; A. leases for years to B. but yet A. continues the possession, and afterwards A. levies a fine with proclamations, &c. It was said by Warberton, Winch, and Hutton, that that is no barr to the lessee for his term, but only as a grant of a reversion by A. See the record it self, and the difference between that case and 5. rep. 123. T. 2 Jac. C. B. Mills against Bradley. That a copy-hold estate is not barred by fine and 5 years, and that the lessee for years in futuro is not barred by such a fine, but otherwise of a lessee in possession.

WATERER AGAINST FREEMAN.

Freeman had recovered in debt against Waterer, and had a fieri fac. and the sheriff takes the goods, and returns, that he could not have buyers, &c. and that yet F. knowing that, hath sued another fieri fac. and F. upon that brought an action upon the case, and the better opinion was that it was well, although that F. had sued it in course. The 2 R. 3. 9. was urged to the contrary. But note, there it does not appear whether the suit was determined or not, & res adhuc sub. judice. ve. 5 E. 4. 126. 4. rep. 18. and in the Kings Bench, M. 43. 44 Eliz.

BREY AGAINST PARTRIDGE.

By his deed compounds for tithes, and after sues for them in the Spiritual Court, by Popham and Gawdy, that an action upon the case lies. See 8 E. 4. 13. M. 4 Jac. The Lady Waterhouse was sued for the tithes of trees, whereof none were due, &c. there an action upon the case does not lye, for the person may well be ignorant of what things are due, otherwise where he sues against his own knowledge. Sharplees case in the Exchequer was vouched. A. having recovered in debt against B. in the Common Bench, and knowing that B. was resident in Middlesex, causes him to be out-lawed in London, by proclamations there: and adjudged an acti-**[24]**-on on the case lies. But at that time the first case was adjourned.

RECORD AGAINST CORNELIUS JOBSON.

Serjeant Harris argued, that a recognisance taken in the Court of Admiralty to stand to the order of the Court is void, and that it hath been so adjudged. Warberton, that it is not a Court of Record.

MONTAGUE AGAINST CLARK.

An administrator is sued in the Spiritual Court to make an accompt, and a prohibition was denied, but otherwise if it had been to make a division of the goods.

STEWARD AGAINST BISHOP.

It was ruled in the Court, that an action upon the case does not lye, for saying, S. was in Warwick Goal for stealing of horses, because 'tis not an express affirmation, that he had stolen horses.

Crawley against Kingsmill.

Lord and tenant, the lord avows the distress for fealty due from D. the tenant said that D. was dead at the day of the taking the distress: by the Court a good plea. But by Hubbard, If the lord demand the fealty of D. and he refuses and dies, yet the lord may distreyn after his death for it.

Note, by the course of the Common-Bench, that a man might have a dedimus potestatem pro guardiano admittendo, where the infant is sick and feeble.

Tooks Case.

A. had issue three sons, B. C. and D. B. and C. die leaving issue, and then A. dies intestate, having bona notabilia: the Commissary of the Superiour Ordinary commits the administration to D. and D. is bound to him to makel awful administration. D. is sued in the Spiritual Court to make a division to the issue of B. and C. D. appeals to the delegates who make a division: and now D. moves a prohibition. Hubbard was clearly of opinion that the delegates have exceeded their commission and authority, for the Ordinary himself cannot do so. For the statute 21 H. 8. makes an administrator equal to an executor; and if the delegates do to the contrary, a prohibition lies. Also they are not interpreters of a statute. And that statute 21 H. 8. that takes away the power of the Ordinary to dispose the goods of the intestate, and the Ordinary now hath only power left to revoke the administration. Also such distribution of the Ordinary is not a good plea in an action of debt, &c. brought against the administrator at common-law. Now by the Court a prohibition was granted, and that by 21 H. 8. an administration shall not be committed to the grand children, if any son of the party of the intestate be alive: note P. 16 Jac. C. B. Lanch against Rosse in a sute in the Spiritual Court to make a division of the goods against an administrator, a prohibition was granted: but otherwise for to render an account.

[25] Winchcombe against Pulleston.

A. seised of a mannor with an advowson appendant: S. comes to A. and promises that if he would present him, &c. after the death of the now incumbent, he would give him 70l. to which he agreed. And upon that it was agreed between them that the next avoidance shall be granted to B. &c. the incumbent dies, B. presents S. who continues incumbent from 27 Eliz. until 7 King James. Then A. grants the mannor cum pertinent. to Winchcombe in fee. S. the incumbent dies, 7 Jac. and the King presents Pulleston by the title of simony, and Winchcombe brought a quare impedit, and adjudged that it doth not lie, in which case 2 points were resolved.

1. That that is simony. (1) Because there was a corrupt contract for the advowson: note, that in the stat. 31 Eliz. there is no word of simony, for by that meanes then the common-law would have been judge, what should have been simony and what not. (2) Although that the prochein avoidance might be bought and sold bona fide, without simony, yet it was so granted to B. to perform the corrupt contract, 2 Jac. was vouch't, that if the father purchased the prochein avoidance, and presents his son after the death of the incumbent, that is not simony, and that it was accordingly judged in 42 and 43 Eliz. It was Smith and Shelbornes case. But by Hubbard, that if in the grant of the prochein avoidance it appears that it was to the intent to present his son or his kinsman, and it was done accordingly, that is simony. In the 7 Jac. in the Exchequer Calvert against Parkinson, the cozen of C. being clark, comes to the grantee of the prochein avoydance, and promises him twenty pound, and twenty pound per annum if he will present C. to the church quando, &c. C. (not knowing any thing of the contract) is presented accordingly: that is simony a

fortiore in our case, where S. himself who was to be presented, was party to the first motion of the contract for presentation.

2. It was resolved, that the death of the simonaical incumbent does not hinder but that the King may well present, for the church was never full as to the King, and that turn is preserved to the King by force of the statute. Yet it seems that the church is so full that an estranger may not present for usurpation, for it is not like 7 Rep. 28. where the King is to present by lapse. And there were many cases put, as that the church may be full or void in effect when there is a simonaical incumbent. Hubbard said that if A. be obliged to present B. &c. and he presents by simony, yet the obligation is forfeited; and he put this case, that if the executor pays a debt upon an usurious contract, that is a devastavit if the executor had notice of the usury. And so likewise, that the rightful patron may have a quare impedit after the six months against the incumbent of an usurper, that is in by simony. And by the Court, to say the church was full for six months is no plea, when he is in by simony. Warberton and Hutton cited Doctor Hutchinsons case 10 Eliz. Parson prefers his bill for tithes, the parishioner pleads that he was presented by corruption, &c. and by simony, and a prohibition was granted notwithstanding that the parson pleaded pardon of the simony by the King, and it seemed that it was now triable by the common-law. Note, 7 H. 7. 37. and M. 40. and 41 Eliz. Gregory against Ouldham. In debt upon an obligation to perform certain covenants, which in truth were upon simonaical contracts, and the plaintiff recovered, for it was said that that obligation is colateral, and the law does not at all look upon or take notice of the simony, eo nomine, for it is not once named in the statute, but only corrupt giving, &c.

[26] SMITH AGAINST STAFFORD.

H. 15 Jac. C. B. rot. 906.

In an assumpsit the case was thus, A. promises to his wife that if she would marry he would leave her worth 100l. they intermarry, &c. And now Serjeant Altham moved in arrest of judgement, because the assumpsit is a personal thing, and extinguisht by their intermarriage. But judgment ready to be given for the plaintiff it was compounded in Court. And note the reason why the intermarriage did not extinguish that promise and assumpsit, because it was to have its essence upon the contingency (viz.) that if the wife survived, for it was not a certain promise for any duty, nor in esse during the coverture, and for that it could not be suspended nor extinguished by the intermarriage. But by Warberton Justice, that if A. be bound to a feme sole to pay to her 100l. after his death, and after marries her, the obligation is extinguished, which the Court granted. And the case of Belcher against Hudson in H. 6. Eliz. B. R. rot. 132. was cited. A. said to a feme sole, Marry my friend W. and if you over-live him I will give you 100l. they intermarry, and the husband releases to A. all demands, and dyes, the wife brings an assumpsit or an action of debt upon that, and adjudged that she shall not be barred by that release. Serjeant Altham said that the reason of that case was because during the life of the husband it was not a thing in demand; but it might well be released by apt and special words, although that it was to take effect by contingency in futuro. And so Justice Winch also thought.

SENDALL AGAINST SENDALL.

In an action of trespass, and a new assignment made, &c. the issue is found for the plaintiff, and the writ of enquiry of damages was general without any mention of the new assignment. And yet 'twas ruled by the Court, that judgment shall be entred for the plaintiff, although that the clarkes say in ordinary course 'tis otherwise; and with that judgement agreed the case of Pullen and Eason H. 43 Eliz. B. R. rot. 941. for the new assignment is not the declaration of the certainty of account.

FORD AGAINST MEAD.

M. 15 Jac. C. B. rot. 725.

A. recovers the arrearages of rent against B. at a nisi prius: but before the day in bank A. releases to B. all demands: by Hubbard, that if it had been in the case of the King, the defendant at the day of bank might have pleaded that, for he cannot have an audita querela against the King. But otherwise in case of a common person.

Note, that it was allowed for a principal challenge, that the defendant was indebted to the juror, sed quære in E. 5. if it been't è converso.

It was said by the Court, that in pleading of a lease for years, a man need not say, by force of which he entred, &c. 11. rep. 52. of a lease for life 8. rep. 82. b. yet note, if there been't a difference when the lease is to commence in futuro. Dyer, 189. a.

[27] COOPER AGAINST ILES.

The baily of a liberty makes an execution of a scire fac. within his liberty, and takes his fee by the statute of 28 Eliz. and the sheriff of the county takes also his fee; and that it hath been so used in that place. But by the Court it is not good; but that the baily ought to have his fee only, for see P. 1 Jac. B. R. rot. 445. Gardner against Harrison, where the escape was brought against the baily of the franchise ve. Dyer 278.

PIGG AGAINST CALEY.

H. 15 Jac. C. B. rot. 1966.

P. brought an action of trespass against C. for taking his horse, &c. C. said that he is seized of the mannor of D. to which P. is a villein regardant. And that he and all those, &c. have been seized of the plaintiff and his ancestors; the plaintiff said, that he is free, &c. absque hoc, that the defendant, &c. were seized of the plaintiff, &c. as of villein regardant, and the issue is found for the plaintiff. And upon motion in arrest of judgment it is ruled that the traverse is well taken. Note, Dyer 283. accordingly. And by Hubbard if a man hath not seisin of a villein in grosse within 6 years, he shall be barred by 32 H. 8. of limitation, in nativo habendo, for liberty is favoured; but yet of a villein regardant, the seisin of the mannor to whom, &c. is sufficient seisin of the villein.

Note, it was said by Hubbard Chief Justice, and Winch, but Warberton was of the contrary; that if a man hath a license of forestalling upon the 5 E. 6. he need but only recite the statute 5 E. 6. in his pleadings, without pleading 13 Eliz. for the licence is grounded only upon 5 E. 6. and the 13 Eliz. only qualifies the person.

Note, that in the argument of a case at Bar, Leonards case P. 28 Eliz. was voucht. Lessor for years grants to the lessee by parol to enfeoff, grant, bargain, sell and confirm to the lessee, in fee, with a letter of attorney in the same deed to make livery and seisin; the need was delivered to the lessee, but no livery and seisin was made. And adjudged that the reversion does not pass: for the intent of the lessor appears to passe that by livery and seisin. ve. Dyer 269. 145.

COX AGAINST DAWSON.

H. 13 Jac. C. B. rot. 519.

Copyholder for life becomes lunatick, and A. his cozen sowes his land after the lord grants the custody of the lunatick to B. A. takes the corn to the use of the lunatick, and B. brought an action of trover and conversion in his own name. It was said by the Court, that it was ill brought, for he ought to have brought it in the name of the lunatick.

2. The second opinion of the Court was, that as this case stood, neither the lord nor the committee have any thing to do to meddle with the corn, for this reason, and Mr. Brownl. said it had been lately adjudged in this Court, that a quare impedit ought to have been brought in the name of the lunatick. ve. Dyer 302.

[28] FORD AGAINST WEEDHAM.

M. 15 Jac. C. B. rot. 725.

In an action of trespasse the plaintiff makes this title to himself, that I. S. was seized of that land, &c. and being so seized, &c. 10th. of February, &c. was attainted of felony before A. B. C. and D. commissioners, by force of a commission awarded to them and others, and upon the motion in arrest of judgment, it was rul'd by the Court, that it was not well pleaded, for there it was (as it is pleaded) a joint authority to all the names in the commission. But if he had pleaded that I. S. was attainted by force of a commission awarded to A. B. and others, that had been good, by Hubbard and Winch.

The surmise was to have a prohibition, that the inhabitants of D. of which he is an inhabitant, have paid un. mod. decimand. &c. And they were at issue, and he proved only that he himself had paid it, and yet well. And no consultation; for every particular is included in the general and proved by it. And it appears sufficient matter for a prohibition, and to oust a Spiritual Court of their conusance.

2. Agreed that where the statute appoints proof of the surmise to be by two, it is sufficient if two affirm that they have known it to be so, or that the common fame is so.

SPARROW AGAINST NORFOLK.

B. administrator of A. makes C. his executor and dies, C. is sued in the Spiritual Court to make an account of the goods of A. the first intestate: and C. now moves for a prohibition, and had it, for an executor shall not be compelled to an account. Note the statute 21 H. 8. gives power to the Ordinary but not for accompts; but an administrator shall be compelled to accompt before the Ordinary.

COOPERS CASE.

The sheriff makes an execution of an 100l. 46s. 8d. and now moves that he shall have but 6d. per pound for his fee, according to the stat. 28 Eliz. which gives 6d. in the pound for all above 100l. yet because the 8d. is so little above 100l. the Court awarded that he shall have 3l. 6s. 8d. for his fee.

GREEN AGAINST DINKENSON.

M. 16 Jac. C. B. rot. 541.

It was said by all the protonotaries, that the defendant in account, upon the first writ, shall not be held to put in bayle to the action, yet in special cases by the discretion of the Court, he shall find bayl, and so there are presidents.

Upon a surmise by a parishioner, that he had compounded with the parson for his tithes for one year, and it may be without deed; by Brownlowe that a prohibition shall be awarded, and that there are divers presidents in this Court. But otherwise if it be for more years, 'tis not good without deed.

[29] RENNINGTON AGAINST COLE.

H. 15 Jac. C. B. rot. 362.

Upon evidence admitted by the Court to be a good custome, that an executor or administrator shall have a year in the land of a copyholder against the wife that claims her frankbanck, or durante viduitate. The principal case as it was argued in T. 16 Jac. was copyholder for life (where there is a custome that the wife shall hold durante viduitate) takes A. to wife (being daughter of the sister of the father of the said copyholder) Co. Litt. 235. that it is not a cause of divorce. They have issue, the husband dyes; the wife prays to be admitted to the copyhold, the lord refuses, the wife enters, and the lord ousts her, she re-enters, and leases for a year, and that lessee being ousted brought an ejectione firm. And adjudged that it well lies.

1. Although, that marriage be within the Levitical decrees, yet it is a marriage de facto, and only avoidable by divorce, that now after the death of the husband it cannot be done, for by that the issue shall be bastardized; and that if the wife had been inheritrix, &c. the husband should have been tenant by the courtesie. 7. H. 4. was voucht. A gift in tail to the brother and sister are several estates. And by Hubbard that it ought to appear in the very deed of the gift, that it is brother and sister otherwise it is a joynt tayl, and the issue shall inherit and hold a formedon. 8. rep. 87. 17 E. 3. 51. 18 E. 3. 39. 9 H. 6. 39. 22 E. 4. 18 E. 4. 29.

2. That that lease of the wife where such a custome is good before admittance, especially as our case is (1.) Because she had pray'd to be admitted, and no default is assign'd to be in the wife. (2.) Because in that case no fine is due to the lord, and so no prejudice to the lord. For in that case it was said by the Court, there needs no admittance. For by Hubbard that estate durante viduitate, is but a branch of the estate of the husband, and the admission of the husband suffices for the estate of the wife, and the estate of the husband was big with the estate of the wife, which was to be brought forth by the death of the husband. And that case is more strange which is the case of an heir of coppyholder, which ought to pay a fine for admittance, and yet before admittance he may bring an action of trespass.

BRAND AGAINST TODD.

Note the difference agreed by the Court. If the King grants to A. all the wasts in D. after an ad quod damnum return'd, and that the waste conteins 120 acres, yet if it contain 300 acres, all pass: for the grant is general, and the ad quod damnum was to enquire of the damages, and not for the quantity of the waste. But if the King grants 120 acres of his waste in D. and the ad quod damnum returns, that it is not to his damage, and that the waste contains 300 acres, there nothing passes, for it is uncertain which 120 acres were intended, and the party shall not have any election against the King. All which was agreed upon evidence to the jury.

LORD RICH AGAINST MAKEPEACE.

Lessee for years, the trees being excepted, as liberty to take the shrewes and loppings for fireboot; if he cut any tree it shall be as well for the loppings as for the body of the tree. By Hubbard and the whole Court, without question.

[30] LISTER AGAINST CRAMEEL.

In a quare impedit, the incumbent pleads, that before the action brought he had been in by the space of 6 months, &c. of the presentment of S. S. in the church. This difference was taken by Serjeant Henden, and agreed by the Court. When the incumbent pleads the presentment of a stranger, there he ought to shew, that the stranger had a title, and that he was seized of the advowson, &c. or that he was seized of a mannor, to which, &c. But where he pleads that he was in for 6 months of the presentment of the plaintiff himself, or by collation, by lapse by the Ordinary, there he need not make any title, 10 E. 4. 11.

COLE AGAINST FOXMAN.

[See *Robertson* v. *Hartopp*, 1889, 43 Ch. D. 516.]

In an action upon the case by a commoner against I. S. for charging of the common, see 9 rep. 112. The point was, A. seized of 5 acres, and of a common appurtenant to them, aliens one acre, if the common be extinct, for part or in the whole. And by the Court it is not extinct, for any part, but it shall be apportioned, and no prejudice to the terre-tenant. And Hubbard Chief Justice, who gave the rule said, the sole reason is, that otherwise a grand inconvenience and mischief would ensue. For by that all commons in England shall be extinct, and salus populi est summa lex, & apices juris non sunt jura. And the great dispute in that case was, for the certainty what shall be said to be cattle levant and couchant. And Serjeant Attee said, that Cook, Chief Justice in his circuit in Norff. said, that so many of the cattle that the land, to which the common is appurtenant, may maintain in the winter, so many shall be said levant and couchant. To which Warberton and Hutton agreed.

SKINNERS CASE.

A surmise to have a prohibition, if it be prov'd before one of the Judges, within the six months, although that it be not recorded till after the six months, yet tis well enough. And so rul'd by the Court. And good also, although that the proof be in the vacation. P. 43 Eliz. B. R. Pottinger against Johnson.

WOLFE AGAINST HAYTON.

A. makes B. his executor and dies, and in an action of debt against C. as executor of an executor, C. pleads that he had renounced the executorship of B. and it now being mov'd at Court, it was rul'd, that he ought to be executor to both or none. For by Hubbard, quod lex conjunxit nemo separet.

PINDER AGAINST SPENCER.

Parson prefers his bill for tithes of hasle, holly, willow, white-thorn, &c. a prohibition was moved, because they were of 21 years growth, and more. And by the common custome in Hampsh. they were us'd for timber to build and repair their

plowes, and cited P. 14 Jac. C. B. rot. 1918. Cufflyes case against the parson, for holly, willows and maple, and a prohibition was awarded. And Hubbard said, in Cumberland beech was used for timber, and the use of the country, for scarcity of other trees will alter the case.

[31] Doctor Bridgmans Case.

The parson libells for tithes of hay, &c. The parson said that the custome of the parish hath been, that he that hath corn within the parish ought to reap the corn, and also the tithes of the parson, and to make them into cocks, and to preserve them untill the parson shall carry them away. And a prohibition was granted; for although that the parishioners ought de jure, to reap the corn as it was agreed T. 28 Eliz. B. R. yet he is not bound to guard the tithes of the parson, &c. but if the parson does not carry them away in convenient time an action on the case lies against him. P. 20 Jac. B. R. rot. 286. there such an action was brought by Wiseman against the Rector of Landen in Essex for not accepting, &c. of the tithes of cheese.

Livesly against Glasbrook.

Intr. P. 16 Jac. C. B. rot. 2313.

By Hubbard Chief Justice, and Warberton. that if the parties are at issue upon not guiltie in battery; as that case was that the defendant relict. verification. cannot confess the action without consent of the plaintiff, for although it be intended to be for his benefit, yet he ought to pay for the entry of the confession, and perhaps too the record is made ready for the tryall, at a nisi prius. But Winch and Hutton to the contrary. For the intent of the law is to punish the guilty; and when the action is confess'd the plaintiff may have judgment, and it shall be as beneficial to him, as if he had had judgment upon a verdict. But Winch agreed that at a nisi prius the defendant cannot confess the action. By Hubbard that it is the practice to this day. And Warberton said, that when an action is brought for a thing certain, as debt, &c. there the defendant may confesse without the assent of the plaintiff; but otherwise, if it be for a thing uncertain, as trespass for battery. Walter the prothonotary said, that before now such a confession was refused, because the record was seal'd, and that such a confession was accepted in the Kings Bench; but yet it was rul'd that the confession shall not be accepted because it appears to be a grand battery, and misdemeanour. [8 rep. 59, 60.]

Butt's Case.

Moore Serjeant mov'd at Court for a prohibition, because where the custome of the village was, that the parishioners have used to elect two churchwardens; and at the end of the year, to discharge one, and elect another in his room: and so alternis vicibus, &c. by the new canon now the parson hath the election of one, and the parish of the other. And that he that was elected by the parishioners, was discharged by the Ordinary at his visitation. And for that he praid a prohibition & allocat. as a thing usual and of course. For otherwise, (by Hubbard) the parson might have all the authority of his church and parish.

Sir Henry Lindeleves Case.

It was said by the Court, that a man needs not have a writ of allowance upon pardon for treason but otherwise of felony, ve. 7 E. 3. 248. 3 Assize 15. Note, that he comes in without process.

[32] BASSET AGAINST BAYNARD.

Intr. P. 48 Eliz. B. R. rot. 483. 8 E. 3. 55.

A. sells one hundred load of wood, of his trees, to B. to be taken at the assignment of the bargainor, and after A. sells one hundred load to C. to be taken at his pleasure; B. assigns his interest to D. the vendor assigns, &c. C. takes them away, and D. recover'd in an action of trover.

GRAY AGAINST CHAMPEINE.

G. recovers by verdict, in an ejectione firm. and it was moved in arrest of judgment, that the Court was of a lease of ten acres of land, by the name of all his lands and tenements in Shoram in Kent, and judgment was stayed, because there is no place where the ten acres of land are: and that after the per nomen it is not sufficient. ve. Tr. 33 Eliz. B. R. Sewters case; upon a grand debate the indictment was held insufficient, because no place is put, untill after the al. dict. &c.

Note, in the argument of a case, Tr. 38 Eliz. B. R. rot. 236. Leeds against Crompton was vouch'd, the Lord Stafford leases land to three, provided that they nor any of them shall alien the premises without licence of the lessor; he licences one of them to alien his part, and after the other two alien without licence. And the entry of the lessor is there adjudged not lawfull, because the condition was intire. 4 H. 7. 9. the very case is there put. Sed quære if they had made partition by consent before that licence. [4 rep. 120.]

SPARK AGAINST SPARK. T. 43 ELIZ.

Intr. 43 Eliz. B. R. rot. 503.

Lessee for years assigns a part, &c. rendring rent, and dies, and his executor for the rent arrear after the death of the testator brought an action of debt, in the detinet only. That it was well brought. ve. 19 H. 8. 8. 11 H. 6. 36. 20 H. 6. 4.

A parson brought an action of debt upon the statute of 2 E. 6. cap. 13. against Spurr, for that that he had not divided the tithes according to the statute; afterwards the plaintiff after appearance is non-suted. If he shall have costs by the statute, 23 H. 8. cap. 15. was the question. Upon that statute it seem'd to King and Walmsley (being only present,) to be clear, that it was out of these words in the statute (viz.) or any action, bill, or plaint of debt or covenant, upon any specialty made to the plaintiff or plaintiffs. For that there ought to be upon a contract, to which the plaintiff was party. But the doubt depended upon the subsequent (scil:) or any statute for any offence or wrong personal immediate supposed to be done to the plaintiff or plaintiffs, &c. Walmsly. The statute of 23 H. 8. will, that if any action be brought upon any statute for any offence or wrong, &c. and also the action is not brought for the offence but for debt which is not any offence, then 'tis out of the words of the statute. King. But the action of the debt is by reason of the offence. Walm. The debt is the penalty for the offence, and the penalty upon that are several distinct things. Sed adjournatur.

[33] Wilkins against The Maior of Lincoln.

Wilkins a baker of the City of Lincoln, brought an action of trespass against the maior of the same city, for taking certain loaves of bread. The defendant said the City of Lincoln est antiqua civitas, &c. and that the custome is, and that it hath been within the same city, time out of, &c. that if any baker within the same city, bake any bread, and offer to sell it within the same city, and that the maior for the time being, hath used to weigh it, and if it be found not weight, that then he hath us'd to distribute it to the poor of the same city. And shew'd how that he was maior, &c. and upon that it was demurr'd.

Gibbons against White.

Gibbons brought an action of debt against White upon an obligation, in which White was oblig'd to G. being sheriff, by the name of sheriff, upon condition to appear personally before the Justices of the Bench such a day. The defendant pleads the statute, &c. And the statute is that the condition of the obligation should be, that he appear at a day, and not that he appear personally at a day, and upon that it was demurred.

Bradford against Lassels.

In an ejectione firm. the case was thus. A man seised in fee conveys his land to the use of himself for life, and to his daughters that shall be unmarried at the time of his death, untill every one of them shall and may levy 500l. First, unto the eldest daughter untill she hath levyed 500l. then to the second, so to the third, &c. The father dies, the sonne enters and continues possession for a certain time, and will not suffer the eldest sister to take the profits: if she may now enter and take the profits untill she hath levyed 500l. or if there shall be a defalcation for the time that the sonne continued possession, was the question. Walmsly seem'd that she shall have her remedy against the sonne, for the time that he hath continued possession; and not to begin now to levy the 500l. in prejudice of the other sisters. For it was her folly to suffer the sonne to continue possession.

Dotting against Ford.

Dottin brought an action on the case against Ford for these words, Thou art a beggerly knave, and a bankrupt, and art not able to shew thy face, and it was mov'd by Serjeant Herle in arrest of judgment, that the action will not lye, if he doth not allege in his declaration, that he was a merchant at the same time. Walmsly said, If a man calls an officer or a justice of peace a briber, he ought to allege that he was an officer at the time when the words were spoken. But here it was proved by divers circumstances conteined in the declaration, that he was a merchant at the same time, although that it be not expresly shewed. King: It may be that a man may merchandize at that time, and yet if such words were spoken to him, an action upon the case shall not be mainteyn'd; as if he be an apprentice to a merchant, and although that he merchandizes for another man, during his apprentiship, yet such words are not to his discredit, when hee's out of his time; and a mer-[34]-chant for himself. And now a man may exercise merchandizing, and after relinquish it for a time, and afterwards exercise again: if a man calls such a man bankrupt, an action upon the case lies. Herle. If a merchant relinquish his trade to live in the country in the nature of a gentleman or of a farmer; if a man calls such a man bankrupt, an action upon the case does not lie; but if afterwards he exercises that again, and then is called bankrupt, an action upon the case lies. And so he held the diversity.

A man cannot traverse that which is not alleg'd.

An action of debt was brought upon an obligation bearing date the 10th day of June, anno 29 Eliz. and delivered the 18th day of the same moneth, in the same year. The defendant pleaded that he made the said deed the said 10th day of June, and then delivered it, at which time he was within age, and that he did not come to full age until the 27 day of the same moneth, absque hoc quod deliveravit, &c. after which he came to full age. And it was mov'd by Harris, that the plea was not good, because that that is a traverse, to that which is not alleg'd (scil.) the full age; but only if it were delivered the 18 day or not, that was only traversable. Warberton, The plea is good enough; for the day of the delivery is not material, but if at the same time he was within age, or of full age; and it may be the defendant did not come to full age of a moneth after the 18 day. Wherefore for us to be bound to a day certain would be inconvenient. And upon that vouch'd 8 H. 6. 6. where the confirmation of patron and Ordinary, which bore date before the grant of the parson, was pleaded, prim. deliberat. 4. days after the grant of the parson; and the defendant pleaded that it was delivered the day that it bore date. Absque hoc that it was delivered after the grant; by which, &c. Walms. That the said book is expresse in the point. And so 14 H. 8. 17. Wheelers case. So all the matter is, if he was within age or at full age at the time. Anderson, You may by protestation. That it was delivered the 18 day, absque hoc that he was of full age at the time. And to that the Court agreed. Wherefore it was so pleaded.

WILDE AGAINST COOKEMAN.

In an action upon the case for slander, in hæc verba, thou wast forsworn in the leet at Beaston, the leet of such a one, &c. held 14 Apr. The defendant said, that the plaintiff being sworn before the steward of a leet to make presentments, &c. with another, and they present, that such a ditch not being scowr'd, ad nocumentum, &c. which was false, and so he justified: adjudg'd for the plaintiff. For their the justification is, that the plaintiff made a false presentment, in saying that such a ditch was not scowr'd, and does not say that the ditch being infra jurisdictionem Curiæ Letæ, &c. and then a false presentment of a thing out of the jurisdiction of the Court is not perjury.

2. The justification conteins only a false presentment made by the plaintiff, which may be true, and yet no perjury committed. For it may be that evidence was given to the presentors, sufficient to induce them to find it. But if the justification had been that they, ex notitia illorum propria, made the presentment, then otherwise. Gaudee and Fenner. It shall be so intended. Popham on the contrary. For perjury is an odious thing, and the justification of that shall not be taken by intendment. But note, the principle case of judgment was upon the first reason.

[35] PERKINS AGAINST WILDE.

M. 31, 32 Eliz.

Parson makes a lease for years of parcel of his gleab land, of the value of 13l. per annum, rendring 13s. rent. Adjudged that the lessee shall pay the tenths to the lessor, notwithstanding his own lease, and the reservation of the rent; but there otherwise it had been, if it had been a rack rent to the value of the land. Sed quære of that diversity.

BLADWELL AGAINST EDWARDS.

A rem. limitted to a bastard.

B. makes a feoffment to the use of himself for life, after to the use of such issue or issues, of the body of Mary Floyd, from eldest to eldest, as were reputed to be gotten by the said Bladwell, whether he be lawful or unlawful. And in that case by all but Popham, that that is a good remainder limited to a bastard. For a son in reputation suffices to make him a purchaser, as 'twas held 14 Eliz. Dy. 313. And although that in 22 of Eliz. it is held that a man cannot by way of covenant raise an use to his bastard, yet by way of limitation of an use upon a feoffment 'tis otherwise. And although Littleton says, that a bastard est nullius filius.

1. First, that is only as to the inheriting any man.

2. That is intended, that he had not any father, but without question he had a mother, and so shall be term'd in law, the issue of his mother: and the law does not regard, if the issue be lawful or not in a purchase.

3. A bastard est filius nullius patris in law, but in reputation otherwise it may be. As the case was also noted by Cook. If A. had issue 3 sons, and the eldest is a bastard, and a remainder also is limitted to the eldest issue of A. the second son that is a mulier shall take, and not the bastard. For in general words the construction shall be in digniori sensu; but if the words are special, as in this case, otherwise it is, for modus & conventio vincunt legem. And he cited Plowden, who often sayes, that a woman may give lands in frank marriage with her bastard.

HOLMAN AGAINST COLLINS.

M. 37, 38 Eliz. rot. 2171.

Error was brought upon a judgement given in the Court of Plymouth in Devon.

1. For that the stile of the Court was Curia Dominæ Reg. tent. cor. Majore de Plymouth, without saying, secundum consuet. Villæ. And that was held error; for he that is the Judge of the Court, ought to be by patent or prescription. And because that the Court there hath been held time out of mind, &c. the omitting of those words secund. consuet. was error.

2. The second error was, because that no day was prefixed to the defendant that he should appear, but generally, ad proximam Curiam. And for all that, it was alledged that the Court was held there every Monday, and so enough certainty: yet that also was held error; and so upon both the first judgement was reversed.

MERCER AGAINST SPARKS.

Hill. 38 Eliz. rot. 948. C. B.

In an action upon the case for slander, and upon that error was brought. Because it was not exprest in the declaration, quod malitiose dixit those words. And adjudged that that is no error. For the words them-[36]-selves are malicious and slanderous, so judgement affirm'd.

KIRTON AGAINST WILLIAMS AND OTHERS.

T. 38 Eliz. rot. 623.

In an appeal of mayme against 3. The one pleads null. teil in rerum natura, and pleads further quoad feloniam guilty. The other pleads misnosmer, and quoad

feloniam not guilty. The 3 pleads not guilty. The plaintiff demurs upon the pleas of the two first: and adjudged clearly that the plea is naught. For although a man be charg'd with felony, yet that is in favorem vitæ; but in that appeal of maym, being but a trespass without any jeopardy of life, as 40 Ass. 9. 40. 41 E. 3. the reason is given, and so it shall be otherwise.

ADAMS AGAINST DIXIE.

Consideration to raise an assumpsit.

B. being arrested for debt at the suit of A. puts in R. his special bayl, after judgement was given against B. and for that, that B. neither paid the debt, nor rendred himself, A. brought a scire fac against R. R. hearing of that comes to A. and said, that in consideration that A. would assign over the debt of B. to him, and deliver to him the obligation of B. that he would pay the debt. A. promised to assign the debt, R. pays the money; and because that A. would not assign the debt, he brought his action against him, and maintainably, and that the consideration was good. Yet it was said by the other party, that by the judgement and default of B. it became the debt of R. and then when R. pays it, which he ought by the law, that will not amount to raise a consideration. Ass. 9. E. 4. 19. delivery of his proper evidences is not a satisfaction for the trespass. Sed non allocatur.

BROWN AGAINST MICHEL.

Tr. 37 Eliz. rot. 661. C. B.

An action upon the case for these words, Mr. Brown hath delivered untruths upon his oath in answer to I. S. Bill in the Chancery. And adjudged for the plaintiff. But by a writ of error in the Kings Bench the judgment was reversed, and that the words are not actionable, because that he did not say he delivered untruths in matter of substance, and in Chancery there are many frivilous discourses in matter of form.

It was adjudged, that as an executor may release a debt, so he may give an obligation, which is the instrument of the debt. So two joynt lessees of a tearm by indenture, and the one gives the indenture to a stranger and dies; all the entire tearm survives to the other, yet he shall not have an action for the indenture.

LOYD AGAINST TWYFORD.

Intr. M. 42, 43 Eliz. B. R. rot. 528.

Judgement was given in debt in the Common Bench upon a non sum informatus, and error was brought and moved for error.

1. Because there is no imparlance.

2. Because the entry was quod defendit, vim & injuriam; when it is not usual that such a judgement shall be given upon a non sum informatus. Yet notwithstanding that judgement was affirmed. And likewise P. 43 Eliz. B. R. rot. 592. Essex against Meredith.

[37] HICKMAN'S CASE.

Intr. 41 Eliz. B. R. rot. Coron. 5.

In a quo warranto he claimes to have toll in specie of grain exposed to sale, whether they be sold or not, ratione manerii. Adjudg'd to be ill, because it ought to have been ratione mercati. Also he cannot have toll if the thing be sold. Dyer, 227, 228.

Note, 20 H. 7. The party hath no remedy for his toll if the goods be carried out of his jurisdiction. ve. 30 E. 3. 20. that a distress is incident to every toll. But in the case of Northampton adjudged that toll is not incident to a market, if it be not specially granted. Also he cannot have toll in kind, (viz.) part of the thing it self. 30 E. 3. 15. Br. 299. and Avowrye 129. But note, 6 H. 6. 46. stalage may be claimed by reason of the soyle.

CAUTWELL AGAINST CHURCH.

Intr. H. 42 Eliz. B. R. rot. 437.

A commoner brought an action upon the case for stopping of his way to the common. And upon a writ of error it is affirm'd to be well brought, although he might have had an assize, also perhaps a meer stranger had done it, and not the terre-tenant; also perhaps he that did the wrong is dead, and for that no ass. And Mich. term ensuing, judgement was affirm'd for the plaintiff. In the first action. See Dyer 250. 22 H. 6. 15. 21 H. 7. 30. 33 H. 6. 26.

BRAY AGAINST PATRIDGE.

B. brought an action upon the case; that P. sued for tithes, and recovered, because there was nisi testis singularis to prove the payment, when in truth he had paid it before two, but now one was dead. And by the Court that an action does not lie, because the cause was meerly spiritual. And for that it differs from 8 E. 4. 13. For there the composition was a temporal contract, although it was for tithes.

WRIGHT AGAINST WHEATLEY.

An ejectione firm. was brought de pomario, and well, for it need not be demanded by the name of a garden, as a precipe ought to be. For an ejectione firm. lies de domo, but the precipe shall be pro mess. And by Poph. that the 18 Eliz. an ejectione firm. was brought de pomario, and well brought, and so it was now adjudg'd, ve. 11. rep. 55. a.

Note, by Poph. that the six moneths upon the Statute of Usury shall be accounted half a year, according to the almanack, and not according to 28 days in the month, which none gainsaid.

DEAN AND CHAPTER OF ROCHESTER AGAINST THE BISHOP OF ROCHESTER.

In an annuity, the Court was, that he was seis'd of it in his demeasn, as of fee. And adjudged well enough, and the records directly agree in it H. 19 H. 6. rot. 403. M. 12 H. 8 rot. 836. H. 30 H. 8, rot. 451. It was so adjudg'd upon a demurrer, and that the plaintiff had judgement. And the case in Dy. 65. is the same, and H. 19 Eliz. was vouch'd. Counstable against Yaron. The plaintiff counts of a grant of an annuity in tayle, virtute cujus, he was seized of it in dominico suo, ut de feodo talliato, and well enough, although that the annuity be not within W. 2. and by Cook, that an annuity is not within 32 H. 8 of Limitation. Poph. That see, if it be by original grant of an annuity, but if it be by **[38]** grant of a rent-charge, &c. that is within the statute. To which opinion Popham, Gaudy and Fenner agreed; and in our case seisin was alleadg'd to be within 60 years.

Beechers Case.

B. was in execution in the Fleet for 12000l. at the suit of Sir Thomas Shirley and one Swey, and being there he had the liberty of the garden and to play at bowls; and upon motion for the creditors, it was ordered by the Court that he should be in strict custody in his chamber. Then Beecher sues a habeas corpus to be brought to the Court, and there prayed, that for dispatching of some necessaries, and to procure speedy payment, that he might have a habeas corpus to be brought to the Chamber of some of the justices to discourse with his creditors; but it was denied by the Court, for he cannot have habeas corpus to any place, but to the Court when the party is in execution, and if the warden of the Fleet so do, it shall be an escape. And it was said by Popham, which none denied, that if the party be confin'd to his chamber by order of Court, and the warden of the Fleet suffer him to have the liberty of the house, that that shal be an escape, and yet it was said that such liberty is granted to the Fleet-prisoners (paying a fine for it) to have that liberty under the Great Seal and Patent. Yet at that time there was not allow'd such liberty to Beecher.

Allwaters against Bird.

A. makes a feoffment to four to certain uses, with power of revocation, upon tender of three shillings for a reasonable cause to be shewed by him, and to be approved of by them; one of them dies: and adjudg'd in an ejectione firm. that a tender to the survivors and their approbation, is not sufficient to revoke &c. For that approbation was a thing of consent, which cannot survive, &c. ve. Dyer 189. But by Popham, Otherwise it had been if the feoffor had limited tender only to be made to two.

Bene against Tricket.

Intr. T. 43 Eliz. B. R.

The point of the case was, if the value of the church for plurality, by 21 H. 8. shall be eight pound, according to the book of rates and valuation in the first fruits office, or according to the very value of the church per annum. Atkinson. That according to the value of the Kings books. For the Parliament never thought that any man could live upon so little as eight pound per annum, which is not six pence a day. Note, 38 E. 3. 4. and Dyer 237. But by the Court, that it shall be according to the very value of the church in yearly value in the statute of 21 H. 8. And by Gawdy and Fenner, to whom agreed Yelverton; that the eight pound shall be accounted according to the very value of the church, per annum.

Coolston against Carre.

An assumpit was brought, and it was moved that the Court was ill in this, that the plaintiff said, that the defendant assum'd to pay, &c. without saying to whom, &c. Crook, That in one Withals case against Jones, in an assumpsit, the plaintiff counted that the defendant in consideration &c. super se assumpsit fol. without saying to whom, &c. and yet adjudg'd [39] good. But Stephens argued to the contrary said, that, that case put by Crook was, that the defendant assumpsit et fidel. promisit to the plaintiff solvere 20s. without saying to whom, &c. But in our case no assumpsit or promise is alleged to be made to the plaintiff or any other; and yet judgement was now given for the plaintiff. Note 9 H. 635. 45 Dy. 15. 2 E. 4. 20. 14 E. 4. 2. 3 E. 4. 11.

Carter against Codd.

Carter had recovered against Codd in debt, who was also committed to the Fleet for contempt, by the Lord Keeper. Carter sues a habeas corpus to the warden of the Fleet to have Codd in Court, to the intent to charge him with the judgement; but after the delivery of the habeas corpus, and before the return of it, Codd was discharged of the contempt by the Lord Keeper; and the warden returns the matter with a corpus parat. habeo, and brings him to the Court. Carter prays that Codd may be kept in execution for him, Codd prays that he may not; for the Lord Keeper may commit by his word without a writ, and so he may discharge the party, 14 H. 6. 8. But Codd would not confess that he was the same party against whom the judgement in debt was had. Note, 22 H. 6. 23. And the plaintiff had not day in Court to take the issue upon that. ve. 33 H. 6. 56. 38 H. 6. 1. Outlary. 43. 1 E. 4. 2. And also the Court would not give him his oath if he was the same person or not. But yet it was pray'd by Carter, because that he alledged in Court, that he was the same person against whom he had recovered, and that he was now in Court: that he should answer to a declaration in an action of debt upon that judgement. And that the justices granted: and ordered that Codd should put in special bayl to answer the action. And for not doing that he was committed to the marshall, and the warden of the Fleet discharged of him.

Bolls against Lassels.

Intr. H. 42 Eliz. B. R. rot. 1107.

The sheriff arrests A. upon a latit. and returns a cepi, having taken sureties for his appearance, the party does not appear, and upon that process issued to bring in the party; and upon that the sheriff returns languidus, &c. where in truth A. was at large, and yet it was held a good return, although that no such return was ever seen before: and although also that he might have returned, that he had let him at large upon bayle; for otherwise a mischief would come to the sheriff, for he is compellable to pay him. And if the party does not appear, the sheriff shall be amerced, and he himself shall be relieved upon his bond: and no action upon the case against him upon that return. And upon that the justices intended to enter quod querens nihil capiat per bill, and will. Note P. 43 Eliz. B. R. rot. 374. Spencers. An action upon the case as also, because after a cepi returned and to the habeas corpus, the sheriff returns languidus, where in truth the party was at large without bayle, and judgement was given for the plaintiff. But otherwise, if the sheriff had let him at large upon bayle; and so judgement was given. H. 44 Eliz. B. R.

Blakebone and Hall against Browne.

Intr. 43 Eliz. B. R. rot. 1073.

In an action of debt upon an obligation, the defendant pleads the Statute 23 H. 8. cap. of Oblig. to the sheriff, and alleadg'd that A. and B. his sureties had not sufficient in that county, &c. and so the obligation **[40]** void. Hubbard, and adjudg'd, that the obligation is good, for that clause was for the security and indemnity of the sheriff, the which if he will he may waive. And it differs from the case of 2 H. 6. upon W. 2. for there the pledges are for the benefit of the party. And that it hath been so adjudged. M. 42, 43 Eliz. C. B. rot. 607. Clifton against Webb, where one of the sureties was insufficient. And Gawdy deny'd Plowd. 67. and said that it hath been adjudg'd to the contrary, that an obligation with one surety is good enough. And Kempe Secondary also remembred that. But Godfrey of counsel on the contrary said, that it was adjudg'd in Burr and Appletons case, that the plaintiff in the first sute may have an action upon the case against the sheriff if

he does not take sufficient security. Which case was not denied. And by Gawdy, that a bond without any surety is good enough between the sheriff and the obligor. And by Fenner, that it hath been so adjudg'd. Poph. was absent, but judgement for the plaintiff.

WOODROSSE AGAINST MICHELL.

Intr. H. 41 Eliz. B. R. 449.

Error upon a judgement in line. The error assign'd was apud Cur. tent. coram Rico. Elimston Maiore, et A. B. C. D. ad num. d 2 capital. burg. vill. prædict. and the plaintiff entred, and the parties at issue, and for the tryal of it diverse of the burgesses aforenamed were return'd for jurors, and found for the plaintiff. And the defendant now assignes that for error, and adjudg'd to be error, for they cannot be Judges and jurors. And although that there might be other burgesses of the same name, yet by the pleading of, in nullo est errat, the party had confest that they were the same persons. And judgement was revers'd.

BROOKS CASE.

Godfrey moves for a prohibition, and surmises that the parishioners had compounded with the parson for the tithes; but yet the due tithes were sever'd, and exposed, and the parson takes and carries them away, the parishioner meets him and takes them from him. And upon that the parson sues in the Spiritual Court. And a prohibition was awarded.

WALDE AGAINST LAMBERT.

Intr. 10, 43 Eliz. B. R. rot. 279.

An action upon an escape upon a latitat before any declaration, and the sheriff returns a rescouse, that is no good return nor plea; for he might have had a posse comitat. as well for the serving of the same process as in execution. 10 H. 7. 26. 33 H. 6. 1. 16 E. 4. 3. Nat. Bre. 102. Dyer 162.

WALREND AGAINST WINROLL.

Wal. sues Win. in an action of battery in London. Win. removes it by habeas corp. to the Kings Bench; and the term after prays an imparlance, and before the end of the term prays the priviledge of the Exchequer, the puisne baron comes cum lib. rubro, and shews that Win. is escheator, and so an accomptant to the King, and at length priviledge was allow'd.

[41] BARNES AGAINST WORLEDGE.

M. 43, 44 Eliz. rot. 548.

B. brought an audita querela upon the Statute of Usury, and that he had borrowed 100l. of W. for a year, and that it was agreed between them, that he should pay 5l. after 6 moneths, and the other 5l. after the year, and verdict was given for the plaintiff, and now mov'd in arrest of judgement, that that is usury, and that the plaintiff himself had declared that he had not cause of action. And by Cook that it hath been so adjudg'd upon an information in the Exchequer; and Fuller Reader upon the Statute of Usury at the Bar, was of the same opinion. But by Poph. if the party had retein'd 5l. of 100l. at the time of the leave, or that that 5l. was to have been paid before the 6 moneths, that clearly had been usury. The better opinion now, that the principal case was not usury. Et adjournatur.

The Churchwardens of Denfords Case.

P. 4 Eliz.

Denford was an ancient church in the county of Northampton, and the churchwardens sue the inhabitants of Kingstead in the same parish, where there was a chapel of ease, for contribution to repair the church of Denf. And they pray a prohibition upon suggestion that time out of, &c. they have used to repair their own chapel; and only a part of the wall of the church-yard of the said church of Denf. And it seem'd by the better opinions of the Court that it was not good. For their ease shall not be a disease to the rest of the parishioners. For Poph. said, that the assent is not requisite to build a chapel of ease, and then the Ordinary and the parson cannot charge the parishioners with greater charge. By Yelvert. that the parson ought to repair the wall of the churchyard. But by Fenner. The parishioners in the Spiritual Court shall be compelled to do it, although that the franck-tenement be in the parson. Yelver. objected, and by Kempe Secondary, that the parishioners of repaired the wall of the church-yard. Yet now it was ordered that a prohibition shall be granted, and the defendants if they please may demurr upon it. Note also B. 5 Jac. B. R. a Darbyshire case, where a prohibition in such case was denyed.

Reeve against Martin and Cooper.

Intr. P. 43 Eliz. B. R. rot. 152. 4 rep. 13. 8 rep. 63.

Upon evidence in an ejectione firm. it was agreed by the Court, that a grant of a copyhold by an infant is good, for the copyholder is in by the custome, and shall bind the infant; as a presentation by an infant to the church is good.

Cox against Carpen, Elye, and his Wife.

A trover against husband and wife, for a conversion by the wife, dum sola &c. They appear and plead non sunt inde culpabiles, and the issue is found for the plaintiff, and now mov'd in arrest of judgement; that the issue was not good, for it ought to have been, that the wife ne fuit culp. And so was the opinion of the Court. And so also of trespass by the wife; because it is a personal wrong. But otherwise in debt, for that shall be against them in the debent &c. and the issue non debent, &c. ve. rep. 52. 34 H. 6. 19.

[42] Markhams Case.

I. S. was convicted in the Starchamber, upon the statute of the 5 Eliz. for forging of a grant of a rent-charge, issuing out of divers houses of Sir Thomas Gresham in London for one hundred years. And thereupon had his ears cut off, and his nostrils clipt. And after he forg'd a deed of feoffment to B. and C. to certain uses; and was now arraing'd, as felon for that and hang'd, being found guilty of the second forgery by the jury. And Cook said, that it was agreed by the justices, upon the first conviction in the Starchamber, that forgery of a rent-charge or of a lease for years is within the statute; but forgery of an assignment of a rent-charge in esse, or of a lease for years is not within the statute; for that does not charge the inheritance of any.

F. brought debt against M. upon a simple contract. M. wages his law, and at the day he was demanded and did not come; upon which, the roll was marked that he had fail'd of his law, by Kemp Secondary, and costs assest. But afterwards sedente Curia, it was mooved and prayed that he might be demanded again, and it was granted, and then he made his law.

Baspole against Long.

A copyhold was surrendred to the use of A. for life, the remainder to B. in fee, into the hands of customary tenant in the presence of two others; and that the custom of that mannor was, that if at the next court after such a surrender, it be to be surrendred, proclamation was to be made, that if any claime, &c. to be admitted that he should come and he should be heard: and if none came, then two proclamations were to be made, and if none came before the third proclamation made and ended, that then it should be a bar to him and his heirs, to whose use such a surrender was made: and that in our case A. did not come before the three proclamations, &c. Whereupon the lord grants it to another. And it was held by the Court, that in our case he in the remainder is not barr'd after the death of A. for B. in the remainder cannot come and claym to be admitted presently; but the lord shall hold it during the life of A. And a case was vouch'd and agreed. T. 29 Eliz. rot. 413. Rastall against Lane. A custom was that waste shall be a forfeiture of the copyhold. And there adjudg'd, that waste by the lessee for life, shall not forfeit the remainder in fee, but during the life of the lessee for life only. Also a custome shall be taken strict: and judgment was given accordingly. Note, it was adjudg'd P. 3 Jac. C. B. Whitton against Savage, that such a custome, (ut supra) shall not bind he that is over seas when such a surrender is made, or when the copyhold descends.

Stephen against Carter.

Stephen brought an action of trespass against C. for divers things. As to part the defendant said, that it was in default of inclosure by the plaintiff, and as to the residue not guilty, and issue upon that joyn'd. But before the tryal, the plaintiff confest the barr and non prosequi ulteri. us entred, and after the issue is found for the plaintiff, and well. For the defendant had relinquisht that part without benefit of the barr: and for that had pleaded not guilty. So by Popham. If it had been for a tres-**[43]**-pass in two several acres, and the defendant justifies in one, and as to the other pleads not guilty; the plaintiff may confess part and have issue and verdict for the other. And judgement in our case for the plaintiff.

Payne against Ferrall.

A. devises his land to B. for twenty-one years to commence at Michaelmas next after his death, the remainder to F. in fee. A. dies, B. enters at Michaelmas, the tearm expires. If he in the remainder shall take. Denne, that the remainder is good: and it cannot be compared to an estate that passes by an act executed. ve. 1. rep. 64. A devise from and after my death, good. 18 Eliz. That a devise for years, remainder to the said heirs of I. S. in fee is good, and that was not denied, if I. S. dyed during the term. And the reason, as to me it seemed: because the frank-tenement in the mean time, is in the heir of the devisor, and not in abeyance. And judgment ordered to be given accordingly.

Purrel against Bishop.

Upon evidence it was agreed, that if a lease for years be made to A. and delivered to B. to the use of A. and B. enters to the use of A. if B. be ejected, A. may have an ejectione firm.

Collins against Phillips.

In an action of debt upon an obligation, dated 25 of September, the defendant pleads, that a capias ad satisfac. was awarded against B. who was taken upon it 30 Septem. And that that obligation was made for the enlargement of B. The plaintiff

demur'd upon that, and had judgement: because it appears that the obligation was made before the arrest, and for that it could not be avoided by 23 H. 6. cap. But he ought to have pleaded that with a prim. deliber. after the arrest. And it was agreed by Yelverton and Fenner, that if a cap. be awarded, against B. and before the arrest the sheriff takes an obligation of him for his enlargement when he shall be arrested: that by special pleading may be avoided by 23 H. 6.

Oliver Saint John against Bawdrip.

The case was thus, W. Bawdrip the grandfather dies seised, Thomas Bawdrip the father of the defendant at age. Thomas makes the defendant his executor and dies. The Lord Saint John as executor of an executor, brought an action of debt for relief against the defendant, being executor, &c. And well. ve. 20. H. 7. 1. Yelverton said that the doing of the fealty is a contract for the relief and services. Fenner doubted it, & adjournatur Dy. 24. 240. 39 H. 6. 31. 7 H. 6. 13. 11 H. 6. 15. And the case was moved again at another time, and then it was agreed by the Court.

1. That an executor may have an action of debt for relief by the common law without fealty, 32 H. 8. and that seisin of the services need not be alleadged when the executor brings debt for relief, otherwise when the party himself avows.

2. That debt may be brought for that in a forraign country, and the defendant cannot plead nihil debet; for relief is made certain by the statute of Magna Charta cap. 2.

[44] 3. That debt well lies against an executor for relief; the testator could not wage his law for that, because 'tis certain and a real duty: and it is not like to 41 Ass. 15. that an escape does not lie against an executor, for that is grounded upon a personal wrong in the testator. Also that action is expresly given by the stat. against a gaoler, and shall not extend to an executor. Also in the case of relief. There was a real contract in the creation of the tenure. Poph. said, that in debt, for relief, the plaintiff ought to shew the tenure in special, and by what part of a knights fee the tenure: that the Court may judge what is due for relief. But in a writ of ward, there if it be a tenure by any part, it is sufficient for the plaintiff to have ward. And judgement was given for the Lord St. John. And after error was brought, but the judgement was affirmed. Note, upon the tryal in this case, that the mannor of Odamsfee in the parish of Penmarke in Gl. is held of the Lord St. John by service of chivalry as of his mannor of Pen. by homage, fealty, and escuage of 40s. cum acciderit to 2s. and to him, &c. and by the rent of 6s. 8. &c. and suit of Court.

Andrews against Cromwell.

Intr. P. 43 Eliz. B. R. rot. 358. & the sc. fac. T. 43 Eliz. B. R. rot. 649.

A writ of error was brought upon a recovery in an ass. And amongst other things this was assign'd for error; because the writ of error was directed to the Chief Justice of the C. B. Because error in processu, nec non in red. judicii of an assize of novel disseisin, arraigned before the Justices of Assize. In recordo quod coram vobis resident. without shewing by whom the judgement was given, neither how it came into the Common Bench; and yet by Tanfield that it is good. By all the justices that the writ is ill. ve. Dyer 76. 18 H. 6. Where it was before special commissioners that had not a clark of assize.

Webb against Petts.

W. sues P. in the Spiritual Court for not setting out the tithes of two acres, P. prays a prohibition, because he had set out the tithes of one acre in specie, and that a party unknown had taken them; and for the other he suggests a modus decimandi for 2s. 6d. and upon that, issue is joyned, and the witnesses said, that for a long time, as they heard say, the occupiers of that farm: whereof that acre, &c. had used to pay annually to the parson 3s. for all tythes, and agreed by the Court.

1. As for the first, quod prohib. stet. For after the tithes are severed if any stranger takes them away, the parson hath his remedy against him at common law, and shall not sue the parishioner in the Spiritual Court.

2. It was agreed, that a proof (by hear-say) was good enough to maintain the surmise within the statute 2 E. 6. But as to the other acre Poph. held, that the modus decimandi is not well proved. But Fenner and Yelverton on the contrary; for by that appears, that the parson is not to have tithes in specie, and for that had not any cause to sue for them in the Spiritual Court.

CROMPTON AGAINST SMITH.

Error upon judgement in the village of Ludlow. Debt was brought in simul computav. and counts of many particulars, that amounted to 3d. more than he had demanded; and that was held error; but be-**[45]**-cause it was of so small a thing, afterwards the Court propounded a composition, to which the parties agreed. Note Dy. 55. and the difference; for there the declaration and judgement were good, and the casting up of that after, is the act of the clark. Note also 7 H. 6. 26. For there the lessor may have debt severally, for the several arrearages of every year, if he please, and for that he need not shew how he was satisfied of the arrearages of the other year.

HARVEY AGAINST THE KEEPER OF A PARK.

The indictment was held ill by Fenner and Yelverton, being only in Court, because the value of the cross bow was not put into the indictment, according to the statute. Also the stroke was supposed to be done at D. whereof the party instanter obiit, at S. which is impossible. And so apud D. interfecit. And upon that the process upon the indictment was staid.

ELWIN AGAINST MOUNTFORD.

Intr. T. 42 Eli. B. R. rot. 679.

M. had recovered against E. by default in the Kings Bench, 42 Eliz. and error was assign'd, because there was not any bayl put that term, and then there was not any appearance, and that being so certified, the judgment was presently reversed. See the like case 38, 39 Eliz. Holman against Collins. B. R.

COLSTON AGAINST ROSSE AND LEVET.

Intr. T. 42 Eliz. B. R.

Debt upon an escape against the defendants, as Sheriffs of the City of York. And counts upon a judgment given in that Court there, for the plaintiff, upon an obligation made by one R. Layten; without shewing, that it was made within the jurisdiction of that Court. Yet judgement was given for the plaintiff.

STEPHENS AGAINST TOTTY AND HIS WIFE.

Intr. P. 44 Eliz. B. R. rot. 342.

A prohibition prayd, upon a suggestion, that he was sued by them in the Spiritual Court, for a legacy to the wife: where he pleads a release to the husband. They appear, and the wife said, that she sued a divorce, a mensa & thoro, for adultery of the husband before that he made that release. Yet it seems to the Court, that that

release binds the wife: for that does not dissolve the marriage a vinculo matrimonii. Note 26 H. 6. 7. But after arguments by the civilians, Poph. said that a consultation shal be granted (so they in the Spiritual Court admit that plea). And Dr. Cromton said, that then it is clear that the wife there shall recover.

GASCOIGNE AGAINST LONGVILL.

At Serjeants Inne, in Justice Pophams Chamber, by Popham and Anderson Chief Just. Pepper Surveyor, and Hesket Attourney of the Court of Wards, upon a case there depending, office was found that one Haslewood was seized in fee of lands die quo obiit, and that he held them of the King in capite. It was agreed by them to be good enough, without finding of the very dying seized, for so it shall be intended. Note, that the writ diem clausit extremum is, die quo obiit F. N. B. 252. So also in a writ of assize of mor. daucester, die quo obiit idem. 195, 196. **[46]** Die quo itr. &c. And that there are many presidents accordingly; who find the dying seiz'd. Sed abundans cautela non nocet. And agreed accordingly, note 1 H. 7. 24. a.

At the same time and day, being Wednesday, post octab. Trinit. Bacon. of Grays-Inne put this question. A. leases for life to B. upon condition that if he pays 10l. at Michaelmas to the lessor, that he shall have the same to him in tail, the remainder to I. D. in fee. The 10l. is not paid; if now he in the remainder shall have the fee, or if the contingent and accrewer extend as well to the fee, as to the estate tayl, or if the fee vests presently. Poph. That is a noote point. Anderson. You will not be able to prove that by any book of law. But if you were to read, it is a good point for you.

PENNISTONS CASE.

At the same time it was also resolved by the justices, that if tenant in tail bargains and sells, and the bargainee levies a fine with proclamations, and 5 years pass: and after tenant in tayle dyes, that the issue shall have 5 years after his death to make claim, for his title is saved by the statute; for the tenant in tail himself could not have claim'd it against his bargain and sale.

MOORTON AGAINST BRIGGS.

At that time the justices voucht this case. It was found by office, that A. dyed seized of 40 acres of land in D. whereof certain lands were held in capite, a melius inquir. was awarded.

At the same time also it was agreed by them, that if tenant in tail of lands in capite, grant his estate to A. and his heirs, and A. dies his heir within age, that he shall not be in ward. But by Poph. That if he had bargain'd and sold the land to A. and his heirs; the heirs of A. should have been in ward. But Anderson denied that.

SIR CLEMENT HEIGHAM AGAINST BEDENFIELD.

It was agreed by the two Chief Justices, and so also afterwards agreed, by all; that if tenant in tayl covenant to stand seis'd to his own use, for his life, the remainder to his son; and after he levies a fine to A. to other uses, that these last uses are good against the son. For when he had limited the use for his life, that was all that he might lawfully do, and it was no alteration of the estate of the covenanter; for his wife shall be endowed, 2 rep. 52. It is there so (verbatim) agreed, H. 38 Eliz. Stapletons case.

SALTER AGAINST BUTLER.

Intr. T. 44 Eliz. B. R. rot. 401.

In an action of trover, and conversion for 8 heifers, the defendant said, that a rent-charge of 16l. per annum, payable at four feasts was granted to B. his executors and assignes, during the life of D. and that he died intestate, and that F. took letters of administration, and that the defendant as servant to F. did distrein the said heifers for arrearages, &c. and put them in a pound overt, which is the convers. &c. And the plaintiff demurred, and agreed by the Court that the plea is not good; for he hath not confessed any convers. for in the pound the beasts **[47]** were in the custody of the law; and so it does not amount to a general issue, for the matter in law, it was resolved, that an administrator cannot be assignee to take that, because it was a frank tenement, and he cannot be an occupant of such a rent; but it passeth to the benefit of the terre-tenant. As Plow. 133. where a rent-charge passeth away by a condition broken. And by Winrell who argued for the plaintiff, that there shall be no occupancy of a coppyhold, but it shall be to the benefit of the lord. Note Dyer 294. a. and by Popham and Fenner, If a man hath granted a rent-charge to another for the life of I. S. the remainder to the right heirs of I. S. if the grantee dies living I. S. the rent shall pass to the benefit of the terre-tenant; but if I. S. dies living the auter vye, his heir shall have the rent after the death of the auter vye. Note that good case. And by all the justices; If in our case B. had assigned that rent, &c. the assignee should have had that during the life of D. And by Gawdy and Fenner, If the grantee had devised that rent, that the devisee should have had that rent during the auter vye. But in this Popham was on the contrary. For that is not devisable by the 32 H. 8. because it is not free; nor by the common law, because it is not a chattel. And in the principal case judgment was given to the plaintiff.

KING AGAINST HOBBS.

Intr. T. 44 Eliz. B. R. rot. 401.

In an assumpsit the case was thus. A cap. ad satisfac. at the suit of the plaintiff, was directed to the Sheriff of Wilts to take one Thomas Hobbs, and that the sheriff mandavit A. B. C. and D. quatuor Balivis & eor. cuilibet to take the said Thomas Hobbs: by virtue of which A. and B. takes the said Thomas Hobbs, and that Francis Hobbs in consideration of the discharge of the said Thomas assumed to the plaintiff, &c. And it was mov'd in arrest of judgement after verdict for the plaintiff, that the arrest by two of them, was not lawful. As 27 H. 6. 6. an obligation by three jointly and severally, two of them cannot be sued. So Dyer 62. And Fenner said, that he was in Shellyes case in the Chancery. A commission was awarded to eight, six, four, or two of them, and the commission was executed by three: and it was held void. Gawdy answered, that that was a judicial act. But in our case only ministerial, and an authority without any colour of interest. And for that it was well executed by two. But it was agreed by all, that the mandavit was good, without shewing it to be by deed. A case was cited of a prisoner discharged by paroll. Popham being absent, it was adjourned. And at another day it was moved again, and the judgement was staid. For the assumpsit was alledged to be apud Westport, and the visne was of Westport without F. Note for the first point. Litt. 181. hath the very case.

HYNDE AGAINST DEANE.

Intr. 43, 45 E. B. R. rot. 206.

Machin being seised of two mannors in Woodbury in the county of Cambridge, and Willousby in Middlesex, and of B. acre in Hackney; acknowledges a recognisance

of 1100l. to Hynde, 31 Eliz. and after 34 Eliz. he acknowledges another recognizance of 2000 marks to Deane. Deane purchaseth Bl. acre, and the recognisance to D. is forfeited, and he sues execution in Cambridge and hath the mannor of Woodbury in execution. And afterwards the recognisance to Hynde is forfeited, and W. Hinde his administrator sues an elegit, and had the moyety of the mannor of Woodbury in execution, and well. And upon that Deane sues an audita querela in the Common Bench against Machin for a contribution of the **[48]** moyety of the mannor of Willousby in Middlesex, of which Machin was in possession. And there was judgement for the plaintiff, for a purchase of part of the land, &c. is no barr, to have contribution against the conusor himself. Pl. 2. b. Also it does not behoove the eldest conusee to have a scir. fac. against the youngest conusee, no more than against a feoffee; and the reason seems to me to be, because it appears upon record that his title is youngest. 9 E. 2. and 22 E. 3. 7. Yet the youngest conusee after the first is satisfied, shall re-have the land, ve 19 E. 3. Estr. defaits 171. Sciri fac. 12. And now upon error, it was order'd that judgement should be affirm'd.

Rooke against Sprat.

Upon evidence, it was said by the Court absente Poph. that if tenant in tail of a remainder in fee discontinue; and retakes an estate in fee, and devises it to his wife for life, the remainder to B. for years, the remainder in fee to him that had the remainder in fee before: and dies without issue, the wife enters and dies; he in the remainder is remitted and may enter upon the devisee for years, and will avoid the lease, although that his remainder be created by the same will. Note, 9 H. 6. 43. Remitter avoids a lease for years without entry 15 E. 4. 6.

Clements against Cassye.

A lease was made to try a title of a house, and the lessee enters into the house, and the wife of the said former lessee ousts him and farms the house: and after the husband came there, yet the ejectione firm. was brought against the husband only, and well. And the matter in law for the title was. A. seised of Bl. acre. and Wh. acre in fee, devises both to his wife for life, the remainder in B. acre to B. in fee. Item, I make my wife executrix of all my goods and lands. By the Court that does not give the fee of W. acre to the wife, for lands shall intend such land as she may have as executrix. But by Popham, otherwise it had been if he had said, I make my wife heir of all my lands.

Carey against Stephens.

An action of tran. quare vi. & armis was brought for casting wine upon his velvet, and well, although that he might have brought for that an action upon the case. ve. 12 H. 4. trespass for casting dung against his wall.

B. brought error upon a judgement given in the Court of Lynne. The case was B. had sold certain wines to A. and warranted them to be the best wines in England; when in truth they were corrupt and nought. And judgement was reversed, because he had not averr'd in that action, that there was better or as good wine in England.

Whartons Case.

Intr. T. 43 El. B. R. rot. 979.

The jurors acquitted him of murder, and found it man-slaughter, contrary to evident proof for the murder of one Herlakenden in Kent, by Wharton and three others. And the jurors were punish'd in this manner, three of the jurors that were

principal leaders of the others, and also suspected to be corrupted by Whartons friends; were committed to pri-[49]-son, & to pay 20 marks a piece to the King for a fine, & to be bound to their good behaviour, and for the good behaviour of the prisoners acquitted by them: and to remain in prison for a year, and after that done to be delivered. Six other less suspitious were fined 10l. a piece, and to be bound in a recognizance for the good behaviour of the prisoners, and of the other 3 jurors before. And the last three because they much disagreed, and did not consent, until by long time and perswasion they were mislead by the others, contrary to their evidence, and because they had not so declared themselves, and pray'd advice of the Court before verdict given; they were committed to prison, and to pay 5l. a piece. And Poph. said there were presidents to that purpose. A. was found guilty, and enquiry of the goods were made: and because the jurors would not find the value of them, as it was plainly proved; they were awarded to prison, and fined to the King. Another president before the justices in eyre: The jurors acquitted a prisoner, contrary to their evidence; and for that they were fined and imprisoned, and bound for the good behaviour of the prisoner during his life. And to this day the Justices of the Kings Bench are the supream justices in eyre, and such an offence is not to be suffered. And the jurors were presently committed to the Marshalsey; and they were so punisht by the advice of all the justices.

MOYLE AGAINST EWER.

Upon evidence, it was moved by Cook, that an indenture of feofment and letter of atturney in it, is not good to a stranger to make livery. But otherwise of a deed poll; because in that 20 men may be made parties one after another, but in an indenture those between whom it is made, only are parties to it. But by the Court, that is good enough, and that it is a common case, and a common use. ve. Cook, Litt. 52, and note, Cook Entrys 192. a president to the contrary: other matter was mov'd. A. grants to B. medietat. manerii sui of C. and 8 rood of land in C. moreover all other lands and tenements in C. whether all the mannor of C. passes or not. Poph. that a moyety only passes. But Gawdy, Fenner and Yelverton were on the contrary, that all passed, and the jury found for the plaintiff accordingly.

HARTLAND AGAINST YATES.

By Poph. that is clear, that if an exigent be awarded against A. and after he is quint. exactus, and before the return of the exigent A. dies; yet the outlary shall stand in its force, and shall not be reversed; for judgement was by coroners upon the quint. exactus, and they may certifie the outlary. But otherwise if A. had died before the quint. exact. Which was not denyed.

JOHNSON AGAINST HERNE.

The plaintiff in an ejectione firm. was admitted to sue by guardian, because he was within age, and they are at issue, and at a nisi prius in the country; the justices assign him a new guardian, and it was found for the plaintiff; and that matter was now moved in arrest of judgment. And by the Court, absente Poph. that it was good, and that the justices at a nisi prius may asign a new guardian, and judgement for the plaintiff.

[50] H. 45 Eliz. B. R.

Heale moved, that an obligation may be delivered as an escrow to the party himself, upon condition to be his deed upon special delivery. But if afterwards it was delivered as a deed, and not by special words as an escrow: then the condition ought to enure, to make that no condition upon the matter that it was made at the beginning.

Poph. and Fenner agreed by a special delivery, Gawdy accordingly. Yelvert. only was on the contrary. And that all the cases in our books are put of such delivery to an estranger. Note, Dy. 34. 9. rep. 136. 137. And that difference reconciled all the books. Cook, Litt. 36. a.

WEBB AGAINST HINDE.

W. sues a replevin, H. removes it by a recordari into the Kings Bench; the plaintiff does no declare, and upon that a return awarded to H. and the sheriff upon that returns averia elongat. And then a withernam was awarded, and executed, and now comes the plaintiff and prays to declare, and prays a deliverance of the withernam. And it was testified to the Court by the clarks, that upon submission of the plaintiff to the fine for not declaring, and that imposed upon him by the Judges, he shall have deliverance of the withernam, and shall declare. And now a fine of 3s. 4d. was imposed upon the plaintiff, and then he declared, and had deliverance; note, the course of the Kings Bench is contrary to that of the Common-Bench.

CHANDFLOWER AGAINST WATERHOUSE AND PRESBYE.

Intr. M. 44, 45 Eliz. B. R. rot. 378.

Covenant was brought., that whereas C. had delivered to the testator of the defendant 70 hogsheads of copras upon condition to pay 170l. at a certain day, and if it be not paid, &c. that then it shall be lawful for the said C. peaceably and quietly habere, capere, &c. the said hogsheads. And said that the money was not paid, & quod non potuit pacificè & quietè habere, &c. Which was nought, because he had not counted: how he was disturbed at the taking of them. Note, 3 E. 2. Covenant 6. And judgment quod quærens nihil capiat.

LAWE AGAINST SANDERS.

Intr. P. 44 Eliz. B. R. rot. 54.

Declaration in an assumpsit was, S. complains against S. in the custody of the marshall, &c. that in consideration that the aforesaid S. would marry M. the daughter of S. super se assumpsit. And it was said to be ill: because he had not shewed who made the assumpsit, and declarations shall not be aided by intendments. This was mov'd in arrest of judgment, and it was staid.

Note that Poph. said, Upon the tryal of Wilburn for the death of Potter, that if two be fighting, and there are more looking on, who do not endeavour to part them; if one be kill'd, the lookers on may be indicted and fined to the King. Yelvert. concessit.

MUSKET AGAINST CORDALL.

Intr. T. 44 Eliz. B. R. rot. 422.

C. recovers in the Common Bench against Musket, being an attourney of that Court, and judgment upon a non sum informatus, & quod defend in misericord. And that was now moved for error, because the defendant is intended to be all times present in the Court. **[51]** But judgement affirm'd because he had imparel'd, and had defended vim & injuriam quando, &c.

Aynesworth against Battye.

Intr. H. 41 Eliz. B. R. rot. 1061.

I. S. devises to every of his younger sons B. C. D. and E. 20l. a piece, to be paid when they shall severally come to the age of 21 years, and devises his land to A. his eldest son, and his heirs: upon condition, that if he refuses to pay these legacies; that then that land shall remain to the younger sons, et, &c. A. pays the legacies to B. and C. and refuses to pay them to D. and E. D. enters into the land in his own right, and the right of E. upon the heir of A. in by discent. And it was resolved.

1. That the younger sons may enter upon the refusal, &c. by way of limitation.
2. Although that he had paid the legacies to two, yet their entry is also lawful.
3. That the descent doth not take away their entry.
4. That by the entry of D. in his right, and the right of E. the estate is invested in all 4, for they take joyntly, and the estate of the heir devests from him in all.

Gardener against Harrison.

G. had recovered against B. 100l. in the Common Bench, and had a cap. ad satis. and B. was enlarg'd, whereupon G. sues a cap. utlagat. against B. directed to the sheriff, quod non omittat. And the sheriff delivers it to Harrison being bayliff of the liberty of Stepney. That it appear'd to the Lord Wentworth, that had there the return of all writs, that H. the defendant had apprehended B. such a day at White Chapel, and had him in his custody, and that after he suffered him to escape. The defendant demurred upon that, because the writ was directed to the sheriff, and he himself ought to have executed it, and the arrest by the baily was not lawful, ve. 5. rep. 88. a. b. by which the party may have an action of debt upon an escape.

Farmer against Ward.

M. 37, 38 Eliz. C. B.

By Anderson and Walmsley, that voluntary waste is a forfeiture of the copyhold by the common law, but negligent waste not without a custome.

Burchier against Wiseman.

It was said by Anderson and Walmsley, that the ancient sheriff is not discharged till he hath deliver'd the county to the new sheriff, although that the patent be sealed. Dyer 355. And by them agreed, that if in the deputation of the under-sheriff, there be such a clause (that he shall not meddle with any execution above 20l.) that that is void as to the subjects; who are not bound to take notice of such private agreements and indentures; and it is void as to the under-sheriff himself, as it was adjudged H. 12 Jac. C. B. Sir Dan. Nothon against Gouldsmith, and by 22 Eliz. cap. And authority cannot be so apportioned. Dyer 175. 4. rep. 33.

[52] Harvey against Bateman.

That if a man assign an obligation to another for a precedent debt due by him to the assignee, there, that is not maintenance; but if he assign it for a consideration then given by way of contract, that is maintenance. ve. 34 H. 6, 30.

The Countess of Rutlands Case.

She brought a detinue for a coach: the defendants pleads an attachment according to the custom of London, hanging the writ: by the Court that is not good. And so was the opinion of the Kings Bench.

Broth against Archer.

Upon evidence it was held by Anderson, that if a feme covert, eject one, and that afterwards the husband assents: that yet the husband is not an ejector, for an ejectment is made in an instant, and hath not a continuance. Otherwise of a disseisin.

Odander against The Hundred of Grodley in Surrey.

In debt upon the Statute of Hue and Cry, it was resolved that notice given to the next village forward in the road is good, although that it be in another hundred, and although that there was another village a latere nearer, in the same hundred. For it cannot be intended that a stranger should have such precise notice or knowledge of the villages in a strange place. So also P. 38. C. B. Stinchcomb against the Hundred of Benhurst in Berks. ve. & lege the statute 27 Eliz. cap. 13.

Patridge against Naylor.

Upon evidence, in an action upon the statute 1 and 2 Phil. and Mary, although that one distress be put into several pounds, yet one replevin shall serve. There that is not within the statute. Otherwise if it had been in divers counties, or several franchises, where there ought to be several replevins. And if several men take the distress, that 5l. shall be upon every of them, because the statute says, every person offending, and not for every offence: and that before that time it had been so adjudged, and after the judgement upon error in the Kings Bench was reversed, but it was for another cause; and the Court now trebled the damages, and 5l. against every offender. But after error upon that very point in T. 38 Eliz. in the Kings Bench, between the same parties; and by the Court it was error, yet they gave a day for presidents. Dyer 177 b.

Strickland against Fallowfield.

In a formedon in discender, the demandant counts of a gift to A. and B. then a feme sole; and to the heirs of their bodies engendred. That they intermarry, and that they as heirs of their bodies, &c. And the tenant demurs, because he had not shew'd the place where the marriage was solemnized: for without marriage no right in discender in tayl, and that is issuable. But by Walmsly upon a count in frank marriage, a man need not alledge the marriage. Which the Court granted.

[53] Snellings against Norton.

S. brought an action of debt against N. as administrator, the defendant pleads upon a prescription: that by the custom of London, debt lies against an administrator, without any specialty; upon a concessit solvere to the testator; and that a recovery hath been had against him upon such a sute, and that was held a good plea: for debt against an administrator is not first given by 31 E. 3. but that was at the common-law, and the statute is declaratory. 19 E. 3. 4 Pl. 27. 1.

ARDEN'S CASE.

By Beomond, that rien rule en le, is a good plea in waste. Walmsly you may see the difference; when the waste is brought by the first lessor himself, and when it is brought by the grantor of a reversion: in the one case it is good, in the other not. Note also these books voucht. 5 H. 5. 12. Br. Waist. 72. 46 E. 3. 20. Br. Waist. 45 H. 8. 6. 5. And note, if they warrant that difference, the reason is, because of the contract and privity between the parties at the making of the lease.

LORD WILLOUGHBY AGAINST KEMPE.

It was said by the Court that a grant of an office, of keeping the courts of dutchy land by Privy Seal is not good; but it ought to be by dutchy seal.

YELVERTON AGAINST CORNWALLIS.

Y. covenants with C. to make an assurance of Bl. acre before P. by indenture. Y. dies the covenant not performed, and the very original deed comes into the hands of the executors of Y. and C. brought a writ of covenant upon the counter-part. And it was said by the Court, that it doth not lye without the deed it self. Walmsly. He may have an action of detinue to recover the deed.

Note, A. leases to B. by indenture for years, in which also were divers covenants, and amongst the rest, there was a covenant to pay the rent, and the lessee was oblig'd to perform all covenants, in that indenture; and an action of debt was brought for non-performance: and assignes breach in non-payment of the rent. And the defendant pleads performance. And by the Court, that is not a good plea, without shewing how he had performed; and agreed also by the Court, that the lessor need not demand the rent. But otherwise it had been if the obligation had been made expresly for the payment of the rent. And by Walmsley, that it had been so adjudg'd in that Court. ve. 22 H. 6. 57.

GRIFFIN AGAINST SHEET.

It was said by the Court, that a writ of disceit lies against the heir of him that had recovered. Note, 8 H. 6. N. B. 97. C.

[54] AKERMAN AGAINST WARREN.

Upon false imprisonment, the plaintiff counts of an imprisonment in the county of B. and also in the county of W. And by the Court it was ill, for he cannot joyn in the tryal, because it is a local trespass: but the plaintiff ought to have had several writs. But a man may justifie battery by an assault of the plaintiff himself in two counties: for that is transitory. 13, 11 H. 4. 14. But not found.

LORD IVERS CASE.

Debt was brought upon an obligation, &c. By the Court, that an obligation to the sheriff to appear and answer, &c. is void by 23 H. 9. cap. 10. But otherwise if it had been to appear to answer; for the party by the law may appear and yet judgement may be given by default.

FISHER AGAINST TRUSTLOW.

That pleading, quod villa de Beverly incorporata fuit was good enough, although that it be better pleading to say, that the maior, burgess, &c. or the inhabitants were incorporate, &c. Note in the Statute of Winchester, that the hundred shall answer, &c. And so in other statutes the village is taken for the inhabitants, and Dyer 100. a. is so.

TOTTEL AGAINST HOWELL.

It was held by the Court, that herbagium for years, cannot be granted without deed. Note 17 E. 4. 6.

JENNINGS AGAINST BRAGGE.

It was said by the Court, that a writ of error bearing teste before the judgement be entred of record, is void, although that the Judges have pronounced judgement, (viz.) quod intr. judic. Note 1 R. 3. 4. is contrary.

BYRONS CASE.

He brought an action of debt as administrator, by the letters of administration of the Bishop of York; because the testator had bona notabilia in divers diocesses in his precinct, upon an obligation then being within the province of Canterbury. And adjudged that it is not good, and the prerogative of York does not extend to Canterbury. And by Anderson, If a man dies having bona notabilia in Canterbury and York, Canterbury shall have the prerogative. And by Walmsly and Beom, that the debt upon a specialty is bona notabillia in that place where it is, at the time of the death of the party: but debt upon a simple contract, there where the party himself dies.

[55] LEAKE AND MICHELL AGAINST HOWELL AND HALE.

[See S. C. Cro. Eliz. 533.]

An information in that term was exhibited in the Exchequer, upon the 1 Eliz. cap. 12. and 19. of Taxes, Custome and Subsidy. Note, that merchandizes, and by way of merchandize, in the statute, and upon those statutes was now resolved. And that goods taken by letters of marque and reprisal, shall pay subsidies. Which was said in Captain Prestons case.

2. That the information was good, saying that the goods were landed as merchandizes, although he did not say, brought in by way of merchandize. And it was agreed by all, that if a man buy goods beyond sea, for his own provision, that is not within the statute.

BEALE AGAINST TAYLOR.

The better opinion was, that if process was delivered to the sheriff, and he takes the party without saying any thing, that yet it is good; for otherwise the sheriff shall be a trespasser; which the law does not intend. And the sheriff hath any lawful authority so to do. So also it is, although the sheriff had not the processe about him at the time of the arrest.

Elwin against Moor.

E. brought an action upon the case against M. for words, Thou art a thief and hast robb'd my son, without averring that he hath or had a son ; and yet it was held good by the Court; because the words, Thou art a thief, are actionable, because of discrediting the party in the audience of others, who know not if E. had a son or not. So if he had said, for thou hast stolen my horse. It was good without averring that he had a horse.

Note it was said by Owen, If there be 2 joyntenants in London, joyntraders, and the one dies, that the survivor shall not have all, but the executor of the other shall have his part. To which the Court agreed. And so it is of a joynt obligation to them for such wares.

Wentworth against Wentworth.

One brought dower in the C. B. in 37, 38 Eliz. and the case was thus. A rent was assigned to her for dower out of land, to which there was a condition that if the rent be in arrear and unpaid, that the grant shall be void, and she restor'd to her action for her dower; and averr'd. And it was adjudg'd.

1. That rent assign'd for dower, and ought to be upon condition, how the same dower could not be upon condition; because the rent is a thing collateral, although that it ought to be of the same land.

2. That there need not be any demand of that rent (for in our case the demandant had not alledg'd a demand of the rent.) But it was distreynable of common right. Also the party need not alledge a demand of the rent, when it is to cease by the non payment to the prejudice of him that demands it, and P. 38 Eliz. judgement accordingly for the demandant.

[56] Note, by Anderson and Walmesly, that not guilty is a good issue in an assumpsit, or detinue. Because a wrong is suppos'd; and 19 H. 6. agreed by the protonotaries. And so debt upon the Statute of Winchester for robberies. But in debt it is not good. And yet in debt not guilty hath been pleaded, and issue upon that, and verdict passed upon it; and by the Court it is now good, and help'd by the Statute of Jeofailes, because it is onely mis-joyning of the issue.

Cooper against Columbell.

Upon evidence in an ejectione firm. by Walmesly, that a gift in tayl, &c. to the lessee at will, or tenant at sufferance, as Dyer 61. is good without livery and seisin; for possessions countervaile livery. Note by E. 5. Dy. 145. b. & 269. b. accordingly. And if lessee at will make a lease for years to commence in fururo, it is not a present disseisin. And Beomond agreed. Note, that if lessee at will, lease to B. for years, and B. enters, B. only is the disseisor. ve. 12 E. 4. 12.

By the Court, that error does not lie against the Queen upon a petition where she is immediate party to the recovery; but otherwise where she is party onely as for conformity, as in an action upon the statute, or in a popular action. Note in Tr. 29 Eliz. B. R. Glazier against Hudleston. Where the difference is for an inheritance, or a real action. ve. 23 E. 3. 22. a. 22 E. 3. 3. a.

Dennyes Case.

It was said by the Court, that debt lies against the heir of an heir upon an obligation of the ancestor, who obliges himself and his heirs unto the 10th degree. ve. Dyer 344. debt against the executor of an heir.

Woodroff against Greenwood.

Intr. 38 Eliz. C. B. rot. 90. 12.

C. tenant in tayl, the reversion to the Queen, leases to A. for 21 years; A. assignes that to B. and covenants, that B. shall enjoy that, without the molestation, expulsion, or eviction of any person, except the Queen her heirs or successors. C. dies without issue, the reversion being granted before to Wentworth, who enters upon B. and B. brought a writ of covenant. And by the Court it was well brought, without acquittance. For the lease by tenant in tayl although it be according to the 21 H. 8. it does not bind him in the remainder or reversion.

Tompson against Clark.

An action upon the case was brought against C. and he counts upon a trover and conversion of his goods in the county of Nottingham; the defendant pleads a recovery against the plaintiff, in the upper bench in another action, in which he had 20l. damages, and for those damages a fier fac. issued out of that Court directed to the Sheriff of York. Upon which the sheriff seises the same goods in the county of York, and delivers them to the defendant in satisfaction of 20l. and so justices, &c. And upon that it was demurred and adjudged for the plaintiff for two causes.

1. First he justifies by reason of a fier fac. upon a recovery in the **[57]** Kings Bench, and does not shew in what county the Kings Bench was, for that Court is removeable; and for that, all processes are to appear coram nobis ubicunque fuerimus in Anglia.

2. The trover and conversion is suppos'd to be in the county of Nottingham, and the defendant pleads special justification in the county of York, without taking any traverse absque hoc that he is guilty in the county of Nottingham. Note by Fenner, that the sheriff cannot upon a fier. fac. deliver the goods to the party in satisfaction of his debt quod concessum.

Hall against Hemmsly.

Tr. 38 Eliz.

Hall brought an action upon the case for words, and declar'd, that whereas he was rob'd of certain cloth, per ignotost, &c. The defendant in præsentia diversorum malitiosè dixit, H. hath receiv'd again 3 pieces of his cloth, and beareth with the thief, innuendo quendam malefactorem ignot. Adjudg'd, that the words were not actionable, for the receipt of the cloth may be lawful; for he doth not shew that he knew them to be his cloaths. So 29 Eliz. intr. George & Parker. Adjudg'd for saying H. hath broken my shop, and taken away my goods, no action lies. Also there was another exception taken, that the declaration is, in præsentia diversorum that may be said, and yet no slander, for it may be in their presence, and yet they not hear it. But that exception was waived, for it shall be intended that they heard it also.

Harrington against Wyse.

M. 37, 38 Eliz. rot. 226.

An action of debt was brought for rent upon a lease, &c. and it was found in this manner, articles of agreement were sealed and delivered between the parties in hæc verba, it is covenanted and agreed that the plaintiff doth let land to the defendant for 5 years, from and after the Feast of St. Michaell next, provided, and it is agreed that the lessee shall pay therefore yearly at 2 feasts of the year, (viz. such a time, and such a time) by even and equal portions, 120l. And there is another covenant, that a lease shall be made and seal'd before the Feast of All Saints next, according to that agreement. And if that may be said a lease or a reservation or not was the question. By some it was said, that that last covenant, that the lessor should make a lease according to those articles declares the intent of the parties, that those articles shall not be a lease. The Court on the contrary, for by the articles the lease is to commence at Michaelmas next, and by the covenant he may make the lease at All Saints, which is after the first lease commenc'd. So it appears that that was but for further assurance, and not to destroy the lease precedent. Also by the Court, that the covenant, that the lessee shall pay yearly, &c. makes a reservation by reason of the word yearly. But by Poph. that is a good reservation also, omitting the word yearly. And that proviso (it is covenanted) makes as well a covenant as a reservation. But adjudg'd for the plaintiff.

Willoughby against Grey.

A venire brought, and the teste out of the term (viz.) after the term ended. If that be error or not, was the question: it was said by the Court that that was not error. And the diversity is between original and judicial writs. As 1 Eliz. Dyer 168. 3 & 4 Mar. Dyer 129. Popham, that it is not ayded by the statute being after verdict. Afterwards a **[58]** case between Moulton and Hall adjudg'd that term was vouch'd. The venire fac. bore teste before the appearance of the defendant in Court; and it was rul'd to be nought, the Court said that that was not like our case, so judgement was affirm'd, another error was assign'd, because the writ of habeas corpus ibi nomina, ommitting jurat. But it was not allow'd.

Crispe against Fryer.

The lord of a mannor comes upon the land of a copyholder to demand his rent, and because none was there to pay it he enters for a forfeiture. Fenner said, his entry was not lawful: but otherwise it had been if the tenant had been there and made an expresse denial; and so the diversity is between a negligent fault, and a wilfull. ve. 31 H. 8. Greenlessees case. Popham and Gawdy, were strongly of the contrary opinion; and said that a denial in law was as much as an expresse denial. As if the tenant had been there present at the time of the demand, and had said nothing: that silence with a non-payment is a forfeiture; ve. 42 E. 3. 5. The lord enters for a forfeiture because the copyholder would not pay the rent. Also it was agreed by all the justices, 22 Eliz. in Sir Christopher Hattons case, that if the copyholders do not come to the court of the lord after a particular summons made to their persons, that was a forfeiture without any expresse refusal to come. Also by Popham, that the lord might avow upon the copyholder. And 6 R. 2. Avowry, 86. Mich. 36, 37 Eliz. 5. C. B. Vaugham. case ergo; because he had another remedy he shall not enter for a forfeiture. See the same reason 4 Eliz. Dyer 211. To which it was answered, that that was no reason; for so in Sir Christopher Hattons case afore voucht, the lord might avow for the not doing of suit of Court, yet he might enter also. Quere.

Sherriff against Diggs.

An action of trespass of an assault and battery was brought, and the plaintiff declares, quod cum the defendant die & anno, &c. the aforesaid plaintiff verberavit & vulneravit, &c. and upon that the plaintiff recover'd. And now error is brought and assign'd in the declaration; in that, that there is not any direct affirmation that that the defendant verberavit, &c. But it is quod cum verberavit. Clerk. The course of the Common-Bench is to declare (the Court being willing to be inform'd by the prothonotaries) in debt with a quod cum, &c. The Court lik't the difference well; and said, certainly that such a declaration in trespass cannot be good. So the judgement was revers'd. ve. Buckleys case, Plowd. 128.

Sir Humphrey Ferres against Wignoll.

An action of debt was brought for taking an horse. The defendant pleads that the now plaintiff was auter foits barr'd in trespass for the same thing. And by the Court that it is a good plea. And judgement given against the plaintiff, for that barr by judgement amounts to a release in law; or otherwise sutes would be infinite. ve. 29 H. 8.

[59] Wooddye against Coles Baily of Southw.

An action of trespass was brought for taking goods, &c. The defendant said that a recovery was had against the plaintiff in Southw. upon which a fieri fac. was directed to him, by which he took the goods and sold them. By Popham. If a fieri fac. for 20l. be awarded to the sheriff, upon which he takes an entire chattell and sells it for 40l. and returns the fieri fac. with the 20l. in Court, he may deteyne the surplusage until the defendant comes to demand it of him; for he is not bound to search the defendant. Agreed. But by Gawdy. If a fi. fac. be awarded for 40s. by force of which the sheriff takes five oxen, every one of the value of 5l. and sells them all, it is clear that the defendant shall have an action of trespass against the sheriff; which was agreed.

Hart against Amerideth.

Errour of reversing a fine levyed by non-age, &c. and after he came to full age before that the fine was revers'd, and now it was said that the fine could not be revers'd, because the plaintiff had levyed a fine of that land to another. Poph. Then he hath extinguisht his title of errour. Gawdy on the contrary. Cook, If the disseisee levy a fine to a stranger, the disseisor shall have the benefit of it, Popham agreed. And it is the case in effect, between Zouch and Bamfield. Fenner accorded. Cook said the reason of that case was the Statute of Fines. Pleming, That is not so in question, for the second fine is not pleaded by the defendant in the writ of error: and so non constat, if there be such a fine levied after that fine or not. By the Court. Then the case is clear, and so it was adjudg'd, quod finis reversetur. Note it was said that that second fine cannot be pleaded, because it was not yet ingross'd: and the ingrosser was staid on purpose by the conusee.

Harewood against Hamond. Trini. and Hill. 39 El.

An action upon the case was brought, and counts that in consideration the plaintiff delivered to the defendant ten quarters of malt to the proper use of the defendant, he assumed to pay the plaintiff ten pound, and upon a non assumpsit pleaded it was found for the plaintiff. And now it was moved in arrest of judgment,

that in that case an action of debt shall lye, and not that action. Which was granted by the Court. And Walmsly cited 21 E. 4. that a delivery of goods ad usum suum proprium, is a gift, and by consequence also it is a sale. Wherefore it was adjudg'd against the plaintiff.

LOVELACE AGAINST REYNOLDS.

An action of trespass was brought, quare clausum fregit: the defendant prescribes to have common in the place, &c. and it was found, that the defendant had used to have the common paying a penny yearly to the plaintiff, and if that issue is found for or against the defendant was the question. And adjudg'd, against the defendant.

1. The prescription is intire, and the payment of the penny is parcel of that, and shall be intended as ancient as the common is. Note the case between Brigandine and Westan before Sir Thomas Gawdy at the assize in Kent, where one prescribed to have a way to the church; and **[60]** it was found, to have a way, paying every year to the terre-tenant 2d. and a pair of gloves for every one that he should marry out of his house.

2. If that payment be not shewn by the commoner, the lord shall have no remedy for it. For he cannot have an action of debt, nor shall he distrein for it, without it be by prescription. As 26 H. 8. cap. 3. that payment cannot be a rent; for a rent cannot be reserved out of a common, office, or other thing which lies not in demand, in which an entry may be made; unless it be out of a mesualty, as 1 H. 4. and that by the possibility of escheat. Note the case in Trin. 36 Eliz. between Gray and Fletcher. A copyholder prescribes to have common in his lords land, and it was found that he had the common accordingly, and it was likewise found in that manner, that the copyholders have used to pay to their lord pro eadem communia unam gallinam & 5. ova yearly. And there, that the tenant hath well alledg'd the prescription, without shewing the payment, &c. And note, that there were two prescriptions, the one by the commoner, the other by the lord, by which it was sufficient for the commoner to alleadge his own prescription.

Debt reserved upon the lease of a warren of conies. The defendant pleads that the plaintiff had plowed a field, parcel of the warren, by which the conies had not sufficient pasture. By the Court (absent Anderson) that it is no plea, for it is not a rent, but a seniory in gross, due by reason of the contract: by which the entry or user of that part is not any suspension.

HARGRAVER AGAINST ARDEN.

Trin. 38 Eliz. rot. 1117. Adjudg'd Hill. 39 Eliz.

Error upon judgement given in a replevin, was assign'd; because the plaint was entred Tho. Harg. and Ambrose Arden. and the recordare that removed the plaint into the Common Bench, was according to the plaint; but the declaration in the Common Bench was Tho. Harg. against Ambrosin Arderne, and according to that declaration were all the proceedings in the Common Bench, and the writ of enquiry of damages was Arderne. So the variance was between Arden and Arderne. But by the Court (absent Poph.) that a variance between the plaint and the declaration in the Common Bench is not error. To which purpose Gawdy voucht 21 E. 4. fol. 6. where a plaint in the county is of 2 oxen, and that is removed into the Common Bench; and there the plaintiff declares of one ox only, and the avowry was made of two oxen. And notwithstanding the variance between the plaint and the declaration in the Common Bench, yet the avowant had judgement to have a return of two oxen; and no fault in the recordare or pone shall abate the plea, when the plaint is removed: for they are determined by the remover into the Court. As 3 H. 6. fo. 1. So the first judgement affirm'd.

GREEDLY AGAINST WHITCOTT.

38, 39 Eliz. rot. 464.

G. sues a plaint in the Court of Ludlow and Wales, against W. et sequitur tam pro Domina Regina, quam pro seipso. And complaines upon the statute 5 Eliz. for that, that the defend. had used the craft of a taylor, not being an apprentice to the occupation. The plaintiff had judgement, upon which error is brought in the Kings Bench and assigned, because by the statute of 18 Eliz. it is enacted, that all sutes **[61]** upon penal statutes, ought to be by original writ; now this sute is by none of them, but by plaint. And by the Court clearly, that it is error. Also the statute 18 Eliz. is a general law, of which the Court ought to take notice. So the first judgement revers'd.

WOLFE AGAINST MEGGS.

Tr. 37 Eliz. rot. 1063. B. R.

In an action of debt upon an obligation of 16l. and declares to the damage of 10l. the defendant pleads non est factum, and it is found against him: and the jury gives the plaintiff damages, and 40s. costs; so the plaintiff had judgement to recover the 16l. and 9l. for the costs, and damages assest by the jury; moreover 4l. pro incremento assest by the Court. And upon that error was brought in the Kings Bench, which was assign'd in this. Because the plaintiff had judgement to recover 13l. for costs and damages, when he declar'd but to the damage of 10l. and the damages and costs ought not to exceed that which the plaintiff hath alledged. But that shall not bind the Court as to the increase of costs above that which is given by the jury. So the judgement was affirm'd. ve. 13 H. 7. 26. 2 H. 6, 7.

RAYNOR AGAINST GRIVISTON.

H. 38 Eliz. rot. 944.

A case was adjudg'd 39 Eliz. Hill. and affirm'd upon error in the Exchequer Chamber, viz. an action upon the case for saying, that he was perjur'd, and would prove him so by two witnesses; without saying in what Court he was perjur'd. And yet the words adjudged actionable.

DUREINGE AGAINST KETTEL.

M. 38, 39 Eliz. rot. 449.

D. brought an action against K. after a tryal by verdict in London, and it was said in arrest of judgement, that the venire fac. is Regina vicecomitibus London salut. præcipimus tibi. &c. where it should have been præcipimus vobis; but by the Court, the venire fac. being as it were a judicial writ, that ought to ensue the other proceedings, and it was held to be amendable; and so it was.

GOWER AGAINST CAPPER.

M. 38, 39 Eliz. rot. 211. B. R.

An action upon the case, upon an assumpsit, and the plaintiff declares, that whereas the defend. was indebted by bill to the plaint. in 20l. in consideration that the plaintiff faithfully promis'd to deliver the said bill to the defendant. The

defendant super se assumpsit, to find two sufficient securities to enter into bond to the plaintiff for the payment of the said 20l. And in fact saith, that he delivered the aforesaid bill to the defendant, &c. and he procured two to be bound for the payment of the said 20l. who were not of any worth or value, &c. The defendant by protestation, non cognoscendo aliqua in narratione, &c. for plea saith, that the aforesaid plaintiff had not re-delivered the bill of 20l. and upon that demurs in law; and adjudged no plea. For the declaration of the plaintiff, that he had re-delivered the bill, &c. was surplusage, and vain. For the defendant cannot traverse that, because the consideration is not that he shall deliver, &c. but that he promis'd to deliver. So there is a reciprocal action given to either party. If the other does not perform his promise; and notwithstanding that the defendant had found two sureties, yet because the plaintiff had averr'd **[62]** that they were insufficient, and that is confessed by the defendant in his plea in barre; it is all one, as if he had not found any surety. And so adjudg'd.

PATRIDGE AGAINST EMSON.

Hill. 39 Eliz. B. R.

An action upon the statute 1. 2. M. for driving distresses and impounding them in several places: so that the owner was put to several replevins, and it was against three defendants, and upon not guilty it was found for the plaintiff, and 40s. damage assest by the jurors against every defendant severally. And judgement was given for the plaintiff, that he should recover the penalty of the statute, (viz.) against every one 5l. and for damages against every one 40s. trebled. Upon which a writ of error was brought, and error assign'd, was in the point of the judgement, (viz.) because the damages and the penalties are sever'd: (viz.) every defendant by himself, where it ought to have been joyntly, (viz.) all one. And that was adjudg'd error, and the first judgement reversed. For but one 5l. shall be inflicted upon all the defendants, and not several 5l. by the statute; yet the words are, that every person offending, shall pay 5l. but the meaning of the statute is that the penalty shall be referr'd to the offence, not the persons, then because there was but one offence in all the defendants, there shall be but one 5l. forfeited. So by Popham, If two distreyn, and they alike drive the distresse, there shall be only one action, and one penalty, which was granted. So by Gawdy, Upon the statute that enacts, that every one that sues in the Admiralty, for a thing done upon the land, shall forfeit 10l. There if two commence an action contra formam statuti, yet but one 10l. shall be forfeited. So upon the Statute of 5 Eliz. of Forgery against 20. but one double damages shall be given against all. And by Popham and Fenner, that where 20 are so joyntly sued, a release to one shall discharge all. But by Fenner: If the plaintiff had brought his action against them severally, every one should have paid 5l. Sed quære.

SMITH AGAINST WOODSTOCK.

Pas. 39 Eliz.

Two men submit them to the arbitrament of A. of all actions and controversies between them; ita quod, the said award be made by such a day. Afterwards the defendant in consideration of 12d. assumes, that if he did not perform the award, he would pay the plaintiff 100l. Afterwards the arbitrator awards, that the defendant should deliver certain cloaths and apparel to Smith the plaintiff, which the defendant hath not perform'd. Whereupon the plaintiff brought an action upon the case upon an assumpsit, and adjudg'd that it doth not lie, because the arbitrament so being conditional, with an ita quod, &c. it ought to have been made for all quarrels, &c. according to the submission. But if the submission had been general of all quarrels between them, without any such clause, ita quod &c. there the arbitrator had had absolute authority, and then if the award had been made but of a part, it is good for

that part, and ought to be performed. So see the diversity in the case. Gawdy denied 7 H. 6. 40. 40. to be law ve. 4. Eliz. Dyer 216. 8 Eliz. Dyer 242. 19 H. 6. 6. and 10. 2 R. 3. 18. And judgement was given quod querens nil. cap. per bill. By Popham. Such an assumpsit, as abovesaid, was before the arbitrament; and after an avoid award is made, he is not bound to perform it: otherwise it is of such **[63]** an assumpsit made after such an arbitrament; for there volenti non fit injuria.

EDWARDS AGAINST STAPLETON.

M. 38, 39 Eliz. rot. 470.

An action upon the case was brought by an executor upon a promise made to the testator; and the executor in the end of the plea omits this clause. Et profert hic in Cur. literas testament. And that was assign'd to be erroneous, and for that it was prayed to be reversed in a writ of error. The Court accordingly, so the judgement was revers'd.

ILE AGAINST SURLINGE.

T. 39 Eliz. rot. 978.

Error was brought upon a judgement in the Common Bench, in a writ of covenant: and it was said that the course of the Court is, that if a man brings a writ of covenant, or other action in the Common Bench, and lays his action in Middlesex, and Middlesex is writ in margent: if the plaintiff in his declaration shews that by his deed covenanted, &c. that is good enough, without shewing in what place the covenant was made; for it shall be intended to be in the same county where the action is brought.

2. It was assigned for error, because the plaintiff had assign'd three covenants to be broken, and the jury assess damages ratione fractionis coventionis to 10l. so that the damages are assest only for the breaking of one covenant in the singular number, and there is not shewn for what covenant. Gawdy. That is no error; for the dammages shall be intended to be assest for every covenant by him broken: so the damages go intirely for all the 3 covenants broken, regarding every one severally by it self, to be broken. So the first judgement confirmed.

WEBB AGAINST POORE.

39 Eliz.

An action upon the case was brought for slander, in hæc verba. I (innuendo) the defendant, will call him (innuendo) the plaintiff, in question for poysoning my aunt, and I make no question but to prove that he hath poysoned my aunt. And upon not guilty, it was found for the plaintiff, and damage assest: and in arrest of judgement it was moved that the action does not lie; because by those words no express affirmance is laid to the charge of the plaintiff. The whole Court on the contrary, and that the action is maintainable, and that without averment of the death of his aunt; because one may be poysoned, and yet he may not dye. So it is not like Snaggs case of murder. For it is impossible for a man to be murdered and he not die. So note the diversity.

ROSCITER AGAINST BUSSEY.

M. 38, 39 Eliz. rot. 197.

An action of debt was brought in the Common Bench: and in the first declaration before appearance, the plaintiff declares upon an obligation made by the defendant,

and does not shew where it was made; but leaves a space for the place and county. Also he counts that the defendant summonitus fuit ad responden. the plaintiff in 10l. quas, &c. Et unde the plaintiff says, quod cum, &c. and does not say unde the plaintiff in his own proper person, or by his atturney says, &c. And the defendant to that imparled, and after appeared, and then the plaintiff declares de novo, and makes the second declaration in all things **[64]** certain; and upon that had judgement to recover. Now errour was brought to reverse that. And Fenner was mov'd by a prothonotary, that it was the course of the Common Bench; that the first declaration is that upon which the judgement is given, and it is an exemplar of the second: and if that be nought, although the second be good, yet it is incurable. So judgement was that the first judgement should be reversed.

PARRET AGAINST CARPENTER.

In an action upon the case; that whereas he is parson of D. and a preacher, the defendant slandered him in hæc verba, Parret is a lewd adulterer, and hath had two children by the wife of I. S. I will cause him to be deprived for it. By the Court the action does not lie: for the slander is to be punished in the Spiritual Court. And so awarded, quod quer. nil. cap. per bill.

THE LADY DIGBYES CASE.

The Lady Digby exec. to brought trespasse and counts of her own possession, &c. And it was mov'd because the plaintiff was non-suted: if the defendant shall have costs upon the statute of 23 H. 8. By the Court. The plaintiff shall render costs. For she did not use the action as executrix; but of goods taken out of her own possession. And so the naming her executrix is nothing to the purpose: ergo within the statute.

TIMMELTHORPS CASE.

An action upon the case was brought for this slander. He is a bloudsucker, and not worthy to live in a commonwealth, and his child not born is bound to curse him. By the Court no action lies.

BROUGHTON AGAINST RANDAL.

Father, tenant for life, the remainder to his son in tayl, the remainder to the right heirs of the father, after the father and son at a certain time were attainted of felony, and executed likewise at one time, the son not having any issue of his body. If now the father shall be said to be seis'd of an estate in fee, that dower, &c. was the matter. And there because it was prov'd by witnesses that the father mov'd his feet after the death of the son, it was found by the jury, seisie que dower, &c. And upon that the wife of the father had judgement to recover. Note after errour was brought, and the error assign'd in the processe. ve. Tr. 38 Eliz. rot. 876.

GARRARD AGAINST SOULE.

Intr. M. 37 Eliz. C. B. rot. 1149.

A devise was to A. and his heirs. And if he die without issue, that then it shall be to B. C. and D. or the survivors of them. Adjudg'd, that that is an estate tayl in A. ve. 37 Ass.

THE COUNTESS OF WARWICK AGAINST THE BISHOP OF LICHFIELD.

The condition of an obligation was, that if A. pay 15l. at Michaelmas next, and 15l. at P. after, so 15l. at every of the said feasts, so **[65]** long as A. shall live, or until B. shall be preferred to a benefice of 30l. per annum. In an action of debt upon that obligation, the defendant pleads that B. was prefer'd, &c. before Michaelmas next. And held no plea upon a demurrer; for take it which way you will, he ought to pay the 15l. at the said two feasts, that are expresly set down; for they are absolute, and so adjudged without argument.

P. 39 Eliz.

Upon evidence to the jury, by the Court, that a lease for years of a mannor except one acre: that that exception extends to the entire estate, and is not determined by the death of the lessor or lessee. But by Walmsley, it hath been a question, if an exception hath been expresly to the lessor, that should determine by his death. The action was for arrearages of rent, and the defendant pleads entry in one acre of land demised: and in evidence given, it was entry in one acre of wood. And by the Court, that shall not maintain the issue.

FEERBY AGAINST LORKINGS.

L. assumes to F. quod dimitteret to him a parsonage, and two months after he leases it to him for years; and by the Court, that it is well as to the time; for it shall be intended within reasonable time. But by Beomond and Walmsley, that it ought to be a lease for life. Anderson on the contrary. For the assumor hath election what estate he will make. But they all agreed upon a difference. But if it had been by way of covenant, there the covenanter shall have the election: for by the grant the thing and estate is executed; but the covenant is executory. And the action was for non-performance.

WHITLEY AGAINST BEST.

W. brought a writ of dower against B. C. lessee for years by lease of the husband rendring rent, was before the coverture prayed to be received for his tearm. The wife recovers, and had judgement. By the Court, the lease of C. is saved, by 21 H. 8 cap. 16. And the Court advised, that an habere fac. seisinam shall be awarded to the sheriff to put the wife in possession, with a proviso, quod ten. ad termin. annor. non expellatur. And Beomond said, that 3 Eliz. so it is said. Rul'd in dower brought by the mother.

SERVEIN AGAINST THE BISHOP OF LINCOLN.

If the incumbent resign and the usurper present within 6 months, and is in for six moneths, no notice being given at the resignation; yet that shall bind him, and he shall be put to his right of advowson. Otherwise if the Ordinary had collated, because the induction is notorious to the country, and the patron ought to take notice of it at his peril, to prevent the usurpation by an estranger.

R. marries the widdow of Terril, who died intestate, and divers goods came to the hands of R. Administration is committed to B. and R. accounts for the goods to B. and pleads that in barre in an action of debt brought against him, as executor in his own wrong, and intermedling, ve. 5. rep. 34.

[66] Cooke against Bromehill.

P. 37 Eliz. C. B. rot. 1437.

A. leases for life to B. and afterwards levies a fine to the use of R. for life, the remainder to A. in fee: with a proviso or power to make leases for 21 years, or three lives; and that the conusees should stand seis'd to such uses. And afterwards A. covenants to stand seis'd to the use of P. in tayl, with divers remainders over: and after A. grants the reversion aforesaid to L. for life, who distrains C. and avows, and judgement was given against the avowant.

1. Because by the covenant to L. A. had destroyed his power to make leases, &c.

2. The pleading was naught, because he pleaded that by grant of reversion, predict. which was limitted to A. himself in fee upon the fine; for he ought to have pleaded that, as is by the limitation in the indenture. So if the reversion be by bargain and sale, or if it be by way of release; if that be pleaded as by grant, that is naught.

Osmand and his Wife.

A. lessee for life, the remainder to B. in fee, A surrenders upon condition to B. and enters for the condition broken. B. dies and his wife brought dower against A. and the issue is joyn'd upon ne unq. sei. q. dower, &c. That shall be found against A. ve. Dy. 41. And by the Court, If a man bargain and sell his land in fee, by those words only, and makes livery, that yet the bargainee, although that the indenture was never inroll'd, may plead that, for a bargain includes a grant.

The Bishop of Glouc. & Al. against Veale.

M. 39, 40 Eli. C. B.

Veale recover'd in a quare impedit against them, and had judgement to have a writ to the bishop. And a writ of enquiry of damages issued. Now the defendants brought error. And by the Court, that writ shall abate, because judgement is not given upon the entire records; and that a writ to the bishop shall not issue, till the writ of enquiry of the value be return'd; unless the plaintiff release the damages. And that by the Court and all the clerks.

Reeve against Cox.

In an ejectione firm. upon a demurrer, the case was thus. A. gives to the eldest brother in tayl, the remainder to the youngest brother in tayl; the remainder over to B. in fee. The eldest brother leases for three lives, according to 32 H. 8. with warranty, and dies without issue; which descends upon the younger brother, who enters and leases to R. for years. And it was resolved that the entry of the younger brother was lawful, and not hindred by the warranty: for the remainder was not devested, because that lease was not a discontinuance P. 40 Eliz. for the plaintiff.

Godbolt against Mallet.

By the Court, that if the husband seis'd in right of his wife, pleads, that he and all those whose estate they had, have used to have a common appendant, that that is naught, for the estate is in the [67] wife. But he ought to have pleaded, that he and his wife, and those whose estates the wife hath, or whose estates they have, have &c.

ENDENNE AGAINST FEVISAME.

Wallet delivers one hundred muskets into the Tower, and the debenture for that, was by consent of both parties made to H. as if he had delivered them. W. dies making F. his executor: and Hopkins surrenders that debenture, and a new one was made to F. And it was agreed by the Court, that the money was not assets in the hands of F, for it was only of trust and confidence between W. and H. and there is no remedy but in the Chancery. But note well 12 Jac. C. B. Harronet against Reynolds, R. as executor recovers 1008l. in Chancery against F. that had leased for years in trust for the testator. And that was adjudg'd to be assets. Et quær. what difference.

ROTHERAM AGAINST GREEN.

In an action of trespass against G. he justifies because of a common appendant by prescription, in 500 acres. And it was found by verdict that the auncestor had releas'd his common in five of these acres.

1. And by the Court he had fail'd in prescription.

2. The common by that is not extinct: because it is discharg'd to be common by Act of Parliament for fayler of prescription ve. Dyer 164. a. 284.

FLOWERS CASE.

[See *Cochrane* v. *Moore*, 1890, 25 Q. B. D. 71.]

A. borrowed one hundred pound of F. and at the day brought it in a bagg and cast it upon the table before F. and F. said to A. being his nephew, I will not have it, take it you and carry it home again with you. And by the Court, that is a good gift by paroll, being cast upon the table. For then it was in the possession of F. and A. might well wage his law. By the Court, otherwise it had been, if A. had only offer'd it to F. for then it was chose in action onely, and could not be given without a writing.

SUSANS AGAINST TURNER.

If a sute be in the Admiral Court, for a contract supposed to be made super altum mare, the defendant upon a surmise that it was made upon the land within the realm, may have a prohibition. And that it may come in issue if it was upon the land or upon the sea. But by the justices, their rule is, that upon such a suggestion they shall not grant a prohibition after sentence pass'd.

BEUM AGAINST FELTON.

An ejectione firm. was brought of 50 acres of land, 10 acres of meadow, 100 acres of pasture, and the jury found the ejectment only in 2 closes, called Black acre and Wh. acre parcel of the said lands, and by the Court the verdict is naught, and that the plaintiff shall have another judgement; for the judgement ought to be according to the declaration of the plaintiff, and his demand: and it does not appear of how **[68]** much execution may be made, also it may be that those two closes conteyn more than was in the declaration; and by the Court a venire fac. de novo. was awarded.

COUNTESS OF WARWICK AGAINST THE LORD BARKLYE.

By the Court, that in a writ of partition no damages shall be recovered, nor an enquiry for them; and yet the writ and the count is ad damnum, &c. N. B. 61 H. E. 3. 57. 3 E. 3. 3. 47. partition. 11.

BESTWICK AGAINST CAMDEN.

Intr. P. 19. C. B. rot. 15.

In a quod permittat in nusance, quod levavit quandam molem (Anglice) abay, by which, &c. the warter-house of his mill was stopped. And it was said by the Court that the writ shall abate; because moles is an equivocal term, and is not proper for a brook or bay.

Note by all the justices, two executors bring an accompt against B. and have judgement quod computet; and after one of them dies, yet the writ shall not abate: but the survivor shall have a special scire fac. ad computandum, in his own name, reciting that the other is dead.

TISDALL AGAINST BEVINGTON.

That maintenance does not lye, for maintenance in the Spiritual Court, nor by 32 H. 8. nor by 1 R. 2 cap. 4. And that so it was adjudged, in one Constantines case.

MINORS AGAINST BOCHER.

Intr. 39 Eliz. C. B. rot. 1615.

In debt upon an obligation there was an attachment by the custome of London taken against one, before the day in which the obligation was payable. But note that custome ought to be so alledg'd, yet judgement was against the defendant, for two other causes, as Bar. Heron reports.

BURLEY AGAINST READ.

B. brought some yarn on horseback to the house of A. his neigbour, for to weigh it upon his scales and beams, and the lord comes and distreyns the horse and yarn for rent arrear by A. And by the Court that is not lawful, for they were brought thither for another intent. 7 H. 7. 10 H. 7. 22. 22 E. 4. Also they were in the possession of the very owner.

ETHRINGTON AGAINST ASHON AND HIS WIFE.

E. brought an action of debt against them, the wife being executrix to the debtor, &c. The husband comes in upon the exigent, and prays his priviledge, because he is a servant to the Lord Keeper. But by the Court that he shall not have it; because the wife is joyn'd with him, and she can have no priviledge. ve. Dyer 377. a. b.

[69] WARNER AND STONE, AND THEIR WIVES.

They bring an action of debt upon an obligation, made to the wives when they were sole, and averr that the mony was not paid to the said wives before the coverture, &c. And an exception was taken, because it is not said nec alicui eorum, for it might be paid to one of them. But by the Court, that the count is good enough, and that had been superfluous, for payment to one of them is payment to all the obligees.

Deeles against Nokes.

A feme the obligor of full age, takes a husband within age. And they in debt upon the obligation pray his age. But the Court denyed it. See a good case in 8 E. 2. Age 125. Debt upon an obligation. Where A. obliges him and his heirs against baron and feme, as heir to A. And they had age allowed, because the wife was within age. And also 19 E. 2. Age 122.

Robbins's Case.

R. brought debt against A. as executor; and upon plene admin. and issue upon that, assetts are found, and judgement for the plaintiff. And upon a testat. execution was awarded to the sheriff in another county than where the tryal was: that sheriff may return a nihil, and is not estopped by the verdict and judgement; otherwise it is of the sheriff of that county where the action was brought; for he cannot return a nihil, &c. but he ought to return a devastavit. ve. 9 H. 6. 9. Exec. 9.

Note, in an action of debt against A. as executor in his own wrong, he pleads ne unque exec. &c. And it is found against him, and execution by the Court against him for all the debt (viz.) 60l. for his false plea, although in truth he had not medled but with one bedstead of smal value. And it was said by Daniel that in 39, 40 Eliz. C. B. Kitchin against Dixon, that one Mr. Offlye for such a false plea was charged to 100l. and he had medled but with one Bible. Therefore beware and plead well the special matter.

There was a question upon a demurrer in law. If a lapse devolves to the Ordinary, and within those 6 months, the Ordinary is translated to another bishoprick: if the King or his metropolitan shall present to that lapse, in default that the patron does not present. Noy Atturney, That the warden of the Spiritualties shall present whosoever he be. ve. Dyer 78. Pl. 103.

Tavernors Case.

That an obligation made to a deputy of a bayly of a franchise, or to an under sheriffs deputy, is void, by 23 H. 6. For it ought to be in the name of the bayly or sheriff himself.

Dean and Chapter of Pauls.

Debt was brought against them, for an escape suffered by their baylye of a franchise, where they had the return of writs. And ad-**[70]**-judged that it doth not lie against them, but against the baily himself. For the writ is directed to him (viz.) ballivo libertat. de mannerii, and not duii, &c. Also an obligation according to 32 H. 6. ought to be taken in his name. Also for an ill return the baily is always fin'd. Note Dyer 278. Escape is brought against a deputy gaoler, because the clause to make a deputy was in patent to the marshal. Note 39 H. 6. 34 a.

Hollmasts Case.

By the Court that a prohibition shall not be awarded to the Admiral, or Spiritual Court after sentence. Also that a plea was there pleaded and refused, which was triable at common law.

Bold against Walters.

In a replevin, and the title was by lease made by a parson; and the avowry was. That A. was seis'd of the rectory of H. and made the lease, without shewing that he was parson. And by the Court; that that should have been a good exception, if it had not been said in the avowry moreover, that A. was seis'd in jure ecclesiæ, which supplyes all.

Russel and his Wife.

They join in a trover and conversion, for a deed of a rent-charge granted to the wife, dum sola fuit. And that the deed came to the hands of the defendant after the coverture. And it was said by the Court that the action was well brought by them two; for the action shall survive; for otherwise a grand inconvenience would ensue to the wife. For if the husband only should recover, and after die; his executors would have execution for the damages, and not the wife. Judgement was given accordingly. T. 40 Eliz. C. B. 38 H. 6.

Colme against Frome.

It was said by the Court, that if an offender be brought before a justice of peace, the party ought to tender sureties, and it doth not behove the justice to demand it. But Owen said: that if the sheriff takes one that is bailable, there the sheriff ought to offer to him, if he will be bail'd: for the party is to pay 4d. to the sheriff by 23 H. 6. for making of the obligation. To which Walmesly agreed.

Moyle against Moyle.

[See S. C. Owen, 66.]

That destroying of coneys, and stopping or digging up of coney burroughs; is not waste by the lessee of a warren. And so it was adjudg'd. N. B. 87 a.

Warneford against Giles.

W. leases to G. for 21 years, if he so long live and continue in his service. W. dyes. And by the Court the lease is not determined, because it was the act of God. So an annuity pro concilio, &c. to the grantee for his life, is not determined by the death of the grantor.

[71] Gascoynes Case.

A. acknowledges a recognizance of a statute staple, according to 38 H. 8. to G. and afterwards he enfeoffs many others of his land severally of several parts. G. sues execution against one only, returnable in the Chancery, as it is said upon that statute; and he that had his lands extended, brought an audita querela in the Common Bench. And it was mov'd by Daniel, that the audita querela ought to have been brought in the Chancery; because there is no record of it in the Common Bench. But by the Court, it may be brought well enough in the C. B. And Williams voucht M. 31, 32 Eliz. Claver and Mulacres case.

By the Court it was said, that where any statute, as 5 Eliz. for perjury, &c. limits any remedy by information for the party grieved, that such an informer is not within the statute 31 Eliz. cap. 5. For that is intended of a common informer. And

by Anderson, it was adjudg'd in the case of the butchers of London, that if a man be an informer, and is not the party grieved at one time, that yet he is not a common informer. And it was agreed in one Holdens case of Coventry, that an information (upon the 27 Eliz. of Fraudulent Conveyances) by the party grieved, after the year, &c. is good enough, and not within the statute.

The Countess of Warwick against The Lord Barkley, Iter.

A writ of partition was brought, and judgement, quod partitio fiet; and before that it was executed in the country by the sheriff, error was brought. And it was said by the Court, that it does not lye, upon such a judgement: before that the partition be made and return'd by the sheriff. And judgement was given, quod partitio stabilis remaneat. For this is not like to other real actions, where errour lies before the habere fac. seisinam be return'd. For that is a final judgement, and no other to be given. Also there needs no return of an habere fac. seisinam. For the party that recovers may execute his judgement by his entry, as Dyer 67. a.

Cawdrey against Kingsmill.

In a replevin the case was thus, A. devises to C. by these words, I devise a rent of 40s. out of all my lands in Hawley (with a clause of distress) payable yearly at the usual feasts, &c. And the devisee avers that such feasts were the usual feasts in Hawly; and so advows, &c. And by the Court, that is a good devise of a rent-charge by these words, with a clause of distress; because of the intent of the devisor, of a remedy and means to come to that rent-charge. So, cum clausula districtionis, is the same with cum clausula warrantiæ, which makes a warranty.

Streingsborrow against Beedlow.

They were tenants in common of a lease for years. And B. brought a partition upon the 32 H. 8. cap. 32. And the writ was general as in the register, with a secundum formam statuti, which made it to be a partition, upon his case within the statute, as the statute limits and appoints. But it had not been good if that clause had been omitted. And it was so ruled in one Maurices case.

[72] The Sheriff of Nottingham's Case.

An escape was brought against two sheriffs, one dies; the question was, if the writ shall abate. By the Court, in debt against two, the death of one abates the whole, but otherwise in trespass, 21 E. 4. 1. 2 H. 7. 16. Because they are several misdemeanors. But the Court deliver'd no opinion in the first case. But by the Court this difference was agreed, that an escape upon an arrest, by the same processe, as a cap. ad. respondend. &c. The writ ought to surmise, ad largum ire permisit, & non comparuit ad diem. Because the party was bayleable, and so the sheriff might lawfully suffer him to go at large. But otherwise, if the arrest be upon an execution, as a cap. ad satisfac. there ad largum ire permisit, is good enough.

Note, P. 2 Jac. C. B. The Lady Mounson against the Sheriffs of Lincoln City, for taking of insufficient security, upon 23 H. 6. And the death of one of the defendants did not abate the whole writ.

Buryes Case.

In the argument of Buryes case for a divorce, the 5 Rep. 98. there was cited 35 Eliz. B. R. rot. 605, that if a lay-man be made a commissary by the bishop, it is good, until it be undone by sentence; although that the canon says, that he ought

to be a Doctor or a Batchelor of Divinity. But 21 H. 8. hath limited that a Doctor of the Civil Law may be a commissary.

GREGORY AGAINST OLDEN.

In debt upon an obligation. It was said that it was made upon a simonaical contract for presentation to the church, with the cure of souls; and so it was for symony. All that was averr'd to be matter de hors, and not appeard within the deed. And for that the plaintiff had judgement. For no such averment is given by the statute.

Note that if a venire fac. be return'd without the name of the sheriff endors'd; that is not ayded by the 18 Eliz. cap. 14. because it is not any return; and the statute remedies insufficient returns. And by Williams, that so it was adjudged. Trin. 40 Eliz. C. B. in Brownlowes office. Sir Henry Darcyes case. And Brownlowe agreed to it, and by Daniel, that it was so adjudg'd in the Kings Bench.

BRITTON AGAINST BARNET.

Britton delivers money to B. to deliver to C. who does not so. Br. brought an action of debt against B. And by the Court well brought. And Glanvil said at St. Albans term, in a case between Dowse and Cawley, Dowse delivered money to C. to dispatch his business in the Exchequer, and he does not do it; and an action of debt was well brought for that, and so adjudg'd: and also in the Common Bench, the Countess of Lincoln against Topcliff. T. makes a bill, testifying that he had receiv'd 7l. of the earl to buy bellows. But does not do it. An action of debt in that case lies, and so 'twas adjudged.

[73] POWELL AGAINST BRAZEN NOSE COLLEGE IN OXON.

A formedon in the discender was brought in a præcipe of 20 acres of land Luddington, and (in) was ommitted: and rul'd, that it shall be amended, although it was a fault of the cursitors, and not of the Judges or their Clerks of the Court, that being an original writ. And Williams who mov'd it vouch'd 48 E. 3. and 35 H. 6. 10.

GREEN AGAINST WALLWIN, OR WISEMAN.

In an ejectione firm. the plaintiff counts that A. was seis'd &c. And of that enfeoffed K. to the use of the plaintiff, and that he was seis'd by 27 H. 8. devisibus, &c. until the defendants lessor entred, and does not say (and him disseis'd) for the truth was, that cestuy que use, had not actually entred in the land. And if upon such a seisin by 27 H. 8. he may maintain an ejectione firm. was the question. And the Court seem'd that he could not, for they advis'd the defendant to demurr; for actual possession is not in cestuy que use by the statute. For he may disagree to it. And by Walmesly and Glanvil. That he may have an ass. but not a trespasse without actual possession.

DOWMAN AGAINST BUTTER.

Tr. 40 Eliz. 8. B. R. rot. 895.

D. sues B. upon a counterbond to save harmlesse, and B. said that the principal bond in which D. and he were obliged, was made upon an usurious contract; and D. pray'd to avoid that by pleader. And Walmesly said, the plaintiff shall recover. For

that counterbond was made bona fide, and perhaps the surety was not conusant of the usurious contract, and then he cannot be, nor ought to plead that, as if error had been in the first suit; yet the surety shall recover upon the counterbond, although that he takes no advantage of the error. So if the surety had been an infante, and had not pleaded nonage. And that counterbonds mentioned in the statute 13 Eliz. are intended for payment of money, to him that lent the money, and not between him that borrows and the surety. Glanvil said, that would be a dangerous president to avoid the statute; for the surety may be a friend of the usurors, who will not plead the statute in an action of debt brought against him; and so the statute should be to little purpose. But at length judgement was given for the plaintiff. Then Glanvill said, that that judgement will be quickly carryed to Cheaside. Note, the saving harmlesse is the substance of the counterbond, 5 Rep. 27. 18 E. 4. 27.

THOROUGHGOODS CASE.

A. recovered in debt, and had execution against B. The defendant B. dies, and the sheriff levies the money upon the executors of B. and by the Court that was nought. For the writ was fier. fac. de bonis & catallis B. which cannot be after his death. But on the other part, if after execution awarded the plaintiff dies: yet by the Court the sheriff may levy the money. And if he makes no executors nor administrators as yet made, the money shall be brought into Court, and there deposited until, &c. Note Dyer 76. b.

An action upon the case for words was brought. Thou keepest an house of bawdry. And held by the Court, that it lies, because the words **[74]** are spoken in London, where it was said by Anderson By the custom there, such that keep a bawdy house may be corporally punisht, but not in other places. But by Glanvile, They may be put in Bridewell, or whipt by the common law for such misdemeanours. But by Anderson, That is for breaking of the peace vi & armis. Also such an offence is inquirable in the leet.

Note by the Court; Lessor for years rendring a rent acknowledges a statute, and the reversion is extended, and the conusee brought an action of debt for rent arrear, and well. But the defendant said that the plaintiff is outlawed, and issue is joyn'd upon null. tiel. record. And the record was certified much varying from the record of the outlawry, as it was pleaded in disability. And awarded that the party had fail'd of the record. And 7 H. 4. j. was denyed for law by the Court.

SUCKLINGE AGAINST CONEY.

Upon a special verdict, upon payment for a redemption of a mortgage, the mortgager comes at the day and place of payment, and said to the said morgagee, Here I am ready to pay you (naming him) the 200l. which was of due money, and yet held it all the time upon his arm in baggs. And adjudg'd no tender; for it might be counters or base coyn for anything appeared. Note, 5 rep. 114, 115. And by Anderson. It is no good tender to say I am ready, &c.

VEALE AGAINST REEDE.

U. brought a quid juris clamat upon a fine against R. &c. as lessee for life, R. said that he was seis'd in fee absque hoc, that he was seis'd for life onely, and issue upon that: and it was found, that R. was tenant in tayl after possibility of issue extinct. And the question was, for whom the issue is found, and for whom judgement shall be given. Williams. For the plaintiff, because it is an estate for life privileg'd, and ought to have been pleaded in bar, ve. 46 E. 3. 27. 15 E. 4. 28.

VAUGHAN AGAINST PARAMORE.

It was adjudged that in false judgment, all that are return'd by the sheriff to be suitors at the court baron, and present when the judgement was given, ought to return the writ, and not all those that ought to make sute at Court. For by that means the party shall never have it certified, as it may happen. ve. N. B. 18 d. Dyer 262. 1 E. 5. 36. false judgment, because the steward named in't, 6 rep. 11. The reason is, because he is not Judge there.

DOBSON AGAINST DUGDALE.

In an action upon the case for words, Thou art a cozener, the plaintiff shew'd how he was an officer, &c. and upon the evidence it appear'd that the Lord Treasurer had made A. deputy of the baylywick of Middlesex per hæc verba. I make A. my bayly, &c. to exercise the office of himself, or his assigns, at the pleasure and will of the Lord Treasurer. And because Dobson was assignee, by A. with the consent of the Lord Treasurer, and by the Court the assignment is not good; for A. is but tenant at will: and he cannot assign over that; and the clause upon that was repugnant. Upon which it was found by the direction of the Court against the plaintiff.

[75] ANDREWS AGAINST NEEDHAM.

Intr. M. 40, 41 Eliz. rot. 21. 21.

A. leases for years, by indenture. N. covenants to repair, &c. and to yield up all at the end of the term, but during that, one Blunt enters by an elder title. If the lessee be discharged of the covenant to yield up all, &c. And it seem'd to the Court that he was. For if the land be gone, the obligation is discharged. ve. 20 H. 6. 45 E. 3. 8.

DAVYES AGAINST BLUNT AND OTHERS.

False judgement, for error in an ancient demean, the writ de droit close was of five messuages, and he makes protestation to sue for five messuages in the nature of a writ of entry upon disseisin and yet he enters his plaint but for two messuages, and hath judgement for them only. And rul'd that it was error, for the writ de droit close, is their warrant, and that is the writ, and the plaint is the count, which ought to be pursuant.

CONUSTABLE AGAINST CLOWBURY.

[S. C. Palmer 397. See *Stanton* v. *Richardson*, 1872-74, L. R. 7 C. P. 433; L. R. 9 C. P. 390.]

Intr. H. 1. Car. 13. B. R. rot. 415.

Clow. fraights the wife of Conustable, who covenants with Clow. that his wife shall go with the next wind to Calles; and Clow. covenants that if the wife shall go the intended voyage and return, &c, that he should pay to Conustable 200l. And the plaintiff now in his count, counts that the defendant non solvit, &c. but he does not shew nor averr that the wife did go with the next wind. The defendant pleads a special plea, and traverse absque hac, that the wife went with the next wind.

First, It was ruled by the Court that the traverse is not well; for the voyage is the substance of the covenant, and not the going with the next wind, which is

uncertain in every hour. And voucht, that a condition precedent is traversable. 3 H. 9. 33. 48 E. 3. 34. 9 E. 4. 3. b.

2. The declaration was upon a covenant by indenture between the plaintiff and the defendant and one A. And upon oyer of the deed, It was between the plaintiff and the defendant and A. and B. and for that cause naught. 15 E. 3. Three covenant joyntly and severally, and the plaintiff declares quod defendens not solvit, without saying, nor any of the others, and yet that was well enough, because the action was not brought against them all; for then otherwise it had been. And if any of the others had paid it to the defendant, might well and properly plead that. So it is in debt upon an obligation where two are bound joyntly and severally.

WALDEN AND GESNER AGAINST VEASELY.

Intr. H. 1 Car. B. R. rot. 710.

The plaintiffs being sheriffs of Coventry, &c. bring debt for 7l. and six pence for their fees for an execution of 181 pound. So that for their fees demanded was 12d. for every pound until 100l. and 6d. for every pound over and above. Read the words of the statute and for the construction of it, note the proviso in the statute 28 Eliz. which does not extend to a city corporate. And note that statute is introductive of a new law; for the encouraging of officers to venture to do executions. And in that case it was resolved.

1. That the sheriff may have an action of debt for his fee, although the statute does not give any remedy. And it was so adjudg'd. 14 Jac. **[76]** B. R. rot. 531. Probee and Lumbee Sheriffs of London. And so debt by a parson upon two E. 6. 6. for not setting out of tithes. And that in our case it was also ruled; that the sheriff may refuse to make execution, until his fee be paid him. But then see if a new sheriff be made, and before that the old one had made execution, what remedy now hath the party. And it seem'd to me, that he may have an account, or an action upon the case, in nature of an assumpsit.

2. It was resolved that the proviso extends to a city corporate, when judgment is there given within their franchise, and execution upon that: and not when judgement and execution issues out of superiour Courts, for in the first case the officer is not at that grand care and peril; but as to the sheriff of a county, his travail and labour is all one, be it in the body of the county or in a franchise. But if that town be a county of it self, there the sheriffs shall have their fees according to 28 Eliz. And now judgement was given for the plaintiff, but now there was much doubt upon the words of the statute, and the Court divided in that point; if the sheriff shall not have but 12d. for every pound to an hundred, and after 6d. or if he shall have but 6d. for every pound when the execution is more than an hundred. Coopers case, that a sheriff cannot take an obligation with a penalty for his fee within the statute.

BAGSHAR AGAINST SALTER.

In an assumpsit, the plaintiff declares; that whereas John Green was indebted to the defendant in 30l, and that the defendant had sued and recovered against Green. And in Tr. 18 Jac. had a cap ut lagat against Green directed to the sheriff. And upon communication between the plaintiff and the defendant; the defendant promised that if the plaintiff would go to the sheriff, and procure a special warrant and arrest John Green, that he would give him 40s. And averr'd that he had done so, and had often requested the same of the defendant. And issue joyn'd upon non assumpsit, it is found for the plaintiff. And it was moved in arrest of judgement, and so rul'd by the Court, that the assumpsit is void by 43 H. 6. And judgement quod querens nil capiat. But one Audleys case was vouch'd and agreed that an assumpsit made to an estranger, to go and help the sheriff to make execution is good, and an assumpsit lyes.

CROUCH AGAINST HANNY.

C. had judgement in the C. B. in an ejectione firm. and H. brought a writ of error in the Kings Bench. And the judgement was there also affirmed. And afterwards he brings error in the Parliament: and the Chief Justice in the Kings Bench brought the record it self in Parliament, and there left a transcript of it, and reports the record it self. And after, the Parliament is dissolved. And C. now prays execution, and had it: although that the error abated without the act of the party. And Noy said, It is doubted if error in Parliament shall be a supersedeas; for upon that if the party be in execution, he shall not be bayl'd as it should be in another Court. ve. 1 H. 7. 19. b. 15 H. 6. 18. By dissolution of Parliament the error is abated, 22 E. 3. 3. 1 H. 7. 19. And so was the case of Godsave and Heydon. Error in Parliament abated by dissolution. And by Doderidge error was brought in Parliament, and the party prays a scire fac. returnable the next Parliament, and it was denyed for the delay. And in our case execution was awarded.

[77] ARGOLL AGAINST CHEYNEY.

The point in that case was, father lessee for life, the remainder to the son in tayl, and a præcipe is brought against the father, who vouches the son; and a common recovery was had accordingly; and indentures made reciting, that that recovery was between the father and the recoverors, &c. to the uses in that indenture. And because no proof was of the assent of the son to that declaration of the uses, nor was party to the indenture, the Court directed the jury to find the uses according to the estates that the parties had at the time of the recovery: and so they agreed, that if two joynt-tenants suffer a common recovery, and one only declares the uses; that does not bind the moiety of the other. Unless that the consent of the other to that declaration be proved. ve. 2 Rep. 57. a. Dyer 143. a.

CALLY AGAINST SIR WILLIAM FISH.

Intr. T. 22 Jac. B. R. rot. 1307.

Upon evidence, the case was thus. F. had three several closes, 1st. arable, 2d. pasture, 3d. medow. B. pretends a right to all, and enters, and makes a lease of all to try title. The servants of A. with carts about their masters business enter in one of the closes. And by the Court that is an ejectment of all: although there be not any proof of the command by their master.

HEENE AGAINST WARDEN.

Intr. H. 22 Jac. B. R. rot. 654.

Judgement for ideo concessum, for consideratum was revers'd for that error. And so also M. 2 Car. B. R. rot. 231. Cooper against Williams. Judgement revers'd because of the word concessum.

MARSHAL AGAINST ALLEN.

An action upon the case was brought for words, He is a base broken rascal, and hath broken twice, and I will make him break the third time. And issue is joyn'd upon not guilty; and it was found for the plaintiff, and now moved in arrest of judgement: that it is not actionable (viz.) he hath broken twice; yet at that time he might be a sufficient merchant as others. And I will make him break, &c. is but a threatning,

&c. But by Justice Jones otherwise it had been if he had said, He will break the third time. And a day was given to shew cause why judgement should not be reversed.

Dixye against Brown.

An executor of an executor was sued for a legacy, and he pleads riens in le mains. And that plea in the Spiritual Court was refused: upon which a prohibition was awarded out of the Kings Bench. Note in the case there was these points toucht upon; that in the Common Bench a prohibition shall not be warded, until the suggestion be of record; and for that the prohibition is the suit of the party, and shall not be discontinu'd by the demise of the King. But otherwise if it be out of the Kings Bench, for there a prohibition may be awarded upon a bare surmise, without any suggestion of record, and is not but in nature of a commission prohibitory: which shall be discontinued by demise of the King.

[78] Carleton against Hutton.

C. claimes the upper place in a seat in the church, and H. disturbs him in violent manner; and the bishop of the diocesse sends an inhibition to C. until the matter be determined before him. And by the Court a prohibition was awarded; because it does not belong to the Spiritual Court: and as well the priority in the seat as the seat it self may be claimed by prescription; and an action upon the case lies for it at common law, ve. Litt. 121. 122.

Bellamy against Alden.

An administrator accounts before the Ordinary, and a creditor of the intestate takes exception to it, and averr'd that the administrator had not paid so much: and the administrator proved payment by one witness, and for default of better proof, he was excommunicate. And a prohibition was awarded. Because the Ordinary had not power in such a case to hold plea, and to try the payment or not payment: or administer an interrogatory to a witness, but ought to accept the account as it is, for the creditors may sue for their debts at the common law; and then payment or not payment shall be well tryed, and there one witness will suffice. 13 E. 3. Exec. 91. An executor shall not have an account against his companion.

Dixon against James.

An escape was brought against the baily of a franchise; and the plaintiff counts of a recovery in the Common Bench, by an attachment of priviledge in the Common Bench. And now error was brought in the Kings Bench.

1. Because he had not shewed, that the plaintiff was an officer. By the Court, That the sheriff nor bayly shall not take advantage for that error.

2. He had counted that the bayly had arrested the party; and detein'd him ex causa prædicta, from such a day until such a day, in which he escaped. And he does not say, that the bayly arrested him virtute warranti, which the sheriff had made to the bayly. And that also was disallowed, because ex causa prædicta supplies that. For he cannot be intended to be arrested for other cause. And judgement affirm'd.

Awdley's Case.

He had the grant of townclerkship in reversion, and he in possession dies, and one Joy was admitted to that office, and Awdley had a restitution: and it was said that the Kings Bench hath jurisdiction of all such causes, and one Bostons case was

vouched. B. was elected to be alderman upon purpose to oust him of an office of town-clerk, because they are incompatible offices in one person: and in the Kings Bench he had restitution to the first office. And one Middletons case was vouched, and he was elected constable, and ousted by the justices, and in the Kings Bench had restitution; and it is the direct way to try the title upon the return of the restitution. And agreed by the whole Court.

[79] GERMIN AGAINST RANDAL.

Intr. H. 1 Jac. B. R. rot. 445.

The condition of an obligation was to pay 20d. weekly for the keeping of a bastard, according to an order made by the justices, &c. The defendant pleads null. talem fec. ordinem, and the plaintiff had judgement, for that is an estoppel to the defendant. Otherwise it had been, if it had been according to an order to be made, &c. Because that is executory. ve. Dyer 196.

An action of debt was brought against A. as executor to Samuel Baker upon an obligation; the defendant defendit vim, &c. Et dixit quod script. præd. non est fact. suum. And issue upon that, and it is found for the plaint. And it was moved in arrest of judgement, that the plea was not good: for suum cannot be referred to the testator, of whom no mention is made in the Bar. But by the Court, judgement for the plaintiff. And by Doderidge. If husband and wife bring an action of trespass of battery, de bonis suis asportatis, that is good, pro reddendo singulis singula.

NEWMAN AGAINST CHEYNEY.

An action of trover is brought against baron and feme, for a conversion (during the coverture) by the wife. And it was said by the Court, that it is good. For by Just. Jones. Although that feme covert cannot make a contract for goods, nor be charged for them; yet she may convert them, &c.

DROPE AGAINST THAIRYE.

Intr. T. 1 Car. B. R. rot. 115.

It was adjudged that the master may have an action against the common ostler, if his servant be robbed there, and he need not shew that the servant was in his journey. For he may be at the end of his journey, as at London about his business. Sir William Sandy's case was vouched to be term. 7 Jac. rot. 15. 35. B. R. It was between Beedle and Morris. Where the master had the action.

HARDEN AGAINST WARNER.

Intr. 19 Jac. B. R. rot. 1553. vel. 1353.

A feoffment was made by Sir William Shelly to 4 men, with power of revocation, upon tender of a ring, or a pair of gloves of 12d. price, to the feoffees or any of them, or to the heir of any of them. Sir William was attainted of treason. And by Act of Parliament 28 Eliz. with the same words which are in 33 H. 8. his lands, &c. are given to the Queen, with a clause, that every one that claimes any interest from Sir William bring their deeds to be enrolled in the Exchequer, otherwise they shall be void. And that feoffment was enrolled accordingly. And afterwards the Queen awards a commission to Sir Francis Fortescue to tender the ring, &c. according to the

proviso in the deed of feoffment. Who returns that he had tendred the ring, &c. to Sir Anthony Hungerford, heir apparent of one of the feoffees. And then the Queen makes a lease of that land to Hardwin, who enters. And Warner brought an ejectione firm. And in that case it was resolved.

1. That the return of the commission was good, as to the ring, although that no price of it was in the commission return'd. For the price of twelve pence only extends to the gloves.

[80] 2. That that return was naught as to the tender to the heir apparent, which implyes that the ancestor himself was alive, and then it is not according to the proviso. In debt upon an obligation, &c. against one an heir apparent in C. B. P. 35 Eliz. rot. 242. Chawdley against Newdigate and a recovery there. Afterwards for that very error, 'twas revers'd in the Kings Bench. So it is naught in our case, also the certificate cannot be supplied by a subsequent record. But otherwise if it had been found by office that Sir Anthony Hungerford had been heir in tro. to one of the feoffees: and after that certificate had been returned as now it is: there it should have been good enough by all the justices, and by the counsel. But by Jones that is ayded also. For the return was secund. form. conditionis, ve. 2 H. 4.

LUTHER AGAINST HOLLAND.

An action was brought upon 5 Eliz. for perjury before one of the Masters of Chancery, who had power to take an oath. Adjudg'd quod nihil cap. per brev. And the reason was, because he does not shew that the oath was in Court. By Whitlock. They were called Masters of Chancery, because they were priests and clergy men in ancient time; and that was the reason that the Lord Chancellor had the disposal of the petty offices of the King for the preferment of those clerks. That was also the reason that they could not marry, until they were inabled by the stat. &c.

CHALLONER AGAINST HOBBS.

The plaintiff in a replevin had judgement, and a writ of enquiry of damages in the Common Bench. The defendant brought errour, then the writ of enquiry is returned in the Common Bench: and judgment there given of the damages: and the plaintiff moved in the Common Bench, that he might proceed to execution for the damages; and awarded that he might proceed. Mr. Brown said, that this is the course upon error upon an interlocutory judgement, to move the superiour Court, where error is brought, for a rule to proceed in the inferiour Court, notwithstanding the errour brought, ve. Dy. 32. 8 Rep. 142. 42 Eliz. 33. 11 H. 4. 49. 8 H. 7. 10.

DANIEL AGAINST UPTON.

H. 22 Jac. B. R. rot. 720.

F. devises land to his wife to dispose at her will and pleasure, and to give it to which of his sons he pleaseth, and dies. The wife takes another husband; and by indenture, reciting the devise, and her power by that, &c. during the coverture, enfeoffs William son of F. and yet the husband and wife continue possession, and the wife only levies a fine to William, sur conusans de droit, without proclamations, &c. And by the Court adjudged, that the wife had not but a power; and that she notwithstanding the coverture might execute the power: for the son is in by the devisor. It was adjudg'd in the time of Poph. The father devised land to his two sons equally to be divided betwixt them. And ruled that the youngest son shall have it for life, although that the eldest being his heir had fee in the other moyety, by discent of the fee; because of the intent of the devisor of the estate. 10 H. 7. 20. A. devises to B. in tayl, the reversion to C. in fee, upon condition that B. shall grant a rent-charge to D. in fee. And adjudged that that is a good rent-charge, and shall bind him in the remainder after the tayl determined.

[81] WATLINGTON AGAINST PERRY.

W. sues P. in the Spiritual Court for tithes of a dove-house. P. upon suggestion had a prohibition, that he did not prove his suggestion within the six moneths. W. takes issue upon the suggestion, and it is found against him; and yet he prays costs by the statute 2 E. 6. for failer of proof within the six moneths. But by the Court adjudg'd, that he shall not have it; for he hath surceast his time, to take advantage of that, and he can never have a consultation; ergo, he shall not have double costs. Read the words of the statute.

STEWARDS CASE.

Parson prefers his bill for tythes of corn, and alleges that time out of mind, &c. in that parish they have used to allot the tenth shock; whereupon the parishioner suggests, that the parishioners and all those who had estates, &c. have us'd only to set out the tenth sheaf for tithes, and had a prohibition. The parson prays a consultation, but it was denyed. And resolv'd by the Court.

1. That the parson might sue for modus decimandi in the Spiritual Court. 2 R. 3. 3. a. But if the parishioner denies that, they ought to surcease, and a prohibition lies, and that shall be tried at the common law.

GOODWIN AGAINST WILLOUGHBY.

In an assumpsit. The plaintiff declares, that the husband of the defendant upon an in simul computav. was indebted to him in 100l. and that the husband had promised to pay it. But he died, and that the defendant having notice of that, and that the plaintiff intended to sue her upon that promise: came of her own accord to the plaintiff and requested him, to forbear to sue until Michaelmas: and in consideration of that promised to pay, &c. And the issue upon non assumpsit is found for the plaintiff, and now moved in arrest of judgement.

1. Because it is not shewn what the account was, &c. But by the Court, that is well enough, because it is the sole inducement, and need not be particularly shewn; because it would be infinite.

2. The second exception was, because it is not shewn, that she was executrix to her husband, and therefore not lyable. Justice Jones voucht Whittypools case. An infant contracts, and at full age promises to pay, &c. And an assumpsit was brought against him. And yet that being not for necessaries was meerly a void contract. And Doderidge said, that the wife of such an infant, who had contracted as abovesaid, being executrix to the infant makes promise for forbearance, an assumpsit lies. Crew, It is a grand presumption, that it was a due debt, and that she was executrix to her husband. Jermin pray'd judgement for the plaintiff, because the defendant first made the request to forbear: as Dyer 127. And now a peremptory day was given to the defendant, &c. to shew cause why judgement, &c. should not be given, &c.

PASCHAL AGAINST WARREN.

The administrator had judgement upon an obligation, &c. and the administrator dies intestate. B. his administrator sues a scire fac. upon that judgement. And upon two nihils returned, had judgement, and [82] execution made upon it. And now it was moved upon the very matter, that the administrator upon an administrator could not have execution, &c. But praid now, that he should not have the monyes levied, &c. But the Court said, he came too late after judgement upon the scir. fac. to remedy it by motion: but he is put to his writ of error. And so there was a day given to shew cause why the plaintiff should not have his money. M. 44 & 45 Eliz. rot. 168.

Yate against Goffe was voucht, that an executor of an administrator shall not have judgement or execution in such a case, 4 Rep. 9.

MARKHAM AGAINST COBBE.

Intr. T. 1 Car. B. R. rot. 112.

[S. C. W. Jones, 147. See *Wells* v. *Abrahams*, 1872, L. R. 7 Q. B. 560; *Midland Insurance Company* v. *Smith*, 1881, 6 Q. B. D. 569; *Appleby* v. *Franklin*, 1885, 17 Q. B. D. 94.]

An action of trespasse was brought for breaking his house, and taking and carrying away of 3000l. of money in baggs. The defendant said, that he and one A. were indicted for that before the Justices of Assize, &c. in the county, &c. by procurement of the plaintiff for the same offence, as of burglary, &c. and that A. was found guilty as principal, and he as accessary, and had his clergy. And demanded judgement if an action shall be brought against him: for nemo debet bis puniri pro uno dilict. 4 Rep. 39. 43. 2 Rep. 3. 14. and 9. And when he had been convicted of fellony, the plaintiff had not any remedy for his goods, untill the statute 21 H. 8. It seemed to Justice Jones that the action would not lie, because it is found to be felony by the verdict and inquest; and the party shall not be admitted now to make that trespass. Tit. Coron. Stamf. 100. Doderidge and Whitelock on the contrary; because an indictment is at the suit of the King. But otherwise if it had been by appeal 6 E. 4. 4. Felony made petty treason, yet is presentable at leet as felony. 1 R. 3. 1. 11 H. 7. 22. But by the Court the plea in bar is naught; because it does not shew that the plaintiff had given evidence for the conviction; for otherwise he shall not have restitution: and an allegation of procurement is not sufficient. Et ea de causa, judgement was given for the plaintiff.

VINCENT AGAINST BEVERLY.

An annuity was granted by the father to the younger son, who delivers the deed to a friend, who loses it. And the younger son sues the eldest at the council at York. Doderidge said, There was not any remedy or ground of equity in this case, for the deed might be upon condition or other limitation; and the deed might be lost by practice or covin to charge the heir absolutely. That case was referred to Justice Hutton, H. 2 Car. and it is said by Doderidge, and not denyed by any, that if the lessor enters and suspends his rent, he shall not have his remedy in equity for it: for it is contrary to the law.

CALF AGAINST BINGLEY.

C. recovered in debt against A. and had a sciri fac. against Bingley, his baily, who pleads that after the judgment A. brought error in the Exchequer-Chamber. And hanging that, A. had rendred his body in the Kings Bench, for only a transcript of the record is removed in custod. marescalli; and there hanging, the error dies. Which matter he is put to averr per pais. And it was ruled by the Court.

1. That that averrment is naught, for it ought to have been by record. And Jerman said, that hanging that suspention of the exe-**[83]**-cution; the principal cannot render himself, for then he cannot be in execution.

2. That by the death of the principal the bayl is discharged. So by Justice Jones if he had died before the return of the first sciri fac. So in Hobbs and Todcastles case, that death after a cap. against a principal, and before a sciri fac. against the bayl is a discharge; and so all the clerks affirmed.

HODGES AGAINST MOOR.

The defendant being burges of Parliament, brought a letter from the speaker of the Parliament to the Kings Bench, to stay, &c. And it was disallowed by the Court, for it ought to have been a writ of privilege. And it was said that when Thorp was speaker of Parliament, he had a general supersedeas for all actions against him, &c. And it was held ill, for he ought to have had a special supersedeas for every action, and that the Parliament only priviledges the person of the members of it, and not stayes the proceedings of the Kings Court. And so in the case of Curtesie against Wescot, that if A. had recovered against B. in two several actions, and had judgement, &c, that B. might not have one audita querela, but he ought to have two several writs.

SHARP AGAINST ROLT.

R. promised to Sharp that if he would deliver certain wares to the daughter of the defendant, that he would pay for them. By the Court that shall be intended payment to the plaintiff. But yet the declaration ought to have been certain. But in our case it was well enough, ve. 40 E. 3. 30. 2 E. 4. 21. Plowd. 149. An assumpsit without shewing to whom is naught. And so it was adjudged upon a false judgement. T. 3 Jac. C. B. rot. 507. Harding against Unton, that if the jury found, that the defendant assum'd modo & forma, without saying to whom yet it is good, and so it was adjudged.

COWLIN AGAINST COOK.

In an action upon the case the plaintiff declares, that whereas the defendant was obliged to him in 100l. and that he intended to sue him for it, that the defendant in consideration that the plaintiff would deferr the payment of the money aforesaid, and not sue him upon that obligation, promised, that he would pay him, and assum'd upon that. Mr. Littleton, that it is not a good consideration; for he may forbear and deferr, &c. for a day only, &c. as 19 Jac. Kebbs case. A lease at will is not a good consideration, for the lessor may determine it presently. But by the Court in our case, it is a good consideration, for the deferring shall be intended during all the life time of the obligee: and that if he sues him sooner upon that obligation, an action upon the case lies. And so it was ruled in one Barkehams case. But if it had been quod deferrat, pauculum temporis, that had not been a good consideration without putting a certain time.

WEAVER AGAINST FELTON.

Upon error; by the Court, after in nullo est erratum pleaded, the plaintiff and defendant are estopped to alledge a diminution, and no certiorari can be awarded at the suit of the parties. But Bishops case, and other presidents are, that the Court ex officio may award, a certi-**[84]**-orari ad informand. conscientiam: and that which is certified shall be annexed to the record, and is called a rider roll, ve. 22 E. 4. 46. a. 28 H. 6. 10. Dyer 32. b. 9 E. 4. 32. b. And note in Chapmans case the difference. If a diminution be alleged, in a thing collateral as warranty of atturney, or any mean process, that is not of the body of the record, so diminution may be alleg'd, after in nullo est er. But otherwise if it be of the substance, and part of the record it self, as if returned in the detinue only, where the first action was in the debet and the detinet. ve. 1 H. 7. 21. which reconciles many differences.

HAMAN AGAINST WITCHBOW.

The plaintiff in an action upon the case declared, that he and F. are tenants in common, &c. and have common in the land of the defendant, and that the defendant

had made trenches in it, by which the cattel of the plaintiff were in danger to perish, &c. And the issue upon not guilty is found for the plaintiff; and now mov'd in arrest of judgement, that the declaration is naught, because a tenant in common cannot have an action in such a case. And that was allowed by the Court for good cause.

SURREY AGAINST PIGGOT.

H. 1 Car. B. R. rot. 124.

The case was in effect thus: A. seis'd of Wh. acre, and also of an house, with a curtillage and hop-yard, and in the curtilage there was a water-pond for the cattel, and the water-pond came and gourded through the hop-yard into the pond. A. enfeoffs P. of the hop-yard, and afterwards leases the house and curtillage to S. P. stops the stream, and S. brought an action upon the case. And the question was, if by the unity of possession, the water-course be gone, so that the feoffee of the land by which he gourded might stop it. And adjudg'd, that it is not extinct.

1. Because it is a thing of necessity by the continual flowing of the stream, 12 H. 7. 4. of a gutter. So it is also of a thing that hath an existence during the time of the unity. As a warren, ve. 35 H. 55. Warrens 16. Otherwise of a rent or a way which a man cannot have in his own land, 14 H. 7. 7. And Barksdale cited the case of M. 6 Jac. B. R. between Challoner and Moor, that an ejectione firm. does not lye of a water-course, because it is a thing fluent and current, and so incertain. Note 11 H. 7. 25. of a gutter. Mr. Beare argued to the contrary, and voucht 21 E. 3. 2. 31 H. 6. 3. a cross way extinct by unity. And by Doderidge, That a cross way of necessity is not extinguisht by unity; otherwise of a cross way of ease. And so was the opinion of the Lord Popham in the Kings Bench in the Lady Browns case, who had a water-pipe through Whiteacre, running to her house, and purchases Whiteacre, and then cuts and stops the pipes. There such a water course is good; because of the intent of the owner declared, and the thing hath not now a continuance in the possession of the party himself. And Doderidge also agreed, that the fence is extinguisht by unity; because it is not a thing of necessity. And so the other justices agreed. And by Crew Ch. Justice, that it was adjudged accordingly in 3 Jac. B. R. between Drew and Prake. And Doder. also put a case which was not denied. A. had a water-mill, and a water-course to it, over his own land, and infeoffs another of that land, yet the watercourse shall remain for the necessity, and the feoffee cannot stop it.

[85] LEWES AGAINST WHITTON.

Whitton sued Luce in the Spiritual Court for a defamation, and had sentence, L. appeales, and hanging the appeal comes a pardon, which relates to the offence, and pardons it, then L. deferrs his appeal; and for that W. had costs taxt him: and now L. pray'd a prohibition, because he deferr'd his appeal because of the pardon, which had taken away the offence. And by the Court in that case, after the pardon the inferiour Court cannot tax costs; but it was urged that the superiour Courts might tax costs upon the desertion of the appeal: which is an offence after the pardon. But it was answered on the other side, that it was in vain to prosecute the appeal, when the offence it self is pardon'd. The words were, Thou art a pander, to Sir Henry Vaughan; and there was much debate if they were actionable at common law; yet it was agreed, that a sute may be brought for them in the Spiritual Court, as for calling one whore, bawd, or drunkard. But otherwise by Jones, if he had said that he was drunk, for then a prohibition lyes. And it was rul'd in 6 Jac. B. R. in the case of Cradock against Thomas; a prohibition was granted in a sute for calling one whoreson. And in Weeks case, a prohibition in a sute for calling one knave.

Dr. Lambes Case.

He was indicted for sorcery and witchcraft (viz.) quod exercuit quasdam malas & execrabiles, & diabolicas artes, Anglice witchcraft; Serjeant Attoe took exception to it, because there is no word there that signifies witchcraft in the indictment, and therefore naught. As an indictment, that A. had murdered quendam hominem ignotum Anglice I. S. that is not good. Now incantation is an apt and proper word for witchcraft, as 4. Rep. Tormentum, Anglice a gun is good enough; because there is no other proper word for it. And for that the indictment was quash'd.

Delavel against Clare.

In an action upon the case the plaintiff counts that the defendant put cloth to the plaintiff being a taylor to make him a suit of cloths, and promised to pay him as much as he deserv'd for the making of it, and for the necessaries thereof, &c. The defendant pleads that he was an infant at the time of the promise: yet judgement was for the plaintiff; and this case was vouch'd M. 17 Jac. B. R. rot. 1574. Blackstones case. A brewer brought an action upon the case against an infant for beer, which he had sold to the infant, and the action was maintainable. For there need not in our case any averrment, of necessary apparel, and convenient for the infant, for the promise is for making of it, and for petty necessaries also, as for lineings and thred, &c. But an obligation with a penalty, by an infant is void: although it be for necessaries. And a case M. 3. Jac. in B. R. was vouch'd, that a gardian in soccage may grant a coppyhold that escheats to an infant.

Giggham against Purchase.

An obligation to pay 100l. 31 day Septemb. in debt brought upon that, and the issue upon payment, and found for the plaintiff. And it was mov'd in arrest of judgement that that issue is upon an impossibility. For Septemb. hath but 30 dayes. Then by the Court it is pay-[86]-able presently, and non payment ad diem is well found for the plaintiff, and the issue is ayded by 18 Eliz. of Jeofayles, and judgement for the plaintiff.

Parke against Stewsam.

An action upon the case is brought, for stopping a way which the plaintiff had from such a place over Black acre, where the nusance is, unto such a field (by name) and it was rul'd to be good, without shewing what interest he had in that field. For it shall be intended to be a common field. But otherwise it had been, usque ad talem clausum. There he ought to shew what interest he hath in the close. Note 8 H. 5. 4 b.

Palmer against Litherland.

In that case it was agreed by Doderidge and James, that an executor durante minore ætate, if he waste the goods after the age of the infant, shall be charg'd upon the special matter, and not as executor in his own wrong; because he had a lawfull authority to that time. 6 Rep. 18. b.

Merritons Case.

A. and B. leases to M. for years, and covenant that he may alien without disturbance, interruption or incumbrance by them; and an obligation was made for perform-

ance, &c. A. makes another lease to C. who enters, and M. brought debt &c. and by the Court it is well. For the covenant is broken, and them shall not be taken joyntly only, but severally also. ve. 2 Rep. 3. 12.

Rochester against Keckhouse.

Error upon judgement in the Common Bench in an ejectione firm. of one messuage or tenement. And it was revers'd because of the incertainty. Note Dy. 264. Mich. 4 Jac. C. B. Waste, in messuagia sive tenemento, and yet well by the certain assignment. Affirmed by the whole Court that a writ in the disjunctive is void.

Petty against Hobson.

Upon error, a nisi prius awarded to be coram Fr. Harvey Armig. uno Iust. Dom. Regis de Banco, and it was return'd to be coram Fr. Harvey milit. &c. and yet good. For he may be knighted after the commission, and before the return; and so it was adjudg'd. ve. 35 H. 6.

Crabb against Tooker.

Intr. H. 1 Car. B. R. rot. 315.

Upon a marriage between the son of T. and the daughter of C. it was covenanted, that after the marriage, &c. T. should find to his son and his wife, and their issues, competent entertainment of meat and drink, and during the life of T. and to live with him in his house. And that if the said T. the son, and his wife should dislike to live together, that then the son and wife should have such lands and such goods of T. the father, and to live where they please. The son having issue dies, the wife takes a second husband: the wife and T. dislike and disagree, &c. **[87]** And now C. brought covenant upon the indenture for the lands and goods. Whitlock said, that that is a disagreement within the covenant, because it came in lieu of maintenance. Doderidge and Jones on the contrary, for the disagreement between the father and son, in the life of the son had not been sufficient. But by the Court, that T. ought to find meat and drinke, &c. to the wife and her issue by the first husband, during the life of T. and judgement was given according to the opinion of Doderidge and Jones.

By Mr. Littleton, who mov'd divers exceptions to an inquisition taken by the coroner of Montgomery; and it was adjudg'd that such an inquisition ought to be upon view of the body. But when a man drowns himself, and the body cannot be found; that cannot be found before the coroner, but the justices of the peace ought to inquire of that. As it was declar'd for law. T. 13 Jac. B. R.

Mason and Bavy against Dixon.

Intr. T. 2 Car. B. R. rot. 1365.

The sheriff arrests A. upon a latitat at the sute of B. A. escapes, B. makes executors and dies; and they bring an escape. And it was doubted if it lies, because a latitat is onely as a mean processe, and is not an execution, in which case the party hath not other remedy: and the Court was divided in opinion. Hide and Jones, that it does lye, Doderidge and Whitlock that it does not. 5 Rep. 27. Trover by an executor for conversion in vita testatoris. And in M. 33, 34 Eliz. C. B. rot. 506. the Bishop of Lichfields case, a quare impedit by an executor for disturbance in vita testatoris. And now this difference was put and agreed, that the executor

shall have the action, where the thing itself is to be recovered: but not where damages only are to be recover'd.

Sir Richard Lucy's Case.

In. M. 2 Car. B. R. rot. 150.

He was indicted for not repairing of an high way. And by Serjeant Thinne an exception was taken, because he is miles & Barronettus, and is not named Barronet in the indictment, and Mr. Holborn said it was resolved in the Common Bench, that in an action brought against a Barronet, he ought to be nam'd Barronet, and it is a clause that they shall be impleaded, &c. by such name in their patent. And the indictment above was quash'd, because it is not shew'd of what place Sir Richard Lucy was an inhabitant.

Wood against Witherick.

The plaintiff declares upon an assumpsit, upon an insimul computav. &c. The defendant pleads infancy, the plaintiff replies that it was for necessaries: and agreed by the Court, that an action upon the case, &c. shall lye well upon a promise by an infant for necessaries. But in our case the action is grounded upon an accompt, which an infant cannot make. And in our case, the value and necessity of the things is not requisite to be given in evidence, but only the accompt; and therefore in our case the action will not lye. But by Master Mason, and so it was adjudged, M. 19 Jac. B. R. Sterril against Holliday; and the reason was because an infant may be an accomptant.

[88] Tharsby against Warn and Sands.

Intr. T. 2 Car. B. R. rot. 1033.

T. brought an action of trespass 1. a. Car. against W. and S. for taking of his goods, &c. they justifie the taking of them by authority of a commission of sewers, granted by the late King James, for a tax assest, by authority of that according to a stat. 32 H. 8. cap. 5. And the barr adjudg'd ill, because they do not averr, that the assessment was in the time of King James. For the commission is expired by the death of the King. And note well the clause in the stat. 32 H. 8. shall be intended in the time of the same King that granted the commission. And rule was given for judgement.

A. for consideration promised to make to M. an assurance of Wh. acre, but afterwards he refuses to make it; and M. sues him to make it, in the Court of Request. And there was now mov'd for a prohibition, because M. might have an action for that at the common-law. But not allow'd. For by the Court, he cannot sue at common-law to assure Wh. acre, the thing itself, but to recover of the damages only.

2. A prohibition was pray'd; because it appear'd in the bill, that the plaintiff is a recusant convicted, and so a person excommunicate; but by the Court, the defendant hath answered him, there admitting him a person, able; and tis now too late to have that plea. And a prohibition was denied.

Note, an infant brought an appeal of murther by his guardian: and at the day in Court, it was pray'd, that the guardian shall not be demanded; because he is sick, and prays two or three days longer. By the Court, that cannot be in an appeal, and we will not make new laws. So the guardian was demanded, and he came not, by which he lost his appeal.

Sherwoods Case.

An action of trespass was brought, for taking of a load of fetches. The defendant said, that they did grow in Wh. and Bl. acre, and for Bl. acre convey shis title from A. and for Wh. acre from Pots, and Dame Ursula his wife, and that he by their commandement, &c. and it was rul'd by the Court.

1. That it is not a good exception to the barr, that the wife of Potts was called lady, but otherwise in a writ.

2. That the commandement shall be taken reddendo singula singulis.

3. It was rul'd to be a good exception, because the defendant had not aver'd quantum crescebat in Wh. acre, and quant. in Bl. acre, and for that the plea was ill. But in our case the defendant had demurr'd upon the replication of the plaintiff, which was ill. And so it was of purpose as it seem'd in policy.

Kitely against Haynes.

Intr. M. 2 Car. B. R. rot. 4837.

An action upon the case upon 9 several assumpsits of several summs of money, which in the whole came to 52l. when in truth the particulars did not amount to so much. And issue is joyn'd and found for the plaintiff, upon a non assumpsit, and damages assest to 42l. which is lesse than was due. And the first matter was mov'd in arrest of judgement, and rul'd that it shall be arrested, 5 E. 4. 14. See such a case resolved.

[89] Note A. recover'd and had judgement against B. and had a cap. and pays the sheriff his fee, and delivers him the cap. and shews him B. and the sheriff turns himself about, and said I cannot see him; and afterwards returns a non est inventus. And upon affidavit made of it, how it was done; the sheriff was remov'd, and a new one made: an attachment was granted against him, because the contempt was made during his office.

Bellamy against Balthrop.

Intr. M. 2. Car. Br. rot. 179.

By the Court, That where the defendant in trover, &c. justifies by lease of the tithes, &c. by the impropriator for a year, that yet it is meerly void without deed; otherwise if it be by lease of the tithes of a year by the parson himself. And that so it was rul'd 20 Jac. B. R. Bennet against Spell.

Good against Lawrence.

Intr. M. 2 Car. B. R. rot. 119.

Errour was assign'd, because the judgement in the inferiour Court was so entred. Ideo ad petitionem querent. considerat. adjudicat. & assess. By Court, quod quær. recup. damna, &c. taxed by the jury, nec non damna de incremento, &c. and rul'd for error.

1. For the addition of the adjudicat. & assess.

2. Because there is not any request of the plaintiff, for the increasing of the damages, and that ad petitionem quærent. before was misplaced, and it is not sufficient, for it is an undue place. So judgement was revers'd.

Dr. Cademan against Grendan.

Intr. T. 2 Car. B. R. rot. 549.

C. brought an action of trespass against G. who pleads the Statute of 3 Jac. cap. 5. of Recusancy; that if any popish recusant be convicted, that he shall be taken in law as an excommunicate person; and averr'd that the plaintiff was convicted at such a place, &c. unde petit ludic. of the bill. The plaintiff demurrs, quia placitum illud minus suffic. certum & issuabile in lege existit, &c. And the Court for the plaintiff, that the plea is naught.

1. Because there is not shewn before what justices he was convicted: so that if it had been denied, the Court might know to whom to write for a certificate of it.

2. He hath not averr'd his plea with a hoc paratus est verificare by record.

3. The conclusion, as judgement of the bill is also naught. But of the third part there was some doubt. But at length by the Court, a respondeas ouster was awarded. And so it was also in Tr. 2 Car. B. R. rot. 894. Ratcliffe against Bewcock, upon that statute; the defendant concludes, judgement si actio where it should have been, if he shall be answered, ve. 24 E. 3. 26. 34 H. 6. 8. 11. rep. 52. Clench the clark shewed a record, Pasc. 2 Car. B. R. rot. 331. where the defendant after imparlance pleads out-lary in the plaintiff, and demands judgement of the bill. And judgement was, that he shall answer further. And the Court agreed to that.

Note a prohibition was awarded, upon the 23 H. 8. because the party was sued out of the diocesse. And now a consultation was **[90]** pray'd because the inferiour Court had remitted that cause to the Arches, and their jurisdiction also. Yet a consultation was denyed. For it ought to be pleaded upon the prohibition.

Ganton against Ganton.

Intr. M. 2 Car. B. R. rot. 366.

Errour upon a judgement in the Isle of Elye.

1. In the stile of the Court, because it is not shewn by what authority they held pleas there.

2. Because it is not shewn that the cause of action arises within their jurisdiction. And although that in that Court they do not use other entry of the stile, or of the matter, yet when they are to certifie it, they ought to shew those things; for the superiour Courts take not notice of any inferiour Courts or of their authority, unless it be in case of the County Palatine, or a Court by Act of Parliament, as in Wales. And judgement was revers'd.

Halsells Case.

He was indicted for stopping the Kings highway in Kensinton, but does not allege any buttals of the King, (viz.) leading from such a village to such a village, &c. And by Justice Jones it needs not, being the nusance is in the Kings highway, which is intended to go through all the realm. But otherwise it should have been of another common way. To which Doder. and Whitlock agreed.

Note, if a lat. be against two, one is taken, and he puts in bayl in Mich. term, and afterwards the other is taken, and he puts in bayl in Hill. term: and it was pray'd that the bayl of Mich. term might be taken off the file of that term, and put upon the file of Hill. term; for otherwise the plaintiff cannot proceed against them joyntly, upon bayl put in several terms. And Clench Deputy Secondary said, that that is the course of the Court. And it was rul'd that it should be done according to the use in such a case.

LAYCOCK AND HIS WIFE AGAINST THE UNDER SHERIFF OF WILTS.

They count that they have sued a lat. against one Willmott, and that the husband delivered it to the under sheriff when W. was in presence, and he was the under sheriff appointed, and did execute that office, and yet notwithstanding he returns non est inventus, in deceptionem. And upon that they bring this special action upon their case against the defendant. Serjeant Ashley argued that it lies. For an escape shall be always brought against the sheriff himself, yet upon a special falsity an action may be well brought against the under sheriff. Dyer 238, 239. 278. But the Court seem'd to the contrary. For the under sheriff is not an officer to the Court, but the sheriff himself shall be amerc'd for all defaults, neglects, and falsities of the under sheriff, but shall not be imprisoned for him. And note 5 E. 3. 26. No challenge for consanguinity to the under sheriff. And also that misdemeanour was in execution of his office, and is laid as a ground of the action.

[91] CLAPHAM VERSUS MIDDLETON.

Intr. M. 2 Car. B. R. rot. 613.

An action of trespass was brought quare testas diversas (Anglice) (earthen pots) ipsius querentis cepit. And mov'd that it is naught for the incertainty. And so was the opinion of the Court. As 5 Rep. 34. Trespass was brought quare pisces suos cepit, without shewing the number, or of what nature they were. And therefore naught.

PALMER AGAINST WARNER.

A sute was in the Spiritual Court, and sentence pass'd for one with costs, and 9 moneths after the costs are assest, and tax'd. And then comes a pardon of 21 Jac. which relates before the taxing of costs. But afterwards the sentence and that pardon was pleaded, and allowed in discharge of the costs. Then W. who had recovered sues an appeal, and P. brought a prohibition, and well, and no consultation shall be awarded, because by the Court that pardon relating before the taxation of costs had discharged them. As 5 Rep. 51. Hall's case.

STOCK AGAINST SICKS.

A lay patron having the next avoidance &c. presents St. being the son of the last incumbent; the Ordinary for that refuses. Because by the canon filius patr. non potest succedere in ecclesia. Then the patron presents Sicks. After which St. procures a dispensation of the canon, yet the Ordinary institutes and inducts Sicks, then St. libels against Si. and the Ordinary in the delegates. And they now pray a prohibition. And allowed by the Court. And by Jones, That in such a case it hath been 3 times granted. 1. In the time of Gawdy. 2. In Cooks time. 3. That time where both persons claim of one and the same patron. And by the Court, That canon does not bind us in England. And by Doderidge, A lay patron may vary from his presentation before induction, but a spiritual patron cannot, because he may well understand the sufficiency of his presentee at first. ve. 38 E. 3. 36. Dyer. 222. Kellw. 154. N. B. 14 E. 4. 2.

DR. SUTTONS CASE.

P. 3 Car. B. R.

He was deprived of the office of official of Gloucester by the Commissioners 3 Jac. appointed to examine the defects of chancellors, and that he was not read in the canon

or civil law. He said, that time of mind, &c. the bishops have used in their diocesses, to bestow the chancellorship, and that A. the bishop, &c. had made him chancellor by deed; and that was confirm'd by the dean and chapter, by which he had a frank-tenement in that office, &c. And Mr. Glanvill moved for to have a prohibition, but it was denyed by the Court; for it is lawfull for the Commissioners to deprive for insufficiency, that being within their commission; but upon a sute in the Spiritual Court for the profits of that office, supposing the grant of that by the predecessor does not bind the successor. As it was in Dr. Barkers case. There a prohibition shall be awarded, because the profits are temporal. But we in the first case cannot try the sufficiency. ve. 8 E. 3. 70. 9 E. 3. 11. So it is if the Or-**[92]**-dinary deprive the Mr. of a lay hospital, for there he is not a visitor; nor is it visitable by him. But otherwise of a spiritual hospital.

ALDERMAN HARRIS'S CASE OF OXFORD.

He was depos'd of his aldermanship for scandalous words of Mr. Davors the then Maior of Oxford, in conference with B. (viz.) Our maior is a base fellow. And B. admonishes him of that which he spoke. Then H. said again, The maior is a base fellow, and thou art a base fellow, that appears upon the return of the writ of restitution; but before that an attachment had issued against the Maior of Oxford for not returning that, and affidavit made of it, and a fine of 5l. impos'd upon him. And in that case it was agreed by the Court.

1. That the pleading that he was depos'd per concilium civitatis, and not civium according to their custome and charters, was good enough. ve. 11 Rep. 9.

2. That the writ of restitution was well enough, although that in it there is not exprest any particular prejudice that the alderman had suffered by that deposal; no more than in case of an infranchisement. 11 Rep. 93. Dyer. 333.

3. That the attachment was well granted, without alias or plures. Because it issued out of that Court. But by Jones otherwise it had been, if it had been a restitution awarded out of the Chancery. But for the matter in law, it was adjourned; for a grand debate was if those words were a sufficient cause of desposer. Noy aggravated the offence, and vouch't 33 E. 1. An accompt was brought in Exchequer against the Lord Bruce, and he being condemn'd in the action, said to Heigham, Ch. Baron. Rogere, Rogere habes de me quod dudum petiisti, upon which the Baron, replyed, quid habeo. And the Lord Bruce answered, habes damnum & dedecus meum, and for that offence he was fin'd and committed to the Tower: he pray'd forgiveness of his offence, in all the Kings Courts, being bare and distinct. And in the black book, in the Exchequer, there is ordain'd a particular law of the Exchequer, for the severe punishment of such offences, and contumelies against the Judges and officers. ve. 23 E. 3. The defendant in a writ of ravishment of ward, beat the plaintiffs atturney. Upon which he brought a special action upon the case, and recovered three hundred pound. Because it is derogation of justice and government. And 32 H. 6. One was punisht for menacing an atturney.

4. By the Court, That as in our principal case, if the maior makes a false return, the party may indict him for perjury, upon the general oath when he was admitted to the office of maior. And by Justice Doderidge, And that by rule of order of that Court, the maior may be compeld to make a return, upon an other particular oath; and that so it was done in the case of the Maior of Coventry.

ASHFIELD AGAINST ASHFIELD.

Intr. T. 2 Car. B. R. rot. 913.

Upon a demurrer the case was, Infant copyholder in fee leases for years without licence, rendring a rent; and at full age he accepts the rent, and after ousts his lessee, who brought an ejectione firm. And agreed by the Court.

1. That a lease for years by a copyholder, although that it be a forfeiture, yet it is no desseisin to the lord.

2. That the lease is not void but voidable, and may be affirm'd by acceptance and judgement for the lessee for years. And agreed that such a for-**[93]**-feiture, does not bind an infant. 8 Rep. 44.

HARVEY AGAINST SIR GEORGE REYNOLDS.

Intr. T. 2 Car. B. R. rot. 1179.

H. brought debt upon an escape, and counts that he had recovered, &c. in Lond. against A. and had him in execution in Lond. and that from thence he was by hab. corp. remov'd and also committed to the Marshalsea, where the defendant was keeper. And that he, &c. had suffered him to go at large voluntarily, &c. The defendant confesses, &c. and said that he had broken prison, and so escap'd contrary to his will; and that upon fresh sute he had retaken A. (viz.) 18 day of May, before the bill exhibited also. But in truth that 18 day of May was after the bill exhibited, and an imparlance had, yet it was before any plea pleaded. And by the Court that the reprisal is found tarde, 13 E. 4. 9. for it shall be mischievous to the party to attend for a reprisal, which if in truth had been before, &c. it had been a good excuse and plea. As reparation of waste, before the writ brought is a good plea in waste. Also there needs not any traverse to a voluntary escape, where he confesses in voluntary escape; for that is a good cause of action. And by the Court the plaintiff had judgement.

DICKER AGAINST MOLLAND.

In a second deliverance D. avows by feoffment made to A. and B. to the use of his father for life, the remainder to him in fee, and so conveys a title to him, &c. M. conveys a title to him and takes a traverse to the feoffment to A. and B. &c. and upon that are at issue; and the jury found the feoffment to be made to A. B. and C. &c. to the use, &c. as D. pleads. And by the Court, that issue is well found for D. because the feoffment to the use, &c. being found, that is the substance. And the number of the feoffees is not traversable. 21 H. 6.

Note, one was indicted for not repairing of a way, which he ought to do ratione tenuræ in Bl. acre in D. without saying tenuræ suæ. And that was naught by the opinion of the Court: for another may have the land. So 5 H. 7. 3.

STONE AGAINST KNIGHT.

Intr. H. 2 Car. B. R. rot. 234.

The question was if a submission to an arbitrament by an infant be void or voydable, for if it be void, then an obligation made by him and his father of the one part, &c. is also void. ve. 8 E. 4. 1. and 22. 19 E. 4. 1. 10 rep. 31. Noy said it was only voydable. 13 H. 4. 12. 10 H. 6. 14. And the opinion of the Court was, that the infant might waive that arbitrament if it be to his prejudice and disadvantage during his minority: but at his full age if he makes any note, which amounts to an agreement, that shall bind him; and the reason that an infant cannot appear by atturney is because he cannot make a warrant. Also by the Court, that an arbitrament to pay, &c. to any of the parties of the one part is good. ve. 2 R. 3. 18.

EVANS AND KIFFIN AGAINST ASCIUTH.

[See S. C. Palmer, 457; W. Jones, 158.]

Intr. H. 22 Jac. B. R. rot. 1169.

In trespasse the grand case of a commend. was thus. D. Thornburye being Dean of York was chosen Bishop of Limbrick in Ireland. But before consecration or confirmation, he obtained a patent, with large words non obstante retinere valeat in commend. the said deanery, &c.

[94] And afterwards he was chosen Bishop of Bristol, and then also before installation he obtained another patent, with a more ample dispensation of retaining the said deanery in commend. Read the case if need be upon the record it self.

1. It was agreed by all, that the church or deanery, &c. in England shall be void by cession, if the parson or dean, &c. be made a bishop in Ireland, for the canon law in that is one through all the world. Also Ireland is governed by the laws of England, and is now as part of England by subordinacy.

Note well 45 E. 3. 19 b. Confirmation under the Great Seal of England of presentation to a church in Ireland, of the heir of the tenant of the King; and that a dispensation under the Great Seal of England, is good in our case, without any patent of it in Ireland, ve. 8 Ass. 27. 10 E. 3. 42. And exchange of land in England for land in Ireland is good. Note 20 H. 6. 8. scir. fac. sued in England to repeal a patent under the Great Seal of Ireland, ve. the Irish statute, 2 Eliz. cap. 4. that an Irish bishop may be made under the Great Seal of England. Note stat. 1. E. 6. the Irish bishops shall be donative by patent by the King, under the Great Seal of England; yet the King may let them be chosen per conge destier, &c.

1. Noy argued at Barr, and so stated the points of the said case by themselves. If a commendatory dean by a retinere in commend. may well confirm a lease made by the bishop, for it is agreed, that a commendatory dean by recipere in commend. cannot confirm because he is but a depositarius. Note 19 H. 6. 16. 12 H. 4. 20. 27 H. 8. 15. A commendatory shall be sued by that name, and by such a commend. he may take the profits and use jurisdiction, and yet is not a dean compleat. Note he may make a deputy for visitation, but not for confirming of leases. Note if there be two deans in one church, both ought to confirm. ve. Dy. 282. Coo. Justi. 30. a.

2. The second point, if such a bishop, be chosen to another bishoprick, if now the first church in commend. (admitting that there was a full incumbent) be void presently by the election and assent of the superiour (viz. the King). And it seem'd to him that it was; because there need not be a new consecration. And he voucht Panormitan 2 part 101. The Bishop of Spires was chosen Bishop of Trevers, and had the assent of the Pope, and that he came to Trevers, and there found another in possession. And he would have return'd to the former bishoprick, and could not. And he also cited the 8 Rep. Troblops case, that the wardship of temporalties cease by the election of a new bishop. Note that Serjeant Henden who argued on the contrary, voucht. M. 4 Jac. May, Bishop of Carlile made a lease to the Queen, and a commission issued out of the Exchequer to take it, and the dean and chapter confirm'd it before the inrolment of it. And yet adjudged good, that case was for the Castle of Horne.

First, The Judges argued two days: and resolv'd that all commendams are dispensations, and that cession commenc'd by the Canon and Council of Lateran.

Secondly, That the King may dispence with that canon. 11 H. 7. 12. for the Pope might, and now by the statute 21 H. 8. that power is given to the King cummullative, by way of exposition veteris, & not by introduction novi juris, and by that statute a concurrent power is given to the Archbishop of Canterbury, and may be granted by the King, or by the archbishop, &c.

3ly, That that dispensation, after election to the first bishoprick and be-**[95]**-fore consecration, &c. and also the dispensation, after election to the second bishoprick, and before the confirmation, is good enough in both cases, and he remains a good dean to

confirm, &c. And afterwards the judgement in the case, being an action of trespass, was given accordingly.

Note, that bishopricks were donatives by the King, untill the time of Will. Rusus, and so untill the time of King John. Read for that the History of Eadmerus.

ALCOCK AGAINST BLOWFIELD.

Intr. P. 3 Car. B. R. rot. 213.

A. had recover'd 50l. against M. and then B. promis'd, that if A. would forbear the execution of it, that he would pay to him 50l. at midsummer next, or 100l. after, if it be not paid then, &c. when it should be reasonably requested, and A. avers non-payment with a licet sæpius requisitus, (but does not aver a request expresse) and recover'd. And now upon error it was agreed, that the request ought to have been expresly averr'd; because that was issuable. For the promise being made by an estranger, there, there is not any duty before request. But otherwise when the party himself which is indebted promises to pay, there a licet sæpius requis. shall suffice; because there was a duty before, and without the promise. But in the case of an estranger it is nudum pactum, and no consideration until a request made. And for a promise where there was a precedent debt, &c. there needs not such precise shewing, for what thing, or how the debt accrued. As upon an assumpsit upon an indebitatus existit, or insimul computaver, because that is only an inducement, 3 H. 7. 1. 21 H. 7. 15. 9 E. 4. 41.

SCARREBORROW AGAINST LYRIUS.

L. being in a ship upon the sea, B. who was in it was reputed an agent and factor, borrows 100l. of L. upon bottomage, (that is) when the money is paid upon the keel of the ship, and the ship obliged to the payment of it; and if it be not paid at the time, &c. that he that lends the money shall have the ship. And that was allowed to be a good and necessary custome by all. And it was agreed by the justices, that if the master, factor, pursor, or he that is reputed owner of the ship borrows money in such a manner, for the necessaries of the ship, that binds the owner of the ship although that the money be not so imployed in truth: and the owner hath his remedy against him that he so put in trust. And it is not a good allegation for to have a prohibition, to say, that the property was not in him, that took such bottomage.

FERRY AGAINST NEWTON.

Intr. M. 2 Car. B. R. rot. 118.

The plaintiff in an ejectione firm. in the Common Bench had judgement quod recuperet termin. and a writ of enquiry of damages. But before the return of that, errour was brought. And it was resolv'd that the errour is well brought before the writ of enquiry of damages return'd, because the judgement was principally given for the thing itself. Otherwise if only damages had been recover'd, then they were the principal. Also in our case the plaintiff by the judgement might enter without suing an habere fac. seisinam, or a writ of enquiry of damages. Noy at Barr said, that they in the Common Bench, upon the return of the writ of enquiry of damages there may well proceed. And judgement given for the damages in our case.

[96] SURREY AGAINST COLES.

Intr. P. 22. Jac. B. R. rot. 62.

The main point of the case was, A. leases to B. for years, rendring a rent annually durante termino prædicto to the lessor and his assigns. A. grants the reversion over to S. in fee, &c. and dies. If now the rent be determin'd. And these cases were voucht, M. 3 Jac. C. B. Barker against Barret. A. leases for a year, and so from year to year; rendring for that so long as the lessee shall enjoy it, 10s. rent. The lessee after the first year dies, his administrator enjoys it for another year. And adjudged that he shall be charg'd for the rent. And P. 4 Jac. C. B. rot. 12. or 112. Hill against Hill, the husband leases for years, rendring a rent yearly, during his life and the life of his wife, and dies; the wife by custom had that land as frank-bank, and in debt recovered the rent. And Wotton against Eggwin was voucht. A. leases for years, rendring a rent to the lessor, his executors and assigns, and dies; and his heir distrains for the rent, and adjudg'd not lawful (note the fault annually) for it was adjudg'd in the Chancery in the case of Winch against Winch. Where the rent being upon a lease for years reserv'd to the lessor and his executors (annually, &c.) that was decreed to the heir.

CROSSMAN AGAINST HUME.

Intr. M. 2 Car. B. R. rot. 451. & 161.

In error, upon a judgement in the Court of Lanceston in Cornewell, error assign'd, because the venire fac. was de viceneto de Lanceston, where it ought to have been of Lancest, for their jurisdiction does not extend but to the village of L. ve. 8 H. 5. that a superiour Court hath a superintendency, and may award a venire fac. de viceneto. But otherwise of a particular jurisdiction. There the enquest is coram non Judice. And so note the case. As administration by the inferiour Ordinary, where there are bona notabilia is void. And so it was rul'd.

WOOD AGAINST BROOKE.

Intr. P. 2 Car. B. R. rot. 383.

In an action upon the case the plaintiff declares to 17l. damages, and upon the demurrer, judgement given for 17l. 10s. for his damages by the Court. And now that judgement was revers'd, because the damages being uncertain, there ought to issue a writ of enquiry of damages. Otherwise where the demand is certain, as in debt. Note, 11 H. 7. 5 b.

Note by the Court upon an arbitrament, the defendant shall be ousted of waging his law, Kellw. 39. And the reason, because a third person hath notice of it. But 1 H. 7. 25. a. is to the contrary.

THARE AGAINST FOSSET.

M. 3 Car. B. R.

F. sues T. in the Court of the Veirge, and declares of a trespass in St. Martins, infra jurisdictionem of that Court. And upon issue of not guilty, a venire fac. was awarded from St. Martins aforesaid, without saying infra jurisdictionem, and there recover'd. And now in errour, it was held by the Court to be errour, because the

Court varied and altered the limits of its jurisdiction, according to the residency of the King. And St. Martins at the time of the trespass might be within the [97] vierge and jurisdiction, and at the time of tryal might be out of it. For that is a removeable jurisdiction.

GREWELL AGAINST IRELAND.

Intr. M. 2 Car. B. R. rot. 130.

In battery the defendant pleads, quod vi & armis, &c. not guilty, without saying, et de hoc ponit se super patriam: and as to the residue, &c. of his own assault; the plaintiff replies that the defendant vi & armis in ipsum insultum fecit, &c. Et hoc paratus verificare. And issue taken upon that, &c. and it was found for the plaintiff, and well, and it is no discontinuance, for also the vi & armis, &c. is in issue: and the defendant shall be fined to the King.

LONGELY AGAINST STREET.

Intr. H. 1 C. B. R. rot. 470.

The plaintiff declares of an action of trespasse in the time of King James, contra pacem Dom. Regis. And it was now mov'd after verdict for the plaintiff in arrest of judgement, and not allowed because it is brought tarde. But otherwise it had been, if it had been mov'd before verdict given, when the jury was at Barre: for, for that they shall be dismissed. As it was done in one Drakes case, vouch'd by Serjeant Davenport. And see for that purpose 2 E. 4. 23 a. The Statute of Jeofailes.

IREMONGER AGAINST NEWSAM.

The point was, Lessee for years rendring a rent dies, the executor assigns the term over, the rent is arrear, the lessor brings debt against the executor. And by Noy and Mr. Mason that it lies. 3 Rep. 24 a. Sydals case, and Marrows case there also was cited, and so adjudg'd. And by Noy in his argument, the 10 Jac. B. R. Sir Thomas Walker's case was vouch'd. Where a freeman of London imports wines, and before the landing of them he dies. His executor shall not pay prisage. And that so it was adjudg'd, although that the executor was not a freeman. Which Justice Doderidge also affirmed.

SLADE AGAINST DRAKE.

Intr. H. 15 Jac. C. B. rot. 418.

S. sues a prohibition against Drake, alleging that an abbot, &c. was seised, &c. of that land discharg'd of the payment of tithes at the time of the dissolution, and so conveyed it to the King, and from the King to him. The defendant demurrs, and it was resolved that the abbots holding of it discharg'd of tithes, &c. was not good, without shewing how. For note the statute 31 H. 8. cap. 3. is in as large and ample manner as the abbot held it, &c. and the statute pinches upon that, ergo he ought to take notice by what manner the abbot was discharged; also such a claim of discharge of tithes, is contrary to common right, and therefore shall be strict, ve. 21 H. 7. 9. He ought to shew how he was discharg'd of the rent, 5 E. 4. 6. a. He ought to shew how he is more neer of blood, for entry for consent of ravisher, 35 H. 6. Replevin 46. He ought to shew how the plaintiff is seis'd of the part of land out of which the rent issues. So if the abbot had it then for life or for years; and no reason that the inheritance shall be discharg'd for

that. Note 22 E. 4. 40. He ought to shew how he hath discharg'd the annuity. See and note 9 rep. 35. and 9 E. 4. He ought to shew before what Judge the abbot was deposed; and so by what Judge the vicaredge was sequestred. 5 E. 4. 28. b. 10 H. 7. 17. **[98]** He ought to shew the heresie, &c. 26 H. 8. 1.

2. He ought to shew what estate he hath made, &c. 5 rep. 57. And by Hubbard Chief Justice, that 31 H. 8. cap. 3. hath created a discharge of tithes, (viz.) by a perpetual unity, which was not before at the common law.

PLUMMER AGAINST WEBB.

B. R.

A. licences P. to put a stack of hay upon the land of A. A. leases that land to W. and the hay remains there for two years, and W. puts in his cattel who waste the hay, and P. brought an action of trespass, and adjudged that it doth not lie.

1. Because it was not remov'd in convenient and reasonable time, and the licence is determined by the lease to W. and P. at his peril was bound to look that the beasts of A. or W. his lessee did not eat the hay. And so the damages comes to him by his own fault.

JELLIET AGAINST BROAD.

M. 18 Jac. B. R.

I. sells goods to B. for 200l. and in consideration of that bargain B. promises that he will not exercise the trade of a mercer in such a village, &c. But after B. uses it there, and I. brought an action upon the case, and resolv'd by the Court that it well lies. For it was a voluntary promise for a good consideration, and is restrained to a place. Otherwise if it had been a general restraint, or upon a coaction, or without consideration. As 2 H. 5. 5. b. Note also M. 43 and 44 Eliz. Common Bench, rot. 3217. Leggate against Batchelour. The condition of an obligation was, that if the son of the defendant us'd his trade, &c. within the county of Kent in the town of Canterbury or Rochester, within 4 years, that then if he payd 20l. the obligation should be void. And it was said by all the justices that that condition is against the law and liberty of a subject by Magna Charta, cap 38. and contrary to the common good.

MURTON AGAINST BURTLEY.

18 Jac. in Exchequer Chamber.

An action upon a promise to pay the arrerages of rent, upon an insimul computav. when he should be thereunto requested. And hath not expresly alleg'd a request, and yet adjudg'd good, for the arrerages are due before the request, and an action of debt lies for them. And also the bringing of an action is a request sufficient; that was mov'd in arrest of judgement, and yet judgement was for the plaintiff. But otherwise it were if it had been to do a collateral thing, which was not a present duty. As to deliver an obligation or an indenture upon request; there he ought to shew a request expresly, with the place and time, for it is issuable, and a licet cæpius requisitus is not sufficient.

PRESTONS CASE.

An action upon the case by a councillor at law for these words, Thou a barrester, thou a barreter, thou called to the Bar, thou wert put from the Bar. And judgement for the plaintiff. And upon errour now also it was affirm'd, although he did not

say common barrettor, nor that he was put from the Bar for just case. And it was said by Lanfield it hath been adjudg'd that an action lies for saying, Thou art a daffidowndilly (innuendo) an ambidexter, in respect of his profession, 4 rep.

[99] IN THE STAR CHAMBER.

GILLIBRAND AGAINST HUBBARD.

M. 38, 39 Eliz.

H. levies in the name of G. he being over-sea. And sentence was given, that the fine shall be void. And Poph. cited Holcombs case. A. acknowledges an action in the name of H. and sentence was also given that (vacat) shall be made upon the roll. And 2 Jac. Serjeant Heals case. He had unduly sued an execution, upon judgment in debt, acknowledged by the Lord Cobham, and afterwards, the Lord Cobham was imprison'd for treason. H. sues an elegit, and there sentence was: that the record of it should be vacated; and Serjeant Heale was fined deeply for that practice.

STRANGWAIES AGAINST HICKS.

P. 41 Eliz.

H. knowing that Str. was within age, procures him to acknowledge a recognisance for wares bought, &c. Str. dies, and his wife sues H. in the Star-chamber; and H. was fin'd one hundred pound, &c. And Calmaders case against Here was voucht for a president of the Court in the point.

SIR EDWARD MEREDITH AGAINST HIS TENANTS.

The defendants were fin'd for making an obligation between them, the one to the other, to contribute to expences in sutes commenc'd or to be commenc'd by the lord against any of them. And this difference was agreed, that for sute, for custome common or copyhold, whereof the obligees participate, there they may contribute, but not in the case where they claim several frank-tenements, or copyholds of inheritance in which they have not a joynt and equal interest. ve 10 E. 4. 2.

THE KING AGAINST CROOKER, HIGGINS, & ALIOS.

M. 41, 42 Eliz.

The under Sheriff of Oxford had process of extent upon a statute staple of goods and lands, of Crooker. And the under sheriff gathers the goods together, and the defendants endeavour to rescue, but did not prevail. And now they were censur'd for that, notwithstanding that the under sheriff had not taken an inquiry by the jury, and although that it was before the appretiari fac. &c. for before such inquiry, &c. the sheriff ought to gather the goods together, for to be view'd by the jury, by the law. But the final power of safeguarding, &c. in the custody of the sheriff is not good, until after the enquiry; and it is not material although they did not prevail, &c. for conatus punitur. Also the fine of Crooker was aggravated, because he said to the sheriff (shewing his writ) put up your bauble.

BLACK AGAINST ALLEN.

M. 42, 43 Eliz.

B. was oblig'd in one hundred pound to A. for the honesty of his sonne an apprentice with A. And A. in the obligation races out libris and puts in marcis.

That is not forgery punishable, for it is not a prejudice to any but himself, for by that the obligation is void, and hath lost his own duty. And so decreed. And the Lord Keeper and the two [100] Chief Justices, saying that if the defendant pleads not guilty, he shall not have the benefit of the general pardon at hearing. But he ought to plead that, and shew that he is not a party excepted in that; but he needs not shew, that the offence is excepted. For the Judges, ex officio, ought to take notice of the offences excepted, but not of the persons.

STEPNEY AGAINST WOLFE.

H. 43 Eliz.

A. was oblig'd as surety with W. and W. for that, and to save A. harmless makes a deed of gift of certain barbits to A. Stepney takes them, and A. sues him, but W. maintains the sute and charges; and at the time of the taking and sute for it. The day of payment of the obligation now was come: and yet by the Lord Keeper and the two Chief Justices, that is no unlawful maintenance: but justifiable, in respect of the trust that was reposed in A. by W. to re-have the barbits if A. be not damnified, &c.

AGARS CASE.

M. 43, 44 Eliz.

He was receiver of certain rents of the Queens, payable at Easter, or within 40 dayes after. And upon conquest of the office, for condition broken for non-payment, he deposes, that the rent was not paid within the 40 days, but after. But he had antidated his acquittance. And it was agreed.

1. That the Queens Attorney may inform for that perjury; although that it be an oath made for the Queens advantage; so for any other if he be grieved by it.

2. That the perjury before the enquest of the office, is a misdemeanor punishable in that Court; but not by the statute 25 Eliz. and the Court held that antidating to be a great offence. But no censure of that, because it is not complained of in the bill.

Note, that in that term it was also rul'd, that if one exhibite a bill or an information, and is not the party agrieved, as an informer upon a penal statute or a misdemeanor, if he dies, his heir, executor or administrator, shall not have a bill of reviver, but Mr. Attorney General may.

RYE AGAINST FULLCUMBE.

H. 44 Eliz.

F. being divorc'd for incontinency of the wife, he afterwards marries P. the daughter of Rye, living the first wife. By the whole Court that is a void marriage; for the divorce is not, but à mensa & thoro, and does not dissolve vinculum matrimonii. And by Whitguift Archbishop of Canterbury. So is the opinions of divines and civilians.

H. 2 Jac. 13. Feb.

Before many noble men, archbishops and bishops, and the Justices and Barons of Exchequer.

1. Agreed that the deprivation of Puritan ministers for non-conformity to the last canons, was lawful by the High Commissioners. For by the common law, the King

hath such a power in causes ecclesiastical. And it is not a thing de novo, given by the first of Eliz. For that is declaratory only, &c. and the King may delegate it to commissioners: [101] and the King without a Parliament may make constitutions for the government of the clergy: and that such a deprivation ex officio, without libel, is good.

2. That the statute 5 H. 5. cap. 4. is to be intended, when they proceed upon libel, and not when ex officio. Read the statute.

3. When their petition subscribed by a great number, with intimation, that if the King denies their suit, that many thousands of his subjects shall be discontented, that is an offence finable at discretion, and is near to treason, by raising sedition by discontent, &c.

Bellew against Bullocke.

The defendants upon a riot, in destroying 16 foot of an hedge for a commoner. There they were fined every one 40s. And the plaintiff for suing in that Court for that riot was fined 20l. And so both parties fined, which was seldom seen before.

Combes the Defendant. The Same Day.

44 Eliz.

For forgery of a will of one Brokenbury, it was held by Popham, Flemming and Yelvert, that if he that writes a will, omits a thing that was appointed to be put in, that is not forgery: but if the devise had been to A. for life, the remainder to B. in fee, and he that writes the will omits the estate for life to A. by which the fee is presently to B. that is forgery.

Stockwells Case.

St. was deputy purveyor for the Toyl, and was fined for misdemeanours, &c. Note in that case, by Poph. who delivered the opinion of all the Justices of England in these 3 points.

1. That no purveyor or his deputy may take any thing, without shewing of his commission.

2. That they cannot take wood or trees growing, without the consent of the owners; because they belong to the freehold.

3. That no purveyor may take that which a man hath provided for his own provision: but of that which is to be sold, the King shall have the buying at reasonable prices, ve. 47 E. 3. 18. 11 H. 4. 28. Mag. Chart. cap. 21. And in 25 E. 3. B. R. rot. 27, the servants of the marshall presented for taking 12 carts for to carry the Kings prisoners, where one would have sufficed. And they had levied to 10 marks for the redemption of their carts and horses; for which they were committed to the Marshalsea, &c.

Doydige against Penkvell.

P. was censured, for inserting the name of a special bayly, in a warrant made with a blank by the sheriff. And note, that in that case, as also P. 4 Jac. an information by Mr. Atturney, against Willoughby and others, for many riots. One was censured, and the others dismist with costs against the relator Mrs. Gawen.

[102] The Lord Sturton and Lord Mordant.

H. 4 Jac.

They were brought to the Barr now, being held for a contempt to the King for not coming to the Parliament by prorogation 5 Novemb. when the gunpower treason

was intended: and it was grandly suspected that they knew of the plot, because they were Papists, and their excuses were frivolous. And St. was fined to 6000 marks, and Mor. to 1000 marks.

STOCKWELL AGAINST NORTH.

N. was Sheriff of Nottingham 43 Eliz. and took money for the offices of gaoler and bailywick, and he first gave them to his servants, who sold them: but he himself had the money; and he was fined for that, for it is contrary to 4 H. 4. cap. 5. And also by the Court; that that is a corruption, and a great cause of oppression in the officers; and such sale of offices is malum in se, and finable.

SIR THOMAS PALMERS CASE.

T. 9 Jac.

For forgery, in that case this arose, and it was resolv'd by the 2 Chief Just. and the Ch. Baron, that whereas Sir Tho. had covenanted by indenture for natural affection, to stand seis'd to himself for life, the remainder for life to F. the eldest son of his brother, the remainder to the first son of the said F. and so to the 8th son, &c. the remainder to the right heirs of Sir Tho. Palmer. Sir Tho. is attainted of treason, and executed before the birth of any son to F. that the sons born after are all utterly barr'd by that attainder. And the King shall have the fee discharged of all the remainders limited to the sons not yet born.

I. was plaintiff in an action against F. makes a breviat of the cause, and delivers it to some of the jurors before their appearance for their instruction. And the plaintiff, after evidence, was non-suited; and for that he sues them. And now resolved by the Lord Keeper, and the two Ch. Just.

1. That the party himself might labour with the jury to appear, but not a stranger.

2. That the party himself cannot instruct, or promise reward for, or before appearance; for that is imbracery, a fortiori in a stranger, and the defendants were fined and censured.

H. exhibits a bill for forging of a will against Turvil, and others, hearing. He relinquishes the forgery, and insists upon a practice between them to draw the party to make that will. And by the Court that he cannot insist upon the practice, for that is but a circumstance of the forgery. But otherwise if he had confest the will, and charged them directly with the practice. And now the bill was dismissed, and the plaintiff fined 200l. to the King, and several damages to every of the parties. Because they have not a remedy for those slanders (being before a competent Judge) at the common law. 4 rep. 14. b. And it seem'd that that was the first president for damages, for a scandalous bill.

[103] HIND AGAINST MANFIELD.

1 P. 12 Jac.

M. was fin'd to two hundred pounds, for diverting part of the River of Thames, by which he weakned the current of the river to carry barges, &c. towards London and other houses of the King upon that river. And such a thing cannot be done without an ad quod damnum. regist. and N. B. Because that river is as an high-way. And also it ought to be by patent of the King, for to do such a thing.

Whinnel against Strowd.

W. exhibits his bill against St. for a misdemeanour in his office of justice of peace as for compounding of matters between the parties, being bound over to the sessions. And now the Court observed this difference; that for petty quarrels between party and party, or for the peace or petty trespasses, where the King is not to have a fine, there a justice of peace may make and perswade an agreement between the parties. But otherwise where a fine shall accrew to the King.

Breerton and Townsend upon a Special Day.

T. 12 Jac.

An information by Mr. Attourney against Sir Thomas Breerton, Richard Breerton his brother, and Sir Henry Townsend and his wife, for the suppressing of a will, &c. And all the defendants but Sir Henry Townsend were fin'd to the King, and the Court assest and gave 3000 pound damages, to one Egerton the relator, whose wife was disinherited, &c. And in that case these three points were mov'd and agreed.

First, That process shall issue out of that Court to the sheriff to levy the damages, to the party or to the relator, upon the goods and lands of the parties, and many presidents were there voucht for that point. T. 22 H. 7. Hales against Sherly, H. 10 H. 8. Bradshaw against Suitor. And it was now decreed that process shall issue to the sheriff to levy the three thousand pounds upon the lands of Breerton.

Secondly, It was decreed, that process shall issue against Sir Henry Townsend the husband, to pay the damages for his wife. Note, Bacon the Atturney having extolled the dignity of that Court, where many Kings in person have sate, and is composed of the chiefest Counsellors of State, of the chiefest divines, and of the chiefest sages of the law, and hath a transcenvent jurisdiction, that now if the husband should not answer for the damages against the wife, as in trespass or in an action upon the case they shall, it would be an incouragement to feme coverts, to commit all manner of outrages. But the two Chief Justices and the Chief Baron, and the Lord Knolls were of a contrary opinion in those two points; but they agreed with the others, that the body, goods and land of the party may be taken for a fine to the King, by the common-law, but not by process out of that Court. But upon an estreat in the Exchequer, process shall issue thence, but not for damages of the party. And they gave this answer to the presidents: because in some of them the damages are part of the decree, and given to them that were parties to the sute, but in our case the damages were given to the relator who is a stranger, and by that means he shall be in a better plight than the King; who must stay till his fine be estreated into the Exchequer. And also by the judge-**[104]**-ment, that the husband shall not answer for the damages given against the wife, because it is a criminal and not a civil offence; as battery, slander or assumpsit by the feme covert.

Thirdly, It was decreed by all, that an injunction shall issue against him that stood in contempt, to surcease all suits in other Courts concerning the same thing or cause, for which the original suit was in the Star-Chamber, and also against the same party, at whose suit he stood in contempt in this Court; until he had obey'd the decree: but not a general inction, for all suits, for any thing, against any other person, as the Baron had urged to be reasonable, as well as outlary, or excommunication in other Courts are pleadable by any man, in many actions, a fortiori, for a contempt against him in the High Court of Star-Chamber. And note, that the party grieved was preferred in his remedy for his damages, before the King for his fine.

Hawkings against Harris.

M. 12 Jac.

Harris was fin'd to 200l. for practising with the Maior of Laskree in Cornwall to be unduly chosen to be a burgess of Parliament: and also came in to the common-hall, and sat there upon the Bench with the maior. And although he was elected by the lesser number, yet he took the book and swore himself; and being a justice of peace, shewed a discontent, and threatned in his gesture and countenance, against them that gave their voices against him.

Day against Beddingfield and Others.

Upon a cross bill in that Court between the parties, for pulling down of painted glass, pictures and armes, in a window in an ile of a chapel, in the parish of Wellington in Somerset, these points in the case were resolved.

1. If an inhabitant there, and his ancestors time out of mind, &c. have us'd to repair an ile in a church, and to sit there with his family, &c. and to bury there, that makes that ile proper and peculiar for his family. Otherwise if he had not us'd to repair it at his own cost, but with the charge of the parish. Then the Ordinary may appoint who shall sit there from time to time, notwithstanding a use to sit there, only, to the contrary.

2. If any superstitious pictures are in a window of a church, or ile, &c. it is not lawful for any to break them, &c. without license of the Ordinary; and if any does to the contrary, he shall bind him to his good behaviour, and so it was in Prickets case.

3. That the Ordinary or churchwarden cannot license a parishioner to bury within the church; but it ought to be licensed by the parson; for the frank tenement is in him only.

4. If coats of armes are put in a window, or upon a monument in the church or church-yard, they may not be broken by Ordinary, parson, or church warden, or any other, for the heir shall have his action upon the case for that, 9 E. 4. 14. For they are, and belong to him, 30 E. 3. 9. b. c.

5. If one be assaulted in the church, or within a church-yard, he may not beat the other, or draw a weapon (although it be in his own defence) there, for it is a sanctified place, and he may be punished for that by 2 E. 6. And so if in any of the Kings Courts, or within view of the [105] Courts of Justice; because a force in that case is not justifiable, though in his own defence.

Oliver St. Johns Case.

About Octob. 12 Jac. a commission for benevolence issued to the village of Marleborough, for to collect, &c. And St. John being required to contribute, absented himself, and wrote a letter to the maior, &c. that such benevolences were contrary to law, ve. Magna Charta, cap. 29. and 25 E. 3. cap. 26. and that it is contrary to the oath of the King at his coronation; and that the breach of that was the chief reasons urged by H. 4. against Richard 2. which was the cause of the barons wars, &c. and much to that purpose. And for that, being urged to be near to treason, he was fined to 5000l. But after his recantation he was pardoned by the King, &c. And now the presidents of such a commission, &c. were produced. Note well that case.

Poulton & Al. against Wiseman & Alios.

A bill exhibited upon 27 Eliz. cap. 4. of Fraudulent Conveyances; in which these points were resolved.

1. That where Wiseman had agreed for 1000l. paid by one Thompson to assure

100l. per annum to him, &c. during his own life and his wives: and for assurance of that a mortgage was made, although that Wiseman and others did not pay the money, yet are they purchasers within the statute of 27 Eliz. because they are named as parties in trust for the benefit of Thompson.

2. That the estate which they had upon that mortgage, was a sufficient purchase within the statute.

3. That one entire years profits, which is the penalty of the statute: shall be forfeited without apportionment; as well upon a mortgage as upon an absolute sale. So also upon a lease or a petty annuity made by fraud, &c. One years value of the land shall be forfeited.

4. That every defendant that is found guilty, shall pay a years value of the land, every one by himself; and not a years value joyntly amongst them all. Note and read the statute (Also and every offender, &c.)

5. That the infancy of one of the defendants shall not excuse him of that penalty, he being of 16 years, and privy to that conveyance, and having justified that fraudulent deed to be made bona fide. And for that he shall be punished as if he were at full age.

6. The bill being preferred only upon the statute of 27 Eliz. that the Court of Star-Chamber could not encrease or diminish the penalty of the statute, nor impose a fine for the King. For that the Lord Chancellor advis'd that all such bills should be framed upon a statute, for to have such punishment as the Court of Star-Chamber shall inflict.

THOMAS VALLEY AGAINST RICHMOND. P. 1 JAC.

Intr. M. 43 & 44 Eliz. C. B. rot. 3272.

V. brought on action upon the case against R. because he had inticed his prentice, (he being a tradesman in London) to depart from his service for 6 days: and divers times to take money out of the box of the shop, and play at cards with R. and that R. cozened the apprentice: and it seemed to the Court, that the master might well have an action for [106] the departure, and losing his money is a damage to the master; and the cosenage is not but an aggravation of the offence. And for that the servant himself only shall have an action. But yet in our case because the damages were intire, with a respect to the cosenage, as well as to the departure, the plaintiff could not have judgement, by the better opinion of the Court. And so the matter was referred to arbitrament.

THE LORD NORRIS'S CASE.

Tenant in tayl of a mannor wherein coppyholds are demisable for life, &c. for a certain rent. The coppyholder for life dies, and lord demises it by indenture for 21 years rendring the ancient rent, &c. And by the better opinion of the Court it is good, within 38 H. 8. For it is not any prejudice to the issue as to the rent.

DALBY AGAINST SPOONER.

Intr. H. 54 Eliz. C. B.

It was resolved that a grant of omnia bona & catalla sua. that the goods that the grantor hath as executor to I. S. shall passe, ve. 10 E. 4. 1. 19 H. 6. 4. Plo. 289.

WEEKS AGAINST CARVEL.

T. 44 Eliz. C. B. rot. 1744.

In a replevin, the case was thus. A. seised in fee of burrough English land, demises it to B. his son in tayl, and dies. B. dyes seis'd having issue two sons. And

by the Court it was resolved, that the youngest son shall inherit as well to the tayl as to the fee-simple. So all the issues shall inherit an estate tayl in gavelkind land, ve. Litt. 107. Dy. 176. 26 H. 8. 5. 22 E. 4. 10. b.

Note, that if the debtee makes the debtor and A. his executors, A. proves the will and dyes. The debtor refuses before the Ordinary. And after an action is brought against the executor; and by the Court the debtor may plead ne unq. executor. For he is discharged in law, there being no administration to charge him, ve. 21 Eliz. 4. 81. b. Note, in T. 2 Jac. in C. B. in an action of debt against an administrator, he pleads that the testator was indebted to him; and over and above which sum he hath not to satisfie, &c. And by the Court that is a good plea, and safer than to plead, plene administ. &c. For by that plea it may be tried.

BRADSHAW AGAINST BOKINGHAM.

Intr. M. 44, 45 Eliz. C. B. rot. 155.

It was adjudg'd that if a commoner incloses part of the wast, in which he ought to have common, that by that all his common is extinguished, ve. 11 H. 6. 22. 19 H. 6. 11.

BELLINGHAM AGAINST ALSOPP.

Adjudged, that if the bargainee before enrollment bargain and sell the land to A. and within the 6 months respectively both the deeds are enrolled, that the bargain and sale to A. is not good. And by Walmsly: If the disseisor bargain and sell, and the disseisee release, &c. to the bargainee. And upon evidence agreed by the Court, that if the bargainor continue possession after enrollment, that [107] he is a disseisor. For the statute transferrs the franktenement to the bargainnee.

BACKWELL AGAINST HUNT.

In an accedas ad Cur. in false judgement, where the writ was in propria persona, &c. the sheriff or under-sheriff sends his servant with the writ, &c. And they of the Court of Shrewsbury refuse to certifie. And the Court that the sheriff ought to return it so, that they have refused. Upon which a distringas shall issue, &c. For the writ was well sent by the sheriff with his servant, ve. N. B. 18. a. b.

WALLER AGAINST WEEDALE. T. 2 JAC. C. B.

Intr. M. 44, 45 Eliz. C. B.

In detinue the case was thus. A. had recovered in debt against W. and execution awarded to the now defendant being then Sheriff of Southampton, who takes the goods, &c. and returns a fieri fac. & denarios habeo, but none of the goods were sold before the return, but the sheriff kept them in his hands; and judgement now for the plaintiff. For the sheriff cannot detain the goods taken upon an execution in his own hands, and satisfie the debt of his proper money. But he ought to sell them upon a venditioni exponas, and may return upon his so doing, quod non invenit emptores; for a grand inconvenience would ensue if the sheriff himself might retain them.

HARVY AGAINST GULSON.

Hil. 1 Jac. C. B.

In a replevin, the husband being seis'd in right of his wife, for damage feasant in his own name, and that the other are servants to him, &c. And that was rul'd to be good, without shewing as servants to the wife also.

2. That if A. hath a close next to the highway, and beasts come out of the highway into the close of A. and there-hence they enter into another close of B. adjoyning, and that B. ought to fence, there in default of enclosure, &c. it is a good plea against A. but not against B. or another stranger, &c. ve. 36 H. 6. barr. 168.

BECKET AGAINST BROMELY.

If A. brings partition, and by that demands the 4th part, &c. and if the jury find that they hold pro indiviso: but that A. ought not but to have a 5th part, &c. yet so A. shall not have that which is due to him; for the judgement shall be variant from the demand.

Note that in a quare impedit, if the venire fac. be returned, the plaintiff cannot be non-suited without calling of the jury, but if the venire fac. be not returned at the day, then he may be non-suited upon the roll, without calling of the jury. But otherwise also in the first cause by consent of the plaintiff himself, because consensus tollit errorem.

[108] HOLLAND AGAINST HEALE.

A libel in the Spiritual Court for the tithes of pilchards taken in the sea, and now the party had a prohibition; upon a surmise that the custome there is, that the owner of the fisher-boat, hath one moyety of the fishes, and the fishermen the other moyety, and that the owner hath used to pay the tenth of his moyety in discharge of all, &c, and it was held by the Court to be a good surmise, for by the common-law the parson cannot have the tithes of fishes taken in the sea, because it is not within any parish; and then when the parson, by the custome, ought to have the tithes of them, he ought to take them according to the custome, and that the tenth of the moyety may be a good discharge of the whole. And the parties went to issue upon the custome in Cornhill.

In debt, they had submitted and obliged themselves to stand to the arbitrament of A. who awards that the defendant should pay to the plaintiff 10s. before Easter, and that if the defendant did not perform the said arbitrament, that then he should pay 5l. to the plaintiff, that the ten shillings is not paid, and now the plaintiff brought an action for the 5l. and adjudg'd, that debt well lies for that penalty, for the arbitrator hath power to appoint the assurance, for the payment of the principal, and of the penalty also, being by one entire deed; although that it be by several clauses, ve. 9 E.4. Bro. Arbitram. 9. Although that it was objected, that the thing it self in debate, and not the performance of the arbitrament was the thing referred to arbitrament, ve. 7 H. 6. 40.

NICHOLS CASE.

2 Jac. C. B.

In an ejectione firm. it was observed by the Court for an infallible rule, that, that as may be reduced by a real action, may be reduced by an entry (as in one acree) in the name of more.

WILLIAM GILSON against WRIGHT & ALIOS.

G. brought an action of trespass for the breaking of his seat in the church, and cutting of the timber in small pieces and carrying them away, &c. The defendant pleads in bar, that they were the church-wardens: and that the plaintiff had erected that seat without the licence of the Ordinary, and it was an hinderance to the parishioners, &c. and that they as church-wardens, the said seat, &c. the which is the same trespass. The plaintiff demurs and judgement for him, for admitting that the church-wardens may remove seats in the church at their pleasure, yet they cannot cut the timber of the pew. And thereupon they confess the trespass, ve. 6 E. 4. 7. 9 E. 4. 14. 8 E. 4. 6. 18 E. 4. 8. 21 H. 7. 21. 12 H. 7. 27. 11 H. 4. 12.

DAME POWEL against WEEKS.

T. 2 Jac. C. B. rot. 2716.

In dower it was resolved, that a divorce causa adulterii is no barr of dower. Because it is but a mensa & thoco and not a vinculo matrimonii. And it was said by Daniel that an elopement is not a bar of dower ad ostium eccles. And judgement for the plaintiff.

[109] FORD against LERKE.

An ejectione firm. was brought of an house, barn, & de coquina (Anglicè) a kitchin, and after verdict it was moved in arrest of judgement, that the writ is not good; for the demand is uncertain: for any room by usage may be made a kitchin, &c. And judgement querens nil cap. per bill. ve. 5 H. 7. 9. Franktenement in an upper-room. Pasc. 13 Jac. An ejectione firm. pro cubiculo maintain'd. And Mr. Corbet reader of Furnivals Inn voucht Tri. 2 Jac. B. R. rot. 649. Perk. against Ford, that an ejectione firm. lies pro coquina.

COURT against BLACKMAN.

Intr. Tri. 2 Jac. C. B. rot. 1320.

In trover and conversion, the plaintiff declares that he was possest of the said gelding, and lost it causually, and that after it came to the hands of the defendant at T. in the county of Warwick; and that he knowing, &c. converted it to his own use. The defendant said, that long time before &c. the Archbishop of Canterbury, &c. was seiz'd of the mannor of Harrow upon the hill, in the county of Middlesex, where he, &c. had waifs and streys; and conveys that mannor to the Lord North, and that the said gelding was waif'd there; and he as a bayliff seised it, absque hoc, that he is guilty in the county of Warwick, &c. The plaintiff upon that demurs, because the traverse is to the place. But by all the justices, the traverse is well; because it was a local justification; and it is not lawful to bring an action in a forein county. And in that was voucht 43 Eliz. 506. Purrels case. 34 H. 6. 5. 9 H. 6. 63. 9 E. 4. 45. 22 E. 4. 39. 1 H. 7. 6. A traverse is well taken to the place, &c.

SHERRET against MALLET.

Intr. H. 3 Jac. C. B. rot. 909.

In debt upon an obligation noverint universi, &c. teneri. &c. in 40 libis, &c. for libris, and that was held an ill and insufficient obligation, for liba is a word that signifies a

cake, and the dash does not help it. And one Penroses case was voucht, who was an atturney of the Court, and makes an obligation of 100 litris for libris, and it was adjudg'd an ill obligation. And he was committed to the Fleet for his knavery.

Note, if tenant of the King in capite, makes a gift in tayl; and the donee dies, his issue within age, N. B. 14. 3. b. the King shall have ward. Otherwise of a tenure in chivalry only. And that difference was held by Frowicke in his reading; the which was inroll'd in the Court of Wards by the Kings command. And the law there rull'd accordingly, which reconcil'd the books, ve. Dyer 54. b.

Warner against Agus.

M. 2 Jac. C. B. rot. 2760.

Lessee for years grants all his interest to the lessor by indenture, rendring rent durante termino. And adjudg'd, that that is a good reservation, and that the lessee may distrain for it, and durante termino, shall be construed for all the years. And Littleton, A rent reserv'd to an estranger. That in truth is not a rent, yet it is a good reservation.

Note, faux judgement, brought upon a recovery in antient demean by the ancestor of the defendant, and he prayd his age, and had it; because he was now a terretenant, by the Court: but otherwise if he had been nam'd for conformity only. ve. 9 H. 6. 47. 47 E. 3. 37.

[110] The Governours of Bridewell.

They brought a quare impedit by that name. And in that a case was voucht to be in 41 Eliz. B. R. Lodars case. And indictment alledg'd de facto to be at D. in the county of Oxford, and that the party went from thence to W. in the county of Buckingham, &c. and concludes; and so apud D. in the county aforesaid, &c. that is ill, because uncertain at which county: but otherwise it had been, if it had been, and so apud D. prædict. in com. prædict. that had been good enough.

Harris against Stephens.

A man makes a feoffment in fee to the use of himself for life, the remainder over to B. in fee, with a power to make leases for three lives, &c. rendring the antient rent, &c. and does accordingly, and dies. Quære, if B. in the remainder shall have rent. And the better opinion was that he should. But 'twas not adjudged.

Bridges against Raymond.

In debt upon an obligation to pay a lesser sum. The defendant pleads tender at the day and place, &c. And the plaintiff takes issue upon the tender, which is found against him. And now he prayes to have the money out of the Court. But it was denyed. For he hath lost that advantage, by taking issue upon the tender. And that he was too covetous, and by seeking to gain all, he hath lost all, ve. 21 E. 4. 45.

Eden against Blake.

In covenant, the case was thus. Lessee for years covenants to repair the houses, during the term. And in a covenant brought for not repairing, from such a time

until such a time. The defendant pleads, there was an agreement between them, that the plaintiff should retain 5l. which he ow'd to the plaintiff in full satisfaction of the said decay and want of reparations. The plaintiff demurs, because an accord by parol is pleaded in discharge of a matter in deed, which is of a more high nature, as 10 H. 4. But by the Court adjudg'd a good plea. Because it is for a thing executorie, and is only a bar pro tempore, and not for a perpetual bar of the said covenant, ve. 47 E. 3. 24. and Dyer 338. 5 Jac. B. R. Executor of lessee for life in a writ of covenant brought against him to remove the utensils before a certain day. And he pleads that accord; and it was ill, because he had not pursued the agreement in removing them, and that was Stamford and Luttleys case.

BANKS AGAINST BROWN.

In an ejectione firm. he sues upon a demise of a copyhold by indenture by Sir Francis Knowls. This point was resolv'd, that if the lord of a copyholder for life demisable by ten shill. rent, leases it by indenture to the copyholder, and two other for their lives, rendring ten shill. rent. By which it is with 32 H. 8. Read the statute. And it is not material, although the herriot be lost, because it is meerly causual, ve. 5 Rep. 4.

[111] THE KING AGAINST THE BISHOP OF WINCHESTER, AND DR. HIDE.

In a quare impedit, after evidence given, and the jury departed from the Bar. And it was moved that one of the jury might be drawn. And it was denied by the Court, because the King shall not be prejudiced; because the judgement is salvo jure. But otherwise it is used in the Exchequer upon an information or intrusion.

STACEY AGAINST WIN. SLANE, AND THO. SLANE.

In debt against two. They plead nihil debent, and upon that they wage their law, and a day given, &c. at which day one of the defendants came, and the other makes default, and he that appeared pray'd for to do his law, and it was denied, for the declaration, and their plea, and the wager of law were all joynt, and the default of one now is the default of both.

BRIDGES AGAINST CAGE.

Intr. H. Jac. C. B. 1856.

A sheriff brought an action upon the case for 60l. upon an assumpsit, for extending of land upon an elegit; and judgement quod nihil cap. per breve by the statute 32 H. 6. which avoids that. And in that case by Just. Walmsly, that if a sheriff execute an extent he shall have his fees according to that when it shall be levied, and not according to the debt, or duty recovered. But other sheriff sues an execution who takes the body of the party, and that 35 El. C. B. By the Court that if one sheriff extend land, and before the delivery to the recoverer, he is removed, and the succeeding sheriff delivers it, the last sheriff shall have the fees, lege verba stat. 29 Eliz. cap. 4.

FLETCHER AGAINST MUFFLETT.

In a writ of covenant the defendant pleads performance, and that he was marryed according to the covenant, within 10 days after the date of the indenture. And the plaintiff said that he was not marryed to his said wife, within the 10 days, and upon that they are at issue, which is found for the plaintiff. And it was now mov'd

in arrest of judgment, that that ought to be tryed by certificate of the Ordinary, and not by the country: and adjudg'd that the issue is well tryed, for the time of the marriage is made part of the issue, and that was all tryable by the country, ve. 49 E. 3. 12 H. 4. 9 H. 6. 33. 9 H. 7. 2. And the common-law shall be preferred. 38 Ass. 29. Dyer 313.

ROE AGAINST MATHEWSON.

R. had recovered in debt against A. for which M. was bayl, &c. And in a scire fac. against him, M. said that the record, &c. cum omnibus id tangentibus is remov'd by error; and the plaintiff demurrs, and adjudg'd for him, because it is an ill plea: for the recognisance remains in Court, and is not removed; by which the Court might well proceed, ve. Dy. 32. and 284. and 6 E. 4. 9. By Piggot and Andrews. For a scire fac. is not so grounded, as a judicial writ upon the record, which is remov'd, but upon the recognisance, which is still in Court, and is not as a dependant upon the other, ve. 7 H. 6. 44.

[112] GAMFORD AGAINST NIGHTINGALE.

Intr. T. 2 Jac. C. B. rot. 1402.

In an action upon the case the plaintiff declares, that he was seis'd in fee of Bl. acre, and that he had a way to it by such and such a gate, &c. and that the defendant had fastened the gate with a lock. And upon not guilty it is found for the plaintiff. And now mov'd in arrest of judgment. And adjudged that that action of the case is well brought, and that he is not put to an ass.

1. Because it does not appear if the defendant claims a francktenement in the land, by which, &c. for it may be an estrangers, and then an assize does not lie against him.

2. That is not but a disturbance of a way pro tempore, of which a man cannot have an assize; as where the party meddles with the francktenement. As in digging or making of a ditch. ve. for that 2 H. 4. 11. 14 H. 8. 31. Dyer 319. b.

OSBURNE AGAINST BRADSHAW.

In debt, by an assignee by commission of bankrupts. The defendant pleads nihil debet, and wages his law. And by the Court he may well, although the interest and power to sue in his own name be good to the plaintiff by the Statute of Bankrupts. But otherwise if the duty it self had been originally due by the statute ve. 10 H. 7. 18.

FITZWILLIAMS AGAINST FITZWILLIAMS.

Resolved upon evidence, in an action upon the 5 H. 6. of forcible entry, that if A. had made a lease for years of Bl. acre, and another lease for years of Wh. acre, and he devises all his goods, plate, and jewels (except the lease of Bl. acre) to I. S. that the lease of Wh. acre pass by such a devise, because the intent appears by the exception.

GOMERSAL AGAINST WOODWARD.

Intr. rot. 2912.

G. brought an action of debt of 24l. against W. who after oyer of the condition pleads, that it was seal'd by him and one William Chute, and that after the ensealing, that the seal of William Chute was worn off, and after reaffixed. Per quod scriptum illud vacuum in lege existit. The plaintiff replyes that the said William Chute never seal'd, &c. Upon which the defendant demurs. But judgment for the plaintiff. 3

H. 7. 5. Note by the Court: It is better to plead the special matter than to plead non est factum.

BARNES AGAINST THE LORD MORDANT.

Note, in debt by an administrator. He declares of the administration committed to him at London by the Bishop of Exceter, and yet it is well, for the power of a bishop is not so local as the authority of a justice of peace.

CORNERS CASE.

By the Court, upon evidence of the case by Cooke Ch. Justice by the request of the Lord Treasurer, agreed that an atturney of that **[113]** Court cannot be compelled to be a constable in his county, for the Court shall discharge him, because he is an officer of the Court; but it is not so in the Kings Bench, and otherwise of a solicitor. ve. 1 H. 12.

Note, an attachment was awarded against the coroners of York, because A. was quinto exactus, but they would not give judgment of the outlawry, and an affidavit of that made. And by Millington an ancient atturney. That the coroners of Stafford for such an offence were fined every one 10l. But after the judgment of the outlawry pronounced they may stay the return of the exigent for to be advised, if the case requires.

DAVID MELLER AGAINST SHERFIELD.

In debt against an executor, he pleads that his testator was obliged to B. in a recognisance of 300l. ultra quod he had not to satisfie. The plaintiff demurs, and judgment for the plaintiff, because the defendant had not averr'd, that it was pro vero & justo debito: upon which issue might have been taken, and the executor well knowing upon what defeasance that was made. And by Cooke Ch. Justice it was rul'd accordingly.

GOLDWELL AGAINST NAVENDEN.

In a replevin the case was thus. B. held 50 acres of A. as of his mannor of Swarden by fealty, and 4s. 7d. rent, &c. And C. held 47 acres of A. &c. by fealty, and 3s. 4d. rent. A. by indenture between him the said B. and C. reciting the said several tenures, gives, grants, &c. and confirms the said rents, services, and seniories to B. and C. and their heirs, to the use of them and their heirs, &c. And in that case it was resolv'd, that is an extinguishment of a moyety of every of their tenures: and for the other moyety they hold one of another. And the avowant had judgment accordingly, for there was a cross tenure between them for the one moyety, and that shall not move as a release, reddendo singula singulis, &c. Dyer 319. See and note, 11 H. 7. 12. a. 39 H. 6. 2. 49 E. 3. 40. A recovery against one joyntenant does not extinguish all the seniory, but the actual entry is gone. 27 E. 3. 88. Pla. 47. In the principal case there is not an equal benefit to every of them: for it was said, that if the acres and rents had been equal, that then it should have been extinguish'd in all. Cooke put this report case. A. lessee for life, the remainder to B. for life. The lessor gives, grants, and confirms to them and their heirs. A. shall have all the possession during his life, and afterwards B. shall have all the possession during his life, and one moyety then executed, and after the death of B. the other moyety to A. in fee.

STRAKE AGAINST THROGMORTON.

M. 4 Jac. B. R.

The parties were at issue, the plaintiff sued a venire fac. and before the return of that, the defendant sues another venire fac. by proviso, which was ill, for no default in the plaintiff then. The venire fac. of the plaintiff was not return'd. And now it was held.

First, That if the defendant had lawfully sued a venire fac. by proviso, that yet he could not sue a nisi prius upon that until the plaintiff had made another default and laches in him; that in our case, (that happen-**[114]**-ing) the defendant, by the opinion of the Court, may sue a new venire fac. by proviso reciting in that, that the first erronice emanavit. And so it was ordered, P. 4 Jac. B. R.

Note by Williams, that it was adjudged that perjury upon interrogatories upon a suit in the Court of Requests, that concern a franktenement is punishable, because that concerning frank-tenement was coram non Judice. 14 E. 4. 2 Br. bre. 487.

SHORTS CASE.

Thou hast stollen my timber, are words actionable, for they shall not be intended of trees growing. By the whole Court, for they are then timber-trees.

GARRONS AGAINST BANBURY.

Intrespass for taking of a mare, the defendant justifies that the Lord Stanhop was general post-master of England, and that he made a commission to A. and B. constables of Torrington in Devonshire for to take 4 pegasos (Anglice) post-horses, virtute cujus they make a warrant to the defendant to take, &c. by force of which he took the said mare, &c.

First, It is a good bar notwithstanding that pegasus be a poets fiction: for it is made good by the (Anglice.)

Secondly, Notwithstanding that the defendant hath not shewed the place where the commission or warrant was made: for if the plaintiff had denied it in his replication the defendant might well have shewed it in his rejoynder, ve 21 H. 7. 23. a.

Thirdly, Notwithstanding that the defendant had not shew'd, that the said mare was imployed in the said service. And if he be not imploy'd, the owner hath his remedy by action against the party for mis-using of his beast. And judgment, quod querens nihil cap, &c.

Note, it was moved in discharge of a rescous. The return was, that they, (viz.) A. and B. aforesaid, the baylies ad tunc & ibidem vulneraverunt, &c. and the aforesaid George Ball rescusserunt, without tunc & ib. And upon that the parties were discharged, for the first ad tunc, &c. referr'd only to the vulneraverunt and not to rescusserunt. And the return judg'd insufficient.

BRADLEY AGAINST BENNEY.

Errour upon a recovery in an assumpsit in Bristol Court. There the plaintiff had counted that the defendant was a common carrier by boat from Bristol to Gloucester, and that he had delivered two buts of muskadel, to the defendant, who assum'd to transport it, pro quadam pecuniæ summa. The defendant his assumption aforesaid not caring, &c. the aforesaid buts so long and carelesly kept, that one of them ran

out. And the defendant pleads not guilty, and the issue found against him. And now upon errour, by the Court, the issue was erroneous; for it ought to have been non assumpsit, for the plaintiff replyed upon that chiefly.

[115] Bafford against Ventres.

A repleader after verdict.

In replevin, the defendant pleads that it is his francktenement. The plaintiff replyes, that the beasts escap'd thence by default of the enclosure, &c. The defendant replyes that tempore raptionis the hedge was well repaired. And issue upon that is found against the plaintiff, who now moves in arrest of judgement, that it is not a good issue, for it ought to have been tempore escapii, or intrationis. But by the Court, that was now disallow'd, being mov'd after a verdict. But because, upon view of the return of the venire fac. nothing was indorsed, but the jurors names, the Court awarded a repleader. 5 Rep. 4.

Hudson against Crane.

Upon evidence in battery, Poph. Fenner, and Williams, directed the jury, that if A. assaults B. and in fighting A. falls to the ground, and then there B. beats and wounds him, that that is an assault in B. not justifiable. And so if another had held A. in his arms, and then B. striks him, that assault is a battery in B. not justifiable, &c. and the jury found accordingly. But Yelverton and Tanfield on the contrary, because it is but a continuance of the former assault, and that all is de son assault dem.

Wood against Smith.

In trover many exceptions were taken.

1. Because the plaintiff had counted that the testator had divers goods, without saying notabilia, in divers diocesses, by which the metropolitan had committed the administration to him, &c. and the Court held that count to be good enough, for if the defendant denied it, the plaintiff might give that in evidence.

2. He had counted, that the intestate was possest of divers goods, and of one gelding, and of one mare, of the price of 50s. without any price of the gelding. And yet by the Court good enough, ve. 44 E. 3. 20 a. Rep. 34. 7 E. 4. 25.

Note by the Court, that a creditor cannot, by the custom of London, of attaching, attach a legacy that is to be paid to the party: because it is a spiritual duty.

2. That the Mayor of London being Chancellour there for petty matters, may examine and order matters after verdict. But Tanfield, No more than after judgement: for it is not reason, that after the party hath been at charges of a tryal, that he should lose his advantage by the order of the mayor, ve. 10 H. 6. 14.

Covil against Barton.

Upon evidence in an action upon 27 Eliz. for avowing of fraudulent conveyances, the defendant in his examination in Chancery had deposed that he thought that it had been a good and simple deed, and upon good consideration, and it was resolved by the Court.

1. That a purchasor after such an avowing shall not have an action.

2. That that (thought) or (believing) is not a direct affirmation.

[116] 3. That it is not a voluntary avowing; but the party is compelled to it, by sub pœna, and so not within that statute.

4. That he that had the future interest for years, might have an action upon that statute, as he in the remainder might have an action for forging of deeds, &c. 15 E. 4. 33 H. 6.

PESCOD AGAINST MARSAM.

P. brought an action upon the case, because M. had maliciously caused him to be indicted for stealing of a plank, that usque acquietatus fuit. And by the Court, It is good without saying, legitimo modo acquietatus, in an action upon the case, which lies as well before as after the acquital, for the infamie by the indictment. And that so it was adjudg'd 29 Eliz. B. R. Knight against Ierome. But otherwise it is in conspiracy; as it was adjudg'd M. 40, 41 Eliz. Gooch against Bricket: for there he ought to say, legitimo modo, &c. ve. N. B. 116. 115.

SIDNER AGAINST CALVER.

Note by Tanf. that by the Stat. 13 Eliz. cap. 20. of Non-residency, that if the parson be absent 80 days in a year, although it be at several times (viz.) 10 dayes at one time, and 20 dayes at another time, until 80 dayes, &c. that is within the statute, by which it hath been adjudg'd.

WITTAMS CASE.

In an action upon the case for words, (viz.) If ever man was perjured, Wittam was. And issue upon not guilty, it is found for the plaintiff; and it was moved in arrest of judgement, because that the plaintiff hath not averr'd that any man was perjured. And by Tanfield only in Court, that judgement shall be stayed, for by him it hath been adjudged, that for words Thou art as very a thief as any in Gloucester Goal, is not actionable, without averment that there was a thief in Gloucester Goal. And the reason is, because theft and perjury are such bad things in themselves, that they shall not be intended without an averment, &c.

VAUGHANS CASE.

He brought a writ de droit close in the inferiour Court in nature of an assize, &c. for 50 acres against five defendants, two of the defendants are found guilty of 3 acres, and the other are quit; yet the verdict was entred against them two, as guilty of all the 50 acres, and execution upon that accordingly. And after the five defendants joyn in false judgement in the Common Bench, and aver the matter aforesaid, according to 1 E. 3. cap. 1. and there adjudged, that it was error. And now in error in the Kings Bench it is now adjudged error.

1. Because all the five defendants joyn in false judgement, where it ought to be brought by the two only, &c.

2. By Popham and the rest, that such an averment is not receivable. Read the words of the statute, G. B. 20. L.

[117] Where a judgement shall be revers'd in part.

Note in the argument of Boswells case, 6 Rep. Crooke cited 14 E. 3. Scire fac. 122. where judgement in an annuity was revers'd as to the annuity and damages, and good for the arrearages; and also voucht 38 Eliz. in the Exchequer, Agar against Candish, who was found guilty in an information, tam pro Rege quam pro seipso, upon the Statute of Liveries. He brought errour, and assign'd for errour that the statute 8 E. 4. cap. 2. gives the examination of that offence to the Kings Bench, and the Common Bench. But because the King may chuse his Court to sue where he will for his moyety, stet. judic. as to the moyety of the King. And the information for that good. But as to the moyety of the party, reversetur.

MOLINEUX'S CASE.

The case, as by the arguments of it in Tr. 4. M. 4. & H. 4 Jac. B. R. was thus: A man makes a grant of several rent-charges by several deeds for the youngest sons, and never executes it by livery, &c. And afterwards by his will devises that his younger children shall have the inheritances according to the several writings. And resolv'd that although that the writings and deeds were not parcel or part of the will, but another matter, yet that reference being to the matter in deed, is a good devise of the rent-charge, within 32 H. 6. of Wills.

GRIMSTONE AGAINST STONES.

Int. P. 3 Jac. B. R. rot. 112.

In an information for not repairing to the church, &c. upon 23 Eliz. cap. 1, it was resolv'd, that if the party be convicted upon an information, there the informer shall have the penalty, according to that statute. But if the party, before the information, be convicted of it upon an indictment at the sute of the King, there the King shall have all the penalty to himself, by 28 Eliz. cap. 6, and the informer and the poor shall have nothing. And the defendant in our case pleaded, that he was indicted at the assises, &c. before A. and B. Justices, &c. and it was held a good barr, and that so it was adjudg'd in the Exchequer, and in the Kings Bench accordingly.

THORNE AGAINST ALICE DURHAM.

D. had sued T. in the Spiritual Court for this, that whereas he was of good fame, and kept a victualling house in good order; that the said T. had publish'd that D. kept an house of bawdry. T. now brought a prohibition, and by the Court well, for D. might have had an action for that at the common law; especially where she kept a victualling house as her trade. Note 27 H. 8. 14. And by the justices, that the keeping of a brothel-house is inquirable in the leet, and so a temporal offence. And so was the opinion of the Court. T. 7. Car. B. R. Mrs. Hollands case.

TAYLOR AGAINST PERKINS.

An action upon the case was brought for words, Thou art not worthy to come into any mans company. Thou art a leprous knave and a leper. Adjudg'd that it is actionable, for a leper shall be secluded, &c. N. B. 134. Br. fo. 12. a.

[118] CHALCHMAN AGAINST WRIGHT.

[See *Girdlestone* v. *Brighton Aquarium*, 1878-79, 3 Ex. D. 143; 4 Ex. D. 107.]

In an information upon 23 H. 8. cap. for selling of beer, (viz.) 100 barrels, contrary to the price set down by the justices. The defendant pleads that there is a former information hanging against him in the Exchequer, for the said offence. And adjudg'd a good barr, if it be bona fide; and if it be not bona fide, the plaintiff may avert the fraud, &c.

2. That that statute extends to the successors of the King: although that they be not there expressed.

3. That in reciting the said statute the plaintiff hath counted for a foris faciat dicto Domino Regi, where (dicto) is not in the statute. And for that, as it is now pleaded, that shall restreyn the penalty only to H. 8. who is only named in the Act.

4. That the orders of the justices of the peace for the price, &c. ought to be

publickly proclaim'd and made known to the country, otherwise the brewers cannot take notice of it.

Austin against Moyle.

A. leases by deed to M. for ten years, and M. covenants at the end of the term, to leave four acres of the land fallow'd and plow'd. And in that there was also a proviso that if M. mislike his bargain, that upon a years warning he may surrender his estate. And after M. surrenders accordingly, but had not left any fallow'd. And adjudg'd by the Court, that that acceptance of the surrender hath not dispenc'd with the covenant. Otherwise it had been if the proviso had been in the end of the 10 years; for then if the lessor accepts the surrender before the ten years expires, it is impossible for the lessee to perform the covenant. Judgment that the plaintiff should recover.

Raymond against Harard.

H. 4. Jac. B. R.

Errour, upon judgment, in the Court of Linne, in debt, for five pound upon an insimul computav. And issue was joyn'd upon nil debet. The jury found quod insimul computav. and that H. was found in arrear of five pound. Sed ultra com. prædict. &c. And upon that judgment was given for the plaintiff. And now it was revers'd for this errour. For the jury hath not found any thing of the debet, which was their issue. But if they had found a debet, &c. then the circumstance after shall not impair that. As Dyer 372. a.

Hill against Prowse.

In an ejectione firm. a special verdict was found; that A. was seis'd, &c. and being so seis'd the first of May, &c. fecit, sigillavit, & scriptum suum tradidit & deliberavit, an indenture purporting a lease for life, which follows, &c. This indenture made, &c. by force of which the Lessee entred, &c. And by the Court, that is no good finding of a lease for life. Because they have not found livery and seisin, nor an express demise for life. But after upon search of the notes of the special verdict, it appears livery and seisin was found; but the Clerk of Assize had omitted that in the entring of the postea. Resolv'd by the Court that the **[119]** clark should amend the postea, and then the record should be amended accordingly. ve. 4. rep. 52.

Parrey against Dale.

An obligation was made of 50l. for 50l. &c. And adjudg'd quod querens nil cap. per bill. For it is not a Latine word, and it differs from 9 H. 6. 7. a. wigint. libr. which is good enough. for v and w are all one, and differs in the pronounciation only in English. But M. and N. are several and distinct letters. Note 2 H. 4. 8. nundare for mundare; the writ shall abate. And 14 Assize 1. tenenent pro tenement. The writ abates, &c.

Heigate against Williams.

Intr. M. 3 Iac. B. C.

In an action of trespass, the case was thus. A. had a cross way by prescription to go to Wh. acre over Bl. acre, and after he purchases Bl. acre, and of that enfeoffs I. S. And adjudg'd that the cross way is extinct. Because by the unity the prescription fails. 21 E. 3. 2. 21 Ass. 1. Dyer. 295. b. 11 H. 4. 5. 11.

Fawcets Case.

If a man be indicted for a forcible entry upon 8 H. 6. and before restitution, the force is pardoned by statute or general pardon, that now there shall not be any restitution upon that indictment; for the first force and offence is pardoned. But of the party had brought his action for forcible entry, &c. such a pardon shall not reach the restitution. And by the Court that so it hath been adjudg'd. The Lord Stafford against Sir John Thinne.

Bagshaw against Gawin.

B. brought an action of trespass (quare vi & armis) for his horse pretii 5l. after the 14 of October. The defendant justifies as bayly, &c. for an estray, and that he delivered it to the plaintiff the 16 of Octob. And the plaintiff replies, that the defendant himself the said 16 day of Oct. before there delivery had us'd and work'd the said horse. The defendant demurrs. And it was resolv'd by the Court,

1. That although that it be a general writ of trespass, yet it is good although that the price of the horse be put in, the declaration and the damages may be qualified upon the evidence, and yet the plaintiff may have a special action.
2. That by his acceptance of his horse, be it before or hanging the action, the plaintiff has not abated his writ.
3. That an estray cannot be wrought no more than a distress; for the party hath not any interest, but only a custody of it.
4. That by the using the 16 of Octob. he was a trespasser ab initio (viz.) the 14 day of Octob.
5. That he that seises an estray, may detein it till he is satisfied for his feeding. 44 E. 3. 14.
6. That one may milk an estray cow. So by Noy Atturney General. That it was resolv'd in one Prideux's case, which he vowch'd in Lincolns-Inne Hall 23 March 1633. That a man may shear a stray, but cannot work it. But a cow taken for a distress cannot be milk'd nor wrought, because it is a punishment to the owner, and in custodia legis.

[120] Buchgrave against Heale.

Errour was assign'd, that in debt against an executor, he pleads fully administred, and afterwards relicta verificatione confesses the action; and judgment that the plaintiff shall recover the debt and damages de bonis testatoris, if not de bonis propriis, whereas the damages ought to have been de bonis propriis. For it is no reason to charge the goods of the testator, with damages for the obstinacy of the executor. And 14 H. 8. 12. 32 H. 6. 23. 7 E. 4. 9. And Dyer 185. differs; because there the defendant stood out the tryal. 6 E. 4. It was so adjudg'd in a judgment upon a nihil dicit against an executor.

Harrington's Case.

Errour assign'd upon a judgment in Shrewsbury Court.

1. Because upon the writ of enquiry of damages no day was given to the plaintiff.
2. Upon the return of the writ of enquiry, &c. in was entered continuato processu jurata ponitur, &c. in respect that it is a proper continuance for a pannel to try an issue, and not upon an inquest of office, as so it is. But that ought to be returned to be executed, or that the sheriff hath not sent the writ, because it is not yet executed. And for these errours judgment revers'd.

Note, an indictment upon 8 H. 6. for forcible entry, was quash'd, because it was, & in disseisivit without saying (inde). And by the justices Sir John Parrats case in

the Exchequer, that a pleader that A. was seis'd, & sic seisitus, enfeoffs, B. &c. That is not good without saying, & sic inde seisitus, &c.

Stone against Wakeman.

P. 5 Jac. B. R.

Stone brought an action upon the case against W. for stopping of a way, and issue upon not guilty it is found for the plaintiff, and mov'd in arrest of judgment, because in the county the plaintiff hath prescrib'd that the inhabitants of C. have used to have a common cross way &c. And that he is an inhabitant in a messuage in C. and hath not shewn that C. is antiqua villa. But by the Court that was disallowed, and the prescription held good enough. For he does not claim any right or interest in the cross way, but only an easement. ve. 6. rep. 59. Dy. 70. Yet for another cause by the Court the plaintiff shall not have judgment. Because he hath not shewn how he hath suffered any particular damage or loss by that stopper, &c. ve. 5. Rep. 73. 27 H. 8. 27.

Preston against Love.

Upon evidence in an ejectione firm. by the Court.

1. That if the lessee for years after his term expired takes a new lease for years of an estranger rendring rent, and pays that; yet he remains tenant at sufferance, as to the first lessor.

2. That in such a case the lessor may lease it to another before any entry by him, for it is not out of his possession.

[121] Smalls Case.

By the Court (Poph. being absent) it is clear, that an agreement betwixt the parson and one of the parishoners; that he shall have his own tythes for years, is good enough without deed; but otherwise if it had been for life. And it is a better way to plead that as an agreement, and not as a lease.

Sir Henry Cheverells Case.

A quo warranto was brought against him, ten. divers. libertat. privil. &c. without putting of any certainty, as waife, stray, frankpledge, &c. To which the defendant might make a particular answer. And by the Court that is nought. But Mr. Waterhouse the prothonotary said, that there are presidents accordingly. And therefore a day was given to search the presidents. And in the interim let processe cease against the defendant. N. B. 160. b.

Doctor Atkins against Doctor Gardener.

Doctor Langton late president of the College of Physicians had recover'd for the King and for himself, by the name of Presidens Collegii 60l. and dies. And afterwards Doctor Atkins being made president brought a sciri fac. upon that judgment. And by the whole Court adjudged well. And it ought not to be brought by the executor of Doctor Langton. ve. Dyer 148. a.

Note, the sheriff delivers possession upon a recovery in an ejectione firm. by A. against B. and in the interim B. ejects A. again. And now A. prays new writ of habere fac. possess. And by the 4 justices, because the first writ is not yet return'd,

so that it may appea rof record if it be executed or not; a new writ shall be awarded. And the entry of the first writ shall be quia vice comes non mifit, &c. And by Tanfield that Hastings case was so adjudg'd.

COMYN AGAINST WHEATLY.

Upon error it was resolv'd that an ejectione firm. lies, of a cole-mine. 43 E. 3. 35. An assize lies and was brought for a cole-mine.

THIMBLETHORPS CASE.

Judgment was reversed by errour, because no pledges of prosecuting were found in the first action to prevent the unjust vexation of the party. Dyer 288. N. B. 31. a. 195.

ORCELLS CASE.

The wardship of the body and land of William Rosse was granted to him during the minority; and under the seal of the Court of Wards. And O. frames an indictment against A. upon 8 H. 6. for a forcibly entry in that land. And held, that it is good, although that the King at the full age of the ward, shall award livery to him of that land; and yet for that, the King hath not the possession of the land, but a cer-**[122]**-tain power and interest to make livery. And by Fenner, that a lessee for years of the King hath brought an ejectione firm. and adjudg'd maintainable, 1 H. 7. 17.

BROWNE AGAINST BANKS.

In an ejectione firm. the defendant pleads, that locus in quo, &c. And by the Court it is a good plea, for a writ of habere fac. possess. out of the Court cannot be executed there. ve. 5. Rep. 105. a. b. of antient demean.

Note, a writ of errour was directed, Maiori, Recordatori, & cap. Aldermanno of Evesham, &c. and the mayor and the recorder only return it, and certifie (viz.) placita ten. coram majore & recordatore (without saying) & cap. aldermanno. And for that, the writ was abated, and the party put to a new writ of errour, &c. Quod coram vobis residet, &c. by the Court.

RAYMONDS CASE.

R. was indicted for stopping of a cross way leading from a certain village called Stoake, unto a village called Melton in the county of Dor. And by the Court that was quash'd, because, in the county of Dor. referrs only to Melton, and not to Stoake. And then it is not shewn in what county Stoake is. And for that the indictment nought.

BOLLS AGAINST SIR HENRY WINTON.

M. for natural affection to his son, covenants to stand seised to the use of his son for life, and after his death, to such a woman as he should marry, for her life, the remainder to D. in tayl; and before that the son had married, A. leases that land for an hundred years to I. S. The son marries S. and dies, she enters upon I. S. and leases to B. who being ousted, brings an ejectione firm.

1. That it is a good consideration to raise an use to her that shall be the wife of the son, ve. Plo. 154.

2. That a lease for years by the covenanter to I. S. does not hinder the raising of

the use contingent, ve. Dy. 290. But otherwise it had been, if the covenanter by the same deed had rais'd a power to himself to make leases for years. But in our case the lease for 100 years takes effect as a future interest out of the fee; that was in the covenanter after the estates determined; and at the worst the feme shall have the reversion, and rent during her life; and Williams voucht Ralph Egertons case, where it was judged accordingly. And now judgment for the plaintiff.

WARD AGAINST MATHEW.

A. in consideration of service and other causes gives Bl. acre to B. his servant, and C. my cosin in tayl. And the jury found an intention of marriage at that time between B. and C. which was effected. After B. the husband dies, having issue D. C. takes E. to husband, and they enfeoff D. the issue in tayl. E. also dies, C. re-enters, D. levies a fine sur. conusans de droit, to I. S. and D. after enters upon C. for the forfeiture by the statute, 11 H. 7. cap. 20. leases to W. the plaintiff, who being ousted by M. the defendant, to whom C. the wife had **[123]** leas'd it, brought an ejectione firm. And it was adjudg'd against the plaintiff.

1. For first, for a moyety there is no question, for the gift being before the marriage, D. and C. shall take by divided moyeties. And so it was adjudg'd in the Court of Wards. Edmunds case, upon such a gift by a father of the son upon an intention of marriage.

2. D. the son hath barr'd himself to take benefit of the forfeiture, by 11 H. 7. cap. 20. for levying of a fine. And I. S. the conusee shall not take benefit of the forfeiture, for it was a fine by estoppel only, and no interest pass'd by that. As it is in the 3 Rep. There he that levyed the fine had a real remainder in him. But in our case D. had not but a dry right to the estate tayl, after the death of C. his mother. And so note the difference; and by the Court judgment against the plaintiff.

HANNOCK AGAINST THE EXECUTORS OF CROUTH.

Lessee for years covenants to repair and leave it repaired. He dies, and in a covenant brought against his executors, it was resolv'd by the Court, that release of all actions and demands, does not discharge that covenant, because in a covenant damages shall be only recovered, which are not due, nor a sute lawfull for them, before the covenant broken. And that word demand, as it is referr'd to the action by cause of a subsequent wrong, does not discharge any thing before cause of action for the wrong, ve. Dyer 57. 217. 11 H. 4. 6.

OLDFIELDS CASE.

A. had an acre of land which was in the middle, and incompass'd with other of his lands, and enfeoffs B. of that acre. And resolv'd by the four justices, that B. shall have a convenient way over the lands of the feoffor, and he is not bound to use the same way that the feoffor uses.

COOK AGAINST WALL.

In an audita querela, it was resolved by the Court, that if a debt be brought upon an obligation, and issue (upon nihil debet) is found for the plaintiff. Now the defendant shall not have an audita querela upon a surmise, that it was an usurious contract, For he might have pleaded that in the action of debt.

Note, that a prohibition was granted, where the commissary, at his visitation court, cited many men of several parishes to appear before him there, and for not

appearing they were excommunicated. And a prohibition was granted, because the Ordinary hath not power to cite any to that Court but the churchwardens and sidesmen, and those he may impannel, and give articles to them, for to enquire as the Justices of Assise. ve. N. Br. 41.

HUNT AGAINST FIELD.

Errour assign'd upon judgment given at Worcester. Hunt summonitus fuit ad respondend. R. F. & unde idem querens per B. his atturney, &c. And because the plaint was so short written, so that of it there could not be sense. And if it were taken for the plaintiff that is not good, for idem may have relation to H. as well as to R. F. But otherwise if it had been & unde idem R. F. quer. for it must of necessity have been **[124]** intended of the plaintiff querens. and for that fault judgment was revers'd.

JENNINGS CASE.

It was resolved upon a special verdict, for the avoiding of a lease for non-residency within 13 Eliz. cap. 20. But that statute was not found by the jury, nor pleaded by the party. For if that statute be general, then the Judges shall take notice of it ex officio, and it need not be pleaded.

ROCKWOODS CASE.

The sheriff sues a scire fac. and inquisition to make execution of the goods of I. S. The enquest found that the goods now in question, were the goods of I. S. who in truth appertained to R. And by the Court, the action of trespass is well brought, for that inquisition is not an absolute discharge for the sheriff, but only matter of evidence, for to excuse or mitigate the offence. ve. N. B. 35. 5 Rep. 32.

BAYLY AGAINST CHILD.

An infant by his guardian brought an action for words, I charge thee with felony, and the issue upon not guilty is found for the plaintiff. And now mov'd in arrest of judgment, because it is not averr'd that the plaintiff was of such an age that he might commit felony. But by the Court that was disallowed, and if in truth he be not of such an age, that ought to be pleaded by the defendant, and not averr'd by the plaintiff for avoiding his own action, and judgment for the plaintiff.

REEDHEAD AGAINST HARPER.

An action upon the case was brought in nature of a disceit. That the defendant had sold to the plaintiff certain sheep, and had warranted them to be sound, when in truth they were rotten. The defendant pleads that they were sound at the time of the sale; et de hoc ponit se super patriam. The plaintiff demurrs, and it was adjudg'd for him, because the defendant had taken traverse to the cause of action (viz.) absque hoc that they were rotten. And issue shall not be taken upon two affirmatives. 4 H. 7. 13. a. 1 H. 7. 9. b. c.

WATS & LEE AGAINST OGNELL.

In debt for rent arrear. It was resolved that the fine was levied to A. and B. to the use of A. B. and C. that they are all joyntenants, although A. and B. was in by

the fine at common law. And by 27 H. 8. of Uses. And that in 21 Eliz. it was adjudg'd accordingly upon a feoffment. ve. Dyer 200.

Stanred against Laycock.

In an assumsit the plaintiff declares that the defendant promised to convey Bl. acre (being copyhold land) to the plaintiff by such assurance as shall be devised. And that B. had devised it to be made by letter of atturney to C. to make a surrender in the name of the defendant, &c. to the use of the plaintiff. And obliges for the quiet en-[125]-joying, &c. And that he had tendred the letter of atturney, &c. to the defendant: and that he had refused to seal it. And the issue upon non assumpsit is found for the plaintiff. And now moved in arrest of judgment, that the defendant had not shew'd if the obligation was sealed or not, and that perhaps the jury had given greater damages in regard of that. Yet by the Court it was adjudg'd for the plaintiff. For the obligation is not part of the assurance; and that it is out of the reference to B. and the not sealing it is not accomptible. And therefore it shall not be intended that greater damages were in regard of that.

Nicholas against Loddington.

In a replevin, it was held by Fenner and Yelverton, that the pleader of an atturnment (viz.) that the tenant of the franktenement attourn'd is not good without naming him. For perhaps the tenant of the franktenement ought not to attourn, as assignee of the tenant in dower, 11 H. 4. 19. Crook accordingly. And if issue be joyned upon another point collateral, then such a pleader is well done, and judgement staid.

Sir James Skidnes against Huson.

If an estranger enters my close, and cuts my trees, and carries them away. That I may have trover, although, that after the cutting and before the carrying away, I could not claim them, and no actual possession in me.

Watts's Case.

An indictment upon 8 H. 6. wanted (illicite), and it was rul'd to be good. For disseisivit implies as much. See a president in Lamberts Justice of Peace, 155.

Winksworth against May.

An action of trespass, for a trespass in Wh. acre, the buttals exprest. And upon not guilty, the jury found the defendant guilty, quoad medietatem acræ prædictæ, without any certainty of which moity. And yet resolv'd that the verdict is good in trespass, because damages only shall be recovered. But otherwise it is in an ejectione firm. Because there, there ought to be a certainty, to make the execution of it. And judgement for the plaintiff, 1 H. 7. 9. a. So in the moyety of a mannor, ve. 1 E. 5. In the case of a detinue.

Andrews against The Hundred of Lewkner.

In an action upon the Statute of Hue and Cry, upon a robbery. The plaintiff concludes contra form. statuti, and resolved that it is good, and that shall refer to the statute, 13 E. 3. And that 27 Eliz. is but restrictive, and for the better direction in such cases.

In debt against baron and feme as executrix, &c. they plead payment by the testator, and upon issue it is found against them, and judgement, quod recuperet debitum, de bonis testatoris, and the costs and damages &c. And if not, then the costs and damages, de bonis propriis. **[126]** And in error it was held to be a good judgement; although a feme covert cannot have goods in his own right; yet she may have them as executrix. And so judgement affirmed.

Note by Yelverton and Williams, nullo negante, upon the motion of Mr. Clark, that if A. be lessee for life, the remainder to B. in tayle, and a præcipe is brought against B. If he happens to have a surrender of the lessee for life at any time before the recovery. That then it shall be a good recovery, and the pæcipe is now made good. That was in the case of a common-recovery. And yet to many intents the judgment shall relate to the first day of the term. But a fiction does not destroy a lawful thing. 5 H. 5. 9. A. brought a præcipe against B. for Bl. acre. B. purchases Bl. acre. Now B. cannot plead non-tenure. Otherwise if Bl. acre had descended to B. hanging the action. 35 H. 6. 4. 41 E. 3. 5. a. b.

CULCOE AGAINST SHARP.

A lease was made with a condition to re-enter for not repayring, &c. the lessor, &c. with the consent of the lessee builds a new barn upon part of the land; and the lessee takes a new lease of the said barn. And resolved by the Court, in an ejectione firm. That by the new lease, the condition is suspended. For it cannot be apportioned, and the new lease is surrendred for that part.

GELLYE AGAINST CLARK.

A man comes to an inne and lodges there that night; and in the morning he departs, and says to his hostess that he will return within two dayes, and that he would leave his hamper there, in which were many hatts; and his host promised that they should be safe. He returns accordingly, but in the interim the hatts were stollen, and judgement quod querens nil cap. per bil. Because he was not a guest at the time of the stealing: and the host had not any benefit or profit by the goods being there. But otherwise it had been of an horse. For then the host hath a benefit for the food.

BROWNLOWE AGAINST THE EXECUTOR OF ELLIN LITTLETON.

L. had recovered in dower against B. and damages from the death of her husband. B. brings errour, and assigns errour, &c. hanging which L. dies. It was resolved upon search of presidents, that a sc. fac. shall not issue against the executor for the damages. And there need not a new writ of errour. For that errour does not abate by the death of the defendant in the errour; as our case is. Otherwise if the plaintiff had died. And as to the land there needs not new errour, because by the death of L. the land belongs to B. So in P. 39. El. B. R. Williams against Williams. In errour brought upon a judgement in dower, with the damages. The defendant in the writ of errour dies. The plaintiff brought a new writ of errour ad coram vobis resident, against the executor, who brings a sciri fac. for to have execution of the damages. And the party pleads, that there is errour hanging for the damages. And by the Court, if the plaintiff in the errour, had assigned errour according to the course of the Court, then the plea is good; but otherwise if he hath not assigned errours. For the sciri fac. for the damages, is, for to hasten him to proceed cum effectu in the errour.

[127] MAUNSELL AGAINST ORIAN.

An habeas corpus was awarded to remove them, being imprisoned for not taking the oath ex officio, before the High Commissioners for Conventicles by the statute 1 Eliz. 5. By Justice Poph. That it hath been adjudg'd, that a fine imposed by the High Commissioners was estreated into the Exchequer. And that was levied by process out of the Exchequer, and well. And if they may impose a fine, they may imprison; and that it hath been so used these 50 years, without any repugnancy, if the offence be ecclesiastical, and belong to them.

FULLERS CASE.

F. was of counsel in an habeas corpus with one Ladd, who was committed to prison by the High Commissioners for refusing the oath ex officio, &c. And F. in his argument, said and objected many things contrary to the proceedings of the High Commissioners; for which he was convented before them, and committed. F. brought a prohibition, and in that shewed the antiquity of the Innes of Courts, and that he was a barrester of Grays Inne, and of counsel for his fee, with Ladd. And afterwards F. brought an habeas corpus, and in that Lees case was voucht, that L. being an atturney of the Court, was committed by the High Commissioners, and afterwards was bayl'd, because of his necessary attendance in Court. And that so it was also ruled in one Mittons case in the time of the Lord Dyer. And in that case it was agreed, that the High Commissioners may commit to prison. And Fuller now was remanded.

BUCK AGAINST AMCOTTS.

H. 5 Jac. B. R.

In a prohibition. The defendant said, that in Hornchurch in Essex are chappels of ease (viz.) Rumford and Haveringe Chappels, and that they of Haveringe have used time out of mind, &c. to contribute to the reparation of Rumford: and that in the time of H. 4. virtute literar. patent. & concurrentibus iis, &c. And Rumford was pulled down, and erected in a more convenient place within this precinct and circuit, (viz.) twenty eight foot longer, and fourteen foot broader. Noy, That it does not lie.

1. Virtute literar. patent. in general is not good. But the patent ought to have been shewn in hæc verba or produced in Court; by which the Court might judge: for a new church cannot be erected without letters patents, because it is a sanctuary, ve. 5 E. 3. 26. 1 H. 7. 25. and 22 E. 4. The Lord Lislees case.

2. The prescription is gone, by the erecting in another place, and longer, &c. as aforesaid, ve. 4 Rep. P. 6. And that shall be taken strict, Perkins 761. 7 E. 4. 27. 10 E. 3. 23. But the Court was on the contrary. Because it is pro bono publico, and in such a case a pleader, by concurrentibus iis, is good. As of an union, 11 H. 7. 8. And that the conusans for reparation of the church, appertains to the Spiritual Court. And is not like the case of a tenure, 4 Rep. 86. Because the tenant by that is put to a greater charge; and no profit or benefit accrews to the tenant, as it does to the parishioner. And Easter term ensuing, a consultation was granted by the Court.

[128] SIR ROBERT MILLERS CASE.

Adjudged by the Court, that a man cannot be punisht by the statute of 5 Eliz. cap. 9. for perjury in his own cause, as wager of law, &c. But by that he shall be indicted at common law, and it was commanded to be observed from henceforth; and that it hath been so adjudged.

Note by the Court, that if a warrant of attorney be entred in any term pendente placito, before judgment, that that is good enough; and for that, a certiorari to search in one term particularly is not good; but it ought to be general. For otherwise a judgement may be reversed without cause.

HARIS'S CASE.

He steals cattel, and sell them at Coventry in an open market, and immediately he was apprehended by the Sheriffs of Coventry, and they seised the money; and afterwards the thief was arraigned and hang'd at the suit of the owner of the cattel. And by the Court, the party shall have restitution of the money; notwithstanding the words of 21 H. 8. The goods stollen, &c. and by Crook, that it is usual at Newgate.

HORN AGAINST TAYLOR.

Adjudged, that whereas T. had a way over the close of H. and H. sows that close and leaves a way in another place of that close, within the same close; that yet T. might well justifie to go, where the ancient way was: and is not bound to go in the way that is unplowed: and accordingly it was adjudged, M. 6 Jac. Horn against Woodlacke.

MARY PALMER AGAINST ANTHONY HARSEY.

In an ejectione firm. the case was thus, Lessee for years dies intestate, administration is granted to A. and P. A. by indenture grants that for 3 years to P. the plaintiff, who now brought the action in her own name. And upon that, the evidence being moved for the defendant, the counsel of the defendant offered voluntarily to have it so specially found; but the Court delivered no opinion. But the verdict past against the plaintiff upon another point.

STURGION AGAINST DOROTHY PAINTER.

There was articles drawn between A. and S. (viz.) articles agreed upon, &c. Imprimis, A. doth demise his close to S. to have it for fourty years, and a rent reserv'd; with a clause of distress, &c. In witness whereof, &c. And afterwards there was written in the same paper, a memorand. that these articles are to be ordered by counsel of both parties, according to the due form of law. And because the intent of both parties appeared by that memorand. and the lease was drawn by the counsel, but never sealed, (for the parties disagreed about fireboot) it was ruled upon evidence in an eject. firm. by the Court, that the articles were not a sufficient lease; and the jury found accordingly, without departing from the Barr.

[129] FALDER AGAINST RIDGE.

F. brought trespass against R. in the Kings Bench. And upon demurrer upon plea of the defendant, it was adjudg'd for the defendant. F. brought errour in the Exchequer Chamber, and there the judgement in the Kings Bench was revers'd, but no writ of enquiry of damages might be awarded out of the Exchequer Chamber, by the statute 27 Eliz. cap. 8. Lege. And now F. sues a writ of enquiry out of the Kings Bench, and well; for the first judgement being revers'd is not a barr.

SIR CHRISTOPHER HODSMAN AGAINST JOHN GRISSEL.

Upon evidence to the jury. By the Court that an action upon the case for words lyes against an infant of 17 years of age. For malitia supplet ætatem.

Note by Yelverton. That an executor pays a debt upon a usurious contract. That that is a devastavit. ve. 4 H. 7.

DAVIS AGAINST ANDERSON.

Intr. H. 5 Jac. B. R. rot. 329.

Debt brought against A. by D. in a court baron, and judgement for it, and 44s. 6d. for costs and damages, and upon that judgement there. D. brings it also in the Kings Bench. And judgement by the Court for the plaintiff. See yet 4. Rep. 30. b. which seems to be contrary. But that was for damages given by the statute.

VENTRES AGAINST CARTER.

Errour upon a judgement in Cambridge, because the cause of action is laid to be in a close called Bl. acre, and it is not averr'd, that it was infra jurisdictionem. ve. Kellw. 33. a. 89. a.

2. The judgement was entred, ideo videtur. And by the Court, Judgement shall not be by a videtur. And judgement for those causes was revers'd.

GORE AGAINST STARK.

Two churchwardens sue S. for reparation of the church according to the tax assest. S. pleads he always offered to pay. By which the sentence in the Spl. Court passed against them. Then they appeal, and sentence is repeal'd and 15l. costs given to them, and they sue for that 15l. in the Spl. Court. And S. pleads a release of one of the churchwardens. And in a prohibition it seem'd to the 3 justices, that that release is a barr against the other, and that if it be disallow'd in the Spiritual Court. By the Court it was said a prohibition shall lie. 7 Jac. B. R. rot. 852. A consultation in such a case was granted, for the churchwardens in such a case are a corporation for the benefit, but not for the prejudice of the parish. 13 H. 7. 9. 11 H. 4. 12. And they shall recover the costs, to the use of the church. And the release shall be well enough determined there, where the suit was commenc'd.

Note; if a man sues in the Spiritual Court, prescribing to have a seat in a church ratione messuagii where he inhabits. And upon the **[130]** motion of Serjeant Henden. A prohibition was granted, for it is a temporal thing.

KENDRIDGE AGAINST PARGETTOR.

In a replevin, the plt. shews that there is a field, the franktenement whereof belongs to the plt. and that at certain times of the year the plt. should put in but so many horses only, according to the custom. And that the defendant had common there for his cattel, and that he had distreyn'd the cattel of the plt. there damage feasant, because there were more than 3 horses. And the issue upon the custom is found for the defendant. And adjudg'd that such custom is good, and that the owner of the land or soyl of the waste or common may be stinted for the number of his cattel. But it seem'd that he ought to allege the custom also to destreyn the cattel of the owners of the same land.

THOMPSON & ALII.

They had acknowledged a statute merchant, and judgement was had upon it in the Common Bench, and the land of Thompson only was extended, because the other had

not any thing, now he brought errour in the Kings Bench, and the judgment in the Common Bench was revers'd. And now the question was, if they both may joyn in the scir fac. for to have restitution of that which they lost, and the mean profits; where in truth one of them had not lost any thing, but resolved by the Court that they may joyn, and that the words of the restitution to Thompson only, may be good enough, because he only had sustained the losse. Also both were parties to the first judgement, and to the reversal of it, and by the restitution he that lost nothing shall recover nothing.

Dr. Meadhouse against Dr. Taylor.

A prohibition for a suit in the Spiritual Court, for tithes of rent in London. It was held by the Court, that by 38 H. 8. cap. 12. the sute ought to be before the Mayor of London by complaint in writing, and not by word of mouth only, in nature of a monstrans de droit, declaring all the title. And if the sute be in the Spiritual Court for tithes in London, that Court may grant a prohibition, and yet that Court hath not power to meddle with them.

2. It was resolved, that a reservation by lessee for life, who leases for years to A. is not sufficient to bind him in the reversion, to pay tithes according to that rate.

3. That a rent for half a year, and afterwards for another half year, is a yearly rent within the meaning of the decree. And note, as the same was last let, is not intended last before the decree, but before the demand of the tithes.

Rames against Machin.

In an ejectione firm. by the Court, that a lease for years for an infant to try the title, is good enough, because it is for his advantage. Note 21 H. 6. 31. Letter of atturney by an infant to receive livery and seisin for him.

[131] Heale against The Churchwardens of Hoblton.

They sued H. in the Spiritual Court, for a tax assest, for the reparation of the church. H. sues a prohibition. And after a consultation was granted. Then H. sues an appeal to the superior Court; and then he praid another prohibition. And it was urged, that it was out of the statute. But Fleming and Williams were on the contrary. And that that was within the statute; because it was upon an appeal in the same case.

Secondly, that the rate was made perpetuis duratura temporibus. But all agreed that that is not good to bind the inheritance. But yet it is good by way of direction. How and how much shall be levied as need requires.

Sir Nicholas Pogars Case.

An indictment upon 8 H. 6. was quasht. Because it was in quoddam mess. existens. lib. tenent. in, &c. And did not say, adhuc existens. And for that fault the party was discharged. And it was ruled accordingly. P. 42 Eliz. Br. rot. 27. Stansby against Croxton.

Pinkard against Ridge.

In covenant, P. said that R. demis'd to him for life per dedi & concessi. And that a stranger had an elder title for years, and had entred. The defendant pleads, that the plaintiff had a warrantia chart. hanging against him for that land; and by the Court that was held no plea. For by the covenant he shall recover damages only: but by a warrantia chart. he shall recover in value. And that the covenant well lies. Because an estate for years only is evicted. Otherwise it had been; if all the estate for life had been evicted. ve. 17 E. 3. 28. Covenant 8. also N. B. 134. That such

a lessee shall not have a warrantia chart, but the lessor himself. But he may have a covenant against the heir.

Scaddings Case.

A habeas corpus was awarded for him, being imprisoned in the Admiral Court. And the cause was returned to be, one Eaton being there imprisoned for pyracy. S. excited him to break the prison, and helpt him out with a ladder of ropes. And by Fleming, Fitzwill. and Crooke. That he is well imprisoned there, and the cause good, although that the offence was done in corpore comitatus. For the offence of breaking and ayding out of prison, shall be of the same nature as the principal offence; and for that the party was imprisoned. 1 H. 7. 6. Yelverton was onely on the contrary. And the prisoner was remanded and was not discharged.

B. and two others sues for three several libells in the Spiritual Court, and they joyn in a prohibition. And by the Court that is not good. But they ought to have had three several prohibitions. And therefore a consultation was granted. M. 26, 27 Eliz. C. B. If A. libels against B. for 3 things by one libel, B. may have one or three prohibitions. Note Dyer 171.

[132] In an ejectione firm. it was found by special verdict, that A. tenant in tayl to him and his heirs males, and the remainder to B. in fee. B. by deed enrol'd bargains and grants to Queen Elizabeth, all his estate, title, interest and demand, habend. for the life of the said A. and after his death, so long as he had issue male of his body; with a proviso, upon payment of 20s. to be void. A. suffers a common recovery, and dies without issue. B. tenders the 20s. and resolv'd that that recovery by A. hath barr'd the remainder in fee; for the grant to the Queen was void: for it was impossible that ever it could take any effect, by that grant to the Queen. And issue in the grant, shall be intended issue male inheritable to the tayl, and shall not be intended of a son of the daughter. And this case was put by the justices. Land is given to A. and his heirs, so long as B. hath issue male, &c. B. dies his wife being big with a son, who is afterwards born. Yet the estate of A. is determined; and judgement was given accordingly.

Dentons Case.

An action of debt was brought upon two obligations. And the defendant pleads, non sunt facta, or per minas. And adjudged good by one plea.

Whitehead Darcyes Case.

An indictment of riot and battery, &c. contra formam diversor. stat. it was rul'd to be good, although he does not express any statute in certain: and the Clerks of the Court said, there were divers presidents for that.

Sanders against Partridge.

An ejectione firm. was brought of a boylary of Salt. and there was no doubt of it. But the case was argued upon points upon the Statute of 27 Eliz. of Fraudulent Conveyances.

In a long prohibition, it was agreed by the Court, that a coppyholder of an inheritance may prescribe in the name of his lord to be discharged of tithes. And that in 44 Eliz. Crowch. against Fryer, it was adjudged accordingly. And Serjeant Hatton

voucht Brewer and Veyseys case, in an action of trespass in the Exchequer, that if the parson of a church which is not impropriate leases his glebe, the lessee shall pay tithes. But otherwise if it had been an impropriate church, because of the Statute of 32 H. 8. of Dissolutions. And that it was rul'd accordingly. Note Dy. 43 a.

PARKER AGAINST HEBLETHWAIT.

D. had recover'd in the Court of Rye within the Cinque-ports. And now brings debt also upon that recovery, quod cum debet. per legis cursum recuperasset, without more of the proceedings there. And it was doubted if that was good. Such a count in a sciri fac. is good, ve. 9 H. 6. 49. 18 E. 4. 7. Plow. 47. And so it has been tryed. And by Henden that the recital of any particular of the proceedings of the other Court is not traversable. 21 E. 4. 54 H. 5. Jac. B. R. rot. 229. Davies against Anderson. And now in our case, issue is taken upon nul teil record. **[133]** And the writ was directed to the warden of the Cinque-ports, that he should use the best means to the Mayor of Rye to send the record; who returns, that the mayor hath certified him, quod habetur tale recordum, in hæc verba; but he hath not sent the record it self. And for that insufficient.

HUNTER AGAINST MOONE.

An information was brought upon 5 Eliz. cap. 4. (for using the trade of a dyer, whereof he had not been an apprentice) at the Quarter Sessions in Southwarke, and was removed by certiorari, and traverse taken; and upon the evidence it appear'd, that the defendant was a feltmaker; and that the feltmakers for the space of 60 years last past, have us'd to dye felts: and many haberdashers deposed, that the colours dyed by them, was better than that which was coloured by the common dyers. And it was adjudged by the Court, that that is part of their trade of feltmaker. And the jury found accordingly for the defendant.

PRIDAM AGAINST TUCKER.

An action upon the case was brought for words, Thou art an healer of felonies, and adjudged maintainable, because in Devonshire where, &c. Healer signifies the same as hider or concealer. And the proverb there is, The healer is as bad as the stealer.

PHIMMER AGAINST HOCKETT.

An ejectione firm. and a tryal at Barre. The plaintiff had declared of a lease made to him by baron and feme; and that he being out of possession, they had made a letter of atturney, to enter and to deliver that lease, and that they sealed and delivered it. And now ruled, that the the declaration is naught; because it is not the lease of the wife, but of the husband onely; and that so it hath been adjudged in one Riches case. And that the letter of atturney of the wife is void, because it is only executory. And the counsel of the plaintiff confest, that it hath been adjudged accordingly.

SIR WILLIAM HALL AGAINST ELLIS.

T. 7 Jac. B. R.

[See *Stileman-Gibbard* v. *Wilkinson* [1897], 1 Q. B. 762.]

E. farmor of a rectory impropriate, libels in the Spiritual Court pro sedile in dextra parte Cancellæ, and in his additional libel, he libels pro loco primo, and principally in

dextra parte Cancellæ. The defendant there surmises to have a prohibition, quod est antiqua parochia & antiqua Cancella; and that he is seised of an antient messuage in that parish, and that he and all those, &c. have used to sit in dextra parte Cancellæ prædict. to hear, &c. And it was resolv'd by the Court.

1. That of common right, the parson impropriate, and per consequens his farmor ought to have the chief seat in the chancell; because he ought to repair it. But by prescription another parishioner may have it. But in our case a consultation was awarded, with a quoad, &c. because the libel and the additional that now is all one, is pro primo loco, &c. and the surmise is only pro sedile in dextra parte, and not pro loco primo in it.

[134] CHRISTOPHER DEANS CASE.

By the Court, that if an archdeacon make a general mandat for the induction of a parson (viz.) univers. personis vicariis clericis & literatis infra archidiaconat. meum ubicunque constitut. That if a minister or a preacher who is not resident within that archdeaconry, makes the induction, yet it is good. And the opinion of the four doctors of the civil law was shewn to the Court accordingly, upon a special verdict.

BRICKENDINE AGAINST DENWOOD.

It was found upon a special verdict, that the parson of the parish makes a collector of tithes, and that A. had licenced a parishioner to carry away his corn, without setting forth of tithes. By the Court clearly, that licence is void. ve. 5 E. 3. 63. Plou. 104. That a collector of rents cannot make an acquittance and discharge them. And a consultation was awarded.

LOUCHES CASE.

Errour was brought to reverse a common recovery had against an infant, and upon that scire fac. ad audiend. errores, estrep. was pray'd. And by the Court allowed, because it lies in the original writ, see likewise in a writ of entry in the post.

Note, an action upon 5 Eliz. cap. 14. for forging of an obligation. And upon not guilty it is found for the defendant. And upon the motion of Hitcham, it was ordered by the Court, that judgment should be staid, because the action is brought only in the name of the party, and not tanquam pro Dom. Rege, &c.

Note, it was said by Williams, that upon judgment in a scire fac. judgment does not lie in the Exchequer Chamber, by 27 Eliz. cap. 8. For that action is not mentioned in that statute.

Note, in an action upon the case for words. If the defendant plead not guilty, and the jury find part of the words, the plaintiff shall recover. But otherwise if the defendant had taken a traverse to the words.

BROWN AGAINST BARWICK.

Errour was brought upon judgment in an account.

1. Because the judgment gives to recover damages. But not allowed. For the defendant hath delayed the plaintiff, and pleaded to the issue, which is found against him. So occasione interplacitandi he shall recover damages. But otherwise if the defendant comes the first day, and enters in the accompt taken, for to make accompt 2 R. 2. accompt 42. 5 E. 3. 40.

2. Errour was assign'd, because upon the first judgment quod computet, it was entred defendens in misericordia, and upon the second judgement also defendens in miser. and so twice punish'd. But that was not allowed, because there were two several judgments. And Manwood said that so it was adjudg'd between Brown and Marsh.

[135] BREERTON AND HIS WIFE.

They brought an action upon the case upon an assumpsit to the wife, dum sola fuit against 3. By the Court it was rul'd.

1. That if 3 assume, and one dies, the survivors shall be charg'd. But if they are alive the action shall be brought against them all.

2. If 3 assume to pay or give, &c. upon request, &c. If the request be made to one of them it is good.

AYRES AGAINST OSWALL.

An action upon the case for these words, Thou art a thief, and hast stollen my appletrees out of my orchard. By the Court maintainable. But otherwise it had been if he had said, for thou hast stollen, &c.

BRUMLEY AGAINST TODD.

T. assumes, that if B. marries his servant, &c. that he will give him 50l. And the plaintiff in the assumpsit shews, that he had taken the servant to wife, and that the defendant licet sæpius requisit. hath not pay'd, &c. And it was moved in arrest of judgement, that the plaintiff hath not shown, that he had given notice of the marriage to the defendant: and yet judgement was given for the plaintiff. And a president was shewed in 34 Eliz. An assumpsit to pay 100l. at the day of marriage, and no notice was shewn, and yet good, and affirm'd upon errour brought.

STONE AND ALII AGAINST BROWICKE.

Two tenants in common (and so expresly said in the declaration throughout) bring an action upon the case against B. for stopping of a river, so that it overflowed the meadow whereof they were tenants in common. And well, for that is but a trespass upon the matter; in which they may joyn. But in forging of false deeds or slander of title: they ought to sever. For that prejudices them with respect to the inheritance, and franktenement. And so 'twas now adjudg'd.

SYMONDS AGAINST BARHAM.

Errour upon a judgement in the Common Bench in an ejectione firm. brought by a gardian in soccage, because he has not shewn in the writ that the heir was within age at the time, &c. But by the Court it is yet good. And judgment affirm'd. But note that the nonage of the heir appears in the declaration 14 H. 4. 13. bre. 471. 17 E. 3. 30. 22 Eliz. C. B. rot. 733. Ass.

LOYDS CASE.

M. 7 Jac. B. R.

A rescous was returned against Evanum alias Jevanum Loyd, which appears upon the exigent. And by the Court the rescous is naught, because he cannot have two Christian names.

JOHN RIVET AGAINST DOWE.

The lord may distreyn the copyholder for the services, or he may seise the copyholders land.

[136] CHAMBERS'S CASE.

A prohibition was awarded to the Court of the Bishop of Oxford. For that, that Ch. was sued there for a perpetual charge impos'd upon his land, for the reparation of the church. For by the Court, an inheritance cannot be charg'd with that.

COX AGAINST SMALL.

The plaintiff brought two actions upon 2 E. 6. for treble damages, &c. and he is non-suted in one action, and discontinues the other, and by the whole Court that the defendant shall not have costs, by 8 Eliz. cap. or 4 Jac. cap. 3. Because if the plaintiff had recover'd he should have recover'd but the treble damages only, by the statute.

Note, an executor brought an action of debt upon an obligation to the testator, and is non-suted. And by the five Judges, the defendant shall not recover costs, by 4 Jac. cap. 3. for although that the words are general; yet they ought to have a general construction. And that in M. 3 Jac. B. R. upon 8 Eliz. cap. 1. It was so rul'd.

FORD AGAINST POMROY.

H. 7 Jac. B. R.

Baron & feme lessees of a parsonage, &c. The parishioner sets forth the tithes fraudulently, and presently takes them away again; as it appears upon the evidence. And the husband only brought the action, upon 2 E. 6. for the treble damages. And it was resolv'd, that debt lies for treble damages, upon such a fraudulent setting forth of tithes, although that the clause of treble damages speaks nothing of fraud.

2. But it was resolv'd, that the husband and wife ought to have joyn'd in the action. Because it is not for a thing in possession. And if the husband dies the wife shall have the damages, and not the executor of the husband.

DARSON AGAINST HUNTER.

Intr. Tr. 7 Jac. rot. 234.

Copyholder had us'd to have common. The lord by deed grants and confirms to him in fee. And adjudg'd that the common is gone. For the custome for the common was individual from the copyhold estate; which is now gone by the confirmation. And so it was adjudg'd for a custome to have loppings of trees for estovers in M. 32, & 33 El. rot 367.

BEADE AGAINST ORME.

P. S. Jac. B. R.

Upon the traverse of an indictment upon the 8 H. 6. of forcible entry: and upon the evidence, amongst other things it was resolved.

1. If two come to make a forcible entry, and one of them breaks open the door of

the house, and 2 or 3 hours after, the other enters peaceably, without a weapon, the door being open: yet it is a forcible entry by him.

2. That is a forcible entry, although no person being in the house **[137]** at the time of the entry; if that be an ordinary dwelling house, &c.

3. By Yelverton, That the putting back of the bolt with his hand, or drawing up of the latch, is a forcible entry; which was granted.

Note, it was ruled in full Court, if a sentence be given in the Spiritual Court, and costs taxed, and the defendant brings an appeal: yet if the sute did not appertain originally or properly to them, as tithes of trees spent in fewel: a prohibition shall be awarded as well to the costs, as to the principal sute. Notwithstanding that the 32 H. 8. cap. 7. says, that the Ecclesiastical Judge shall compell the appellant forthwith to pay costs. This is, when the case appertains properly to the Spiritual Court.

OKELEY AGAINST SALTER.

In an action of trespass against the churchwardens, where by the statute 43 Eliz. cap. 2. If for a distresse taken by them, for money for the relief of the poor: trespass be brought against them, and verdict pass for them, the defendants shall recover treble damages, with their costs, and that to be assest, &c. by the same jury, or by writ of enquiry of damages, it was resolv'd,

1. That the costs shall not be trebled but only the damages.

2. The treble damages are well assest by the jury, although that it be not done by the Court. Because the words are, (by the same jury to be assest) and not damages to be trebled by them.

SIR RICHARD FRANKS CASE.

The very point of Hargraves case, 5 Rep. 31. was agreed and resolv'd. And that that case was after revers'd in the Exchequer-Chamber, but it was for another cause. And Williams said, that he had view'd the very record of that case accordingly: in which case is, if A. brings debt against B. as administrator to I. S. without saying that I. S. died intestate. But yet it is good. For it may be that I. S. made a will and testament, and yet administration might be committed to the defendant by refusal, &c. But otherwise it is where the plaintiff is administrator. There he ought to shew that the party died intestate.

SIR JOHN RATCLIFF AGAINST DAVIS.

[See S. C. Cro. Jac. 244.]

In trover and conversion for a hat-band set with diamonds. The case was this, R. pawns it to A. for 25l. without any day certain for the redemption; A. delivers it to D. A. makes B. his executor and dies, R. tenders the money to the executor, who refuses it. R. demands the hat-band of D. who also refuses; and R. brought an action of trover: and it was resolv'd,

1. That the goods pawn'd without any day of redemption, are not absolutely gone, by the death of him to whom they were pawned. But otherwise by the death of him that pawn'd them, ve. Litt. 334.

2. The tender to the executor, although it be not any payment in fact, and the request after to the defendant, vests the property of the pledge in the plaintiff. And so adjudged.

A. gives in tayl to B. an alien, the remainders to C. in fee. B. suffers a common recovery: and after office is found, the alien dies without issue. Yet that recovery shall bind C. in the remainder.

[138] NOTE MANY PRESIDENTS, THAT BY DETERMINATION OF COMMENDAMS RETINERE, BE IT BY DEATH, RESIGNATION, TRANSLATION, OR OTHERWISE, IT BELONGS TO THE KING TO PRESENT.

By Resignation.—John Flower was presented by the Queen 21 Eliz. 159. to the Prebendary of Caddington Major, from St. Pauls London, after resignation by John Bishop of Rochester, who held it by commendam retinere.

Andrews was presented by the Queen 31 Eliz. 1599 to the Prebendary of North Masham in York, by resignation of the Archbishop of York; who had a commendam retinere.

Richard Renninghton, &c. 23 Eliz. 1600. to the Archdeanery of the East Riding in York, by resignation of John Bishop of Carlile; who had a commendam retinere.

Morgan Jones, &c. 39 Eliz. to the treasurership of Landaff, by resignation of Gervas Bishop of Landaff.

John Goodwin, &c. 33 Eliz. to the rectory of Morton, by resignation of the Bishop of Bangor, who had a commendam retinere.

By Death.—John Underhil, &c. 27 Eliz. to the rectory of Northapp, by the death of the Bishop of Bangor, &c. Asaph.

John Robins, &c. 36 Eliz. 1794. to the rectory of Kenne, by the death of John Bishop of Exceter, &c. Devon.

Thomas Jones, &c. 43 Eliz. 1600. to the rectory of the castle, by the death of William Bishop of St. Asaph. Asaph.

David Humphrys, &c. 43 Eliz. 1600. to the rectory of Lismaine, by the death of William Bishop of St Asaph. Asaph.

Dr. Eden, &c. 43 Eliz. 1600 to the prebendary in the church of Hereford, by the death of Godrey Bishop of Gloucester, &c. Hereford.

William Heltar, &c. 45 Eliz. 1602. to the vicaridge of Haverton, with the chappel annex'd to it, by the death of John Bishop of Downe and Conier in Ireland, &c. Devon.

Thomas Playford, &c. 3 Jac. 1606. to the rectory of Clayham, by the death of Anthony Watson, Bishop of Chichester, &c. Surrey.

By Translation.—Walter Bennet, &c. 4 Jac. 1607. to the rectory of Little Wittam, by the translation of Dr. Ravise of Gloucester to London. Berks.

John Barham, &c. 8 Jac. 1611. to the Bishoprick of Landrich, by the translation of Henry Bishop of Gloucester, to Worcester, &c. Kent.

William Powel, 15 Jac. 1618 &c. to the rectory of Lambeth, by the translation of Doctor Goodwin from Landaff to Hereford, &c. Southampton.

Christopher Foster, 11 Jac. 1613. &c to the rectory of Calborne, by translation of Dr. Hampton of Derrey in Ireland, to the Archbishoprick of Armagh. Southampton.

By Determination.—Dr. Hugh Gray, &c. 42 Eliz. the rectory of Meanstock by promotion of Dr. Cotton to Sarum, who held it for two years, by commendam retinere, &c. Southampton.

Dr. Donne, &c. 14 Jac. to the rectory of Savenoke, by promotion of Dr. Milburne to St. Davids, who held it by commendam retinere for a year. Kent.

There are infinite numbers of such presidents.

[139] Mich. 4 Jac. C. B.

The parson and churchwardens in London by the custom are a corporation, and the parishioners time out of mind, &c. have used at a certain day in the vestry to elect churchwardens, they elect A. and present him to the archdeacon, who refuses A. and forbids him to exercise the office of a churchwarden, because the parson pretended, that by the new canon the election of a churchwarden belong'd to him to dispose, &c. and exercise the office of churchwarden. And A. is sued ex officio in the High Commission Court, amongst other things touching that, A prays a

prohibition, because the canon does not take away the custom. Also it would be very mischievous if the parson should elect whom he please to be churchwarden. And the parson and churchwarden being a corporation, then they may dispose of the goods and lands of the parish as they please. Cook Chief Justice said, that a convocation hath power to make constitutions for ecclesiastical things or persons. 20 H. 6. 14. 21 E. 4. 46. But they ought to be according to the law and custom of the realm. And they cannot make churchwardens that were elegible, to be donative, without Act of Parliament; and the canon is to be intended where the parson had nomination of a churchwarden before the making of the canon. And now rule was given for a prohibition, if cause be not shewn to the contrary, &c. ex motione. Serjeant Foster.

Note, it was mov'd in arrest of judgment by Sherley in an assumpsit. The plaintiff declares of a promise made at D. to pay 10l. to S. &c. and issue joyn'd upon non assumpsit. And the visne was awarded from S. where it ought to have been from D. And for that judgment was arrested, for that is material and not ayded by the Statute of Jeofayles. By the Court: But it had been good, if the issue had been joyn'd upon the payment.

Andrews against Lakin.

In trover the plaintiff, P. Jac. 4. upon the imparlance roll he declares of a feather-bed, and T. 4 Jac. he declares of a feather and flock bed. And upon the general issue it is found for the plaintiff, and 6l. damages given. And Walmsly and Daniell only in Court, that the plaintiff shall not have judgment; for the writ is general, and demands nothing in certain, but the declaration upon the imparlance roll, is the original and warrant of the second declaration. So that the addition of the flock bed is ill, and the damages are intirely given. And for that the plaintiff shall not have judgment.

Sir Richard Vernon's Case.

Debt against A. B. and C. by 3. several præcipes, and is at issue upon non est factum with A. And when the jury returned to give their verdict, the plaintiff is non-suited. And the entry was non prosequitur de verdicto habendo. And by the Court that is most barbarous, for it ought to have been non prosequitur bre. suum, and the non-sute against one is the non-sute against all. But otherwise of a discontinuance as to one, &c. ve 7 H. 6. 27. 21 E. 3. 36. 27 E. 3. 87. And another day the opinion of the Court was, that if a trespass be brought against two, & non prosequitur against one, that is a retraxit, and may stand against the other. Note, the reason was because of the benefit of the King; for if he ought to be found guilty of a trespass, being vi & armis, a fine is due to the King.

[140] Note, Harris mov'd to pass a common recovery, in which an infant was vouch'd. Cook Chief Justice, that a common recovery is the common assurance, and is a forfeiture of the estate. 1 Rep. 15. And by that means the wisdom of the law, for tryal of nonage shall be ousted, and the examination of the infant taken away. And he was against it, M. 3 Jac. B. 4 Jac. So was the opinion of the whole Court. And Cook then said confidently, that that shall not bind the infant. So also he affirm'd P 6 Jac. And said that Popham held accordingly.

Summers Case.

A variance of the juror in the venire fac. and in the postea leronimmus with one (m) too much. The venire fac. cannot be amended. But Cook said that it shall be taken for leronimus without any amendment. Also a writ of errour awarded to the Justices of Assize before whom the judgment was given, was good.

Edwards's Case.

He was found to be a bankrupt by 13 Eliz. 7. And was committed to the Fleet, the warrant to the warden of the Fleet was, to return and keep in prison, to answer and to satisfie all such matters as shall be objected against him. The question now was, if the commissioners may licence him to go at large to treat about his debts. By the Court, If the warrant had been, that the party should have been in execution, then he could not be inlarg'd; but the Court advised them to take security, lest he should withdraw himself: but if one had judgment against a bankrupt, and upon a habeas corpus brought he is committed in execution, without a cap. utlagat.: then the commissioners cannot deal with him any more, for to inlarge him.

Oldfeilds Case.

In an assumpsit upon a general issue it was found for the plaintiff. Hutton mov'd in arrest of judgment, because it appears by the declaration that the plaintiff sold clothes to A. &c. 20 Decemb. And the plaintiff there present assum'd, that if A. did not pay, he would, &c. And it appears also the 20 of Jan. ensuing, the plaintiff had accepted of A. a bond for all the sum upon the contract, by which the contract is determined, and discharged: and by consequence the assumpsit of the defendant, which depended upon it. By the Court then the judgment shall be stayed. For it is all one, as if A. had paid it, or the plaintiff had releas'd the debt due upon the contract. But Altham of the other part shewed, that upon the contract the agreement was, that A. shall pay in hand 13l. and that he should make a bond after for the residue to the plaintiff. And in consideration that the plaintiff would suffer A. to have the clothes, and for 6d given in earnest he assumes. So that the bond is pursuant and part of the contract, and agreement, and does not destroy it. Then by the whole Court judgment shall be entred for the plaintiff, saying to the defendant, your word is better than the others bond, and rule for judgement accordingly.

[141] Sir Fulk Grevill against Stapleton.

In a replevin, it was found by special verdict a private Act of Parliament 27 H. 8. for intailing lands, &c. called Littlewood, alias Littwood, to the ancestor Sir Henry Grevill, with a restraint to make leases but for one life, rendring the ancient rent. Or for a joynture to his wife. And they found also the statute 32 H. 8. cap. 28. And the question was, if the statute 32 H. 8. hath taken away the restraint of the statute of 27 H. 8. which is particular, and 32 H. 8. being general, and in the affirmative. And by the Court, not. ve. 21 H. 7. 17. And that it was adjudged by all the Justices of England, that it is in the original, but not in the printed book of the Lord Dyer. And that 16 R. 2. cap. 5. of a premunire, hath not taken away the statute of W. 2. And that the estate tayl is not forfeited by that. But yet it is forfeited by 26 H. 8. cap. 13. for treason. Note the words of that, any estate of inheritance; which is strong and precise. I may enter upon my villain, if he be enfeoff'd, notwithstanding the Statute of Marlbr. And that if I bring an action against him, he shall be infranchis'd. And the word (notwithstanding) in 32 H. 8. is, as to the estate tayl; but not as to the particular statute. And the Statute of Glocester does not extend to waste in ancient demean, ve. 1 H. 7. 13 Dy. 48. b. That he shall not alien an estate in fee.

2. If the rule be for judgment, per hunc & tunc, and after one of the parties dies, such a rule cannot be given after, as to a continuance to another day, because there is none that can appear for him that is dead.

3. But because the prisell was laid in Littwood, and the jury found the intayl of Littlewood, alias Littwood, without saying that the entail was of the lands aforesaid; or that, Littlewood, or Littwood, are in one and the same place: for that fault only judgment was given against the plaintiff. Note an inference by Harris, upon Sir

George Browns case, that a joyntress in tayl, by 11 H. 7. cannot make leases for three lives. But the Court was on the contrary.

BENDICK AGAINST THATCHER.

B. had recover'd in the Common Bench against T. by judgment. T. petitions the King to refer the matter to three justices. They make an award. B. will not stand to it. T. sues him in the Court of Requests, for performance of an award. B. confesses the reference, but denies his consent to it, or assent of the award. And yet for not standing to that award, he was committed to the Fleet by the Court of Requests, and now B. brought an habeas corpus.

And by the Court this difference was agreed, when the party submits himself to an arbitrament, by an extrajudical course, as by consent, there he cannot be sued in equity, or imprisoned for non-performance of the award; unless he hath any time agreed or assented to it. But when by any Court the matter is referr'd to gentlemen of the country, and the party will not stand to it, the Court may commit him. For upon the matter, that was the award of the Court. So that now in our case B. was let out upon bayl; yet the Court would not grant a prohibition to the Court of Requests. And Cook Chief Justice (in that difference before) said confidently, that the party might have an action upon the case, if the other would not perform the arbitrament; by which he is damnified, quod nemo dedixit.

[142] SMITH AGAINST PAYTER.

A writ of covenant was brought in London, and the breach was alledged in Hertfordshire. The plaintiff had judgment upon a nihil dicit. By the Court, and the prothonotaries said, that the writ of enquiry of damages, shall be awarded to London, and not to Hertford; for the action is laid in London; although that the thing, in which the breach is alledg'd, was meerly local, because damages only are to be recover'd, as in trespass in London the defendant pleads a release, &c. at Hertford, that shall be tryed in London. And that is but a jury of office, whereof no attaint lies.

CALCHMANS CASE.

By the Court. If an obligation be taken in the name of another to the use of a bankrupt, the commissioners may well assign that; unless the other party hath of his own mony paid and satisfied debts due by the bankrupt. In consideration of that also creditors within 13 Eliz. are intended, for merchandizes, &c. and not creditors upon counter-bonds. And the commissioners shall judge of that. For if they make an assignment to such creditors, such allegations afterwards come tarde. For the statute vests the thing assign'd in the party to whom, &c.

GRAY AGAINST BRISCOE.

[See *Turner* v. *Moon*, [1901] 2 Ch. 830.]

B. covenants, that he was seis'd of Bl. acre in fee-simple, where in truth it was copy-hold land in fee, according to the custom. By the Court, the covenant is not broken. And the jury shall give damages, in their consciences, according to that rate, that the country values fee-simple land, more than copy-hold land.

STRANGE AGAINST FOOTE.

Intr. P. 2 Jac. C. B. rot. 1320.

The sole point upon the special verdict was, if one Prideux being admitted and instituted to a prebendary, with the cure, 4 Eliz. he being but of nine years of age. Notwithstanding the statute, it is meerly void. Note 4 H. 6. 3. That if the feme of an infant, under 14 years, had issue, it is a bastard.

ABIGALL BAKER AGAINST MOUNFORD.

In an ejectione firm. the point was, The patron takes an obligation of the clerk (which he presented) that he should pay 10l. to the son of the last incumbent, so long as he should be a student in Cambridge unpreferr'd. By the Court, adjudged that that was not simony. Otherwise if it had been to have paid to the son of the patron. Foster Justice voucht the Earl of Sussex's case. An obligation made by the presentee to the patron, to pay 5l. annually, to the wife and children of the late incumbent. And notwithstanding great opposition to the contrary, the parson keeps and enjoys his parsonage to this day. And judgment accordingly, by verdict in our case.

[143] A. recover'd in debt against B. A. brought a scire fac. B. pleads that A. is outlawed, &c. That is a good plea if he be outlawed after the plea in barr pleaded in the action of debt, but otherwise it is if he be outlawed before, for then B. might have pleaded that in bar in the first action: and that if in our case. The money being in Court, the Kings Serjeant prays to have it for the King; he ought to shew the outlawry sub pede sigilli, and the party ought to confess that he is the same Party.

In an ejectione firm. amongst other things, these points were resolved.

1. Tenant in tayl of a mannor, with an advowson appurt. grants the proche in avoidance and dies, and the issue enters in the mannor, then the grant is void, but not without entry: as it seem'd by 3 Rep. 81. And although that such a grantee present by colour of such a grant, yet that is an usurpation which shall bind, &c.

2. A lease for 3 years, and after for 3 years, and so from 3 years to 3 years, until 10 years be expired. That is a lease but for 9 years, and the odd year shall not be accounted, because that does not happen to be determined by 3 years. And so if it had been for 20 years, &c.

3. That it was found, that the lessor was now incumbent; and good, although they do not find (that he is in life) for it is more than implyed, &c.

NASIES CASE.

An information upon the Statute of Usury, for a contract with persons unknown, recipiendo ultra 10l. in the hundred.

1. That was held ill (because with persons unknown.) Because that is not allowable, but in case of an indictment, pro morte hominis ignoti.

2. That an informer who is not party, although the contract was ultra 10l. &c. per cent. shall not have any benefit, unless there was a receipt of the usury according to the contract. And for that the recipiendo is naught, because there is no place nor time put of the receipt, which is now traversable in that information.

RAY AND JOYCE HIS WIFE.

In waste, estrepment was directed to the party and to the sheriff before judgment. Although that Br. 60. v. says, that a writ of estrepment lies in an action where damages shall not be recovered in waste, but only treble damages for the waste, before the action brought. Note N. B. 61. n.

BAYLYE AGAINST KNIGHTON.

In a partitione facienda, by tenant in common against the other, an estrepment was granted, for all that the plaintiff had confest to be held in common, and not of more, for by such means, a man may be inhibited to cut his own bows, according to his occasions. But Benelowes. cap. 5. fo. 4. seem'd, that an estrepment does not lie between tenants in common. But in M. 6 Jac. it was rul'd that the estrepment shall be granted, although that Cook Chief Justice held with Benelowes. But note, that in 5 Jac. Lady Lucy against Oxenbridge. An estrepment was granted in a partitione faciend. because it is a real action, and no damages to be recovered. And Brownlowe shewed many presidents contrary to Benelowes.

[144] LADY RAYNOR AGAINST THO. HOLCROFT & UXOR.

In dower against baron and feme, the husband appears and was essoign'd. The wife makes default, as well she might, because they appear by several atturneys; and the same day is given to her, at which day she appear'd, and was essoign'd, and then the husband makes default, & idem dies given to him. And it was resolv'd,

1. That an essoign lies in dower, ve. 2 E. 4. 16. a. 21. b. notwithstanding the 44 Eliz. 5. a. And the stat. 12 E. 2. cap. 1. That is to be intended of an essoign of the service of the King, or of an essoign after issue, and so it was also rul'd in Symers case, and in Bedingfields case, and others.

2. The idem dies is given to him that made default. And the Court is so although that otherwise it was done in 2 E. 4. 16. a. 21. b. For that is but a discontinuance of the process.

3. That the husband and wife might have several essoigns.

SIR GEORGE REED AGAINST WAINFORD.

In a writ de valore maritagii, and a jury of two counties, 6 of either of the counties, and the title for the tenure being clear for the plaintiff. The Court directed the jury not only to consider the value of the land held of the plaintiff. But also of all the other lands, leases, and goods, and all his estate, and to give damages according to the rate that a man of such an estate might have with his wife. And they give 40l. although that the plaintiff had prov'd, that one profer'd 100 with him bona fide.

PETER GEE AGAINST PETER LONGE.

Trover and conversion was brought against A. and B. A. pleads not guilty, and that issue is found against A. B. pleads and traverses absque hoc, that he and A. converted, &c. And that issue is found for B. against the plaintiff; yet it seem'd to the Court that the plaintiff shall have judgment against A. upon the first verdict. For although that the declaration be, that they converted, &c. yet that shall be intended joyntly and severally: and so the opinion of the Court was against A.

TAYLOR AGAINST JEANES.

In the replication, the plaintiff avows the taking as an estray, &c. as bayly, &c. And that he delivered the mare and colt to the copyholder of the said mannor, to depasture in a close, which is within the said mannor; and that a year and a day was past, and that within the year the plaintiff had refus'd to satisfie for the feeding. And in that case by the Court,

1. The proof of the property by the plaintiff when his cattel estrays, need not be by oath, but it suffices to be by marks, and affirmance of the neighbours. As for wreck 39 E. 3. ve. Magna Charta cap. 2.

2. The party ought to demand the amends for the feeding at his peril. So that the reasonableness may be adjudg'd by the Court, &c.

3. The bayly cannot delegate his authority to another, or deliver the estray to be kept by another, but the estray ought to be kept within the demeans of the mannor in loco aperto. So that it be obvious to the view, if search be made.

[145] Note, that a man in execution shall not have a supersedeas upon an audita querela, unless it be grounded upon a specialty; but he shall have an audita querela upon a surmise, if he put in bayl, &c. but not a supersedas. Cook Chief Justice advis'd every student to take notice of that. And after in many cases it was rul'd accordingly.

VALENTINE AGAINST PENNY.

A trespass quare clausum fregit, & solum fodit. The defendant justifies, that he and his ancestors, and all whose estate he had in a cottage, have us'd to have common of turbary, to dig and sell ad libitum, as belonging to the house, &c. and adjudg'd that it is an ill plea. For such a common as abovesaid is an interest and a franck-tenement. ve. 7 Assise. 4. and is repugnant in it self. For a common appertaining to a house, ought to be spent in the house, and not sold abroad. And judgment accordingly.

Note, Nichols pray'd the opinion of the Court. Lessee of a portion of tithes (without any soyl or barn) rendring a rent, with a proviso, that if the rent be not pay'd, that the lease should be void. By Walmsly, that the lessor shall not be compelled to seek the lessee, and demand the rent of him. But the lessee ought to seek the lessor (he that needs must blow the coal) and so it hath been rul'd before that time. Daniel agreed expressly, and Warberton non dedixit. Dyer. 88. a.

WELBIES CASE.

In a quare impedit. The plaintiff intitles himself to a mannor, to which there is an advow appendant. That his father was seis'd, &c. And covenanted, without saying by indenture brought here into the Court for natural affection, &c. with B. to stand seis'd to himself for life, the remainder to the plaintiff, &c. And that his father dies, and the defendant demurr'd for that fault: but by the Court the pleading is good, for the party is not privy nor party to the deed, nor hath he a remedy to come to it; and he hath the estate by 27 H. 8. of Uses. And now the deed properly belongs to the covenantee. And so was the better opinion, in Dyer. 277. and that differs from the 14 H. 8. 7, 8. And judgment was given accordingly.

JEFFRY AGAINST JOHN BOYS.

In a replication in the avowry, prescribes to have common appurt. but doth not shew and aver that the cattel were levant and couchant upon the land, &c. And for

that it was held to be naught by the Court. ve. 15 E. 4. 32. But in our case, the issue was joyn'd upon the prescription. And by the other fault is allowed as confest. And is helped after verdict by the stat. ve. 5. rep. 43. a.

CUTTER & UXOR AGAINST BARBAR & SON UXOR.

In a partione facienda by consent quod partitio fiat. And a writ was to the sheriff to make partition. And before that it was fil'd (but after the return) the Court being informed, that one of the wives was dead, and it was pray'd that the writ should not be fil'd. By the Court. If it should be fil'd, then the Court should give an erroneous judgement against the dead person. And a day was given to the other party to **[146]** shew, if the wife was dead. And in the interim the filing of the writ was staid. But after, because it appear'd that she was not dead, until after the return day of the writ, to which day the judgment shall have relation, it was rul'd, that judgment shall be given, and the writ filed: so it should be if the defendant in accompt dyes before the second judgment: or if the defendant in trespass, after judgment upon a demurrer, dies before the return of the writ of enquiry of damages.

TYRWHITE AGAINST KYNASTAN.

An action upon the case upon an indebitatus existit, of an assumpsit. And the plaintiff demurs, because there is not shew'd how, and for what things he was indebted. And in H. 5 Jac. ensuing, without argument, it was clear by the Court, against the plaintiff. And in P. 28 Eliz. B. R. Wood against Draper, that the defendant may safely plead non debet, as well as in debt. By Fenner and Gawdy, and in M. 7 Jac. B. R. Ivers against Ingram. It was adjudged, that he ought to shew how he became indebted, (viz.) for merchandizes, or for ready money.

Note, by Cooke Chief Justice, that the keeping of a church-book for the age of those which should be born and christened in the parish, began in the 30th year of Henry the Eighth: by the instigation of the Lord Cromwel.

BALLARD AGAINST BALLARD.

In a warrant. chart. The plaintiff shews that he and A. were seised in fee, and so seised, that A. releases with warranty for him and his heirs, to B. and his heirs, (without saying contra omnes gentes) and the writ was of two messuages, and half an acre in St Clements Danes, &c. And the deed of release was, as it appears upon demand. And upon sight of parcel of the land, cum edificatione upon it, with the buttals, containing in length from east to west, 28. feet, &c. and in bredth from north to south 21 feet. And upon that the defendant demurrs, and it was adjudged against him. And it was resolv'd, that the count is good, although it is not shewn by what means or conveyance they were seised, or how they were seised; for if they are tenants in common, the release is not good; or that they were joyntenants. But otherwise it is, when a tenant in a real action, pleads joyntenancy, in abatement of the writ. See for that difference 2 E. 4. 11. 30 E. 3. And now agreed by the Court.

2. The variance between the writ and the deed is not material, because the plaintiff in his writ ought to demand it in form, according to the register. Also, it is not any prejudice to the defendant. For the recovery shall be only according to that, which the plaintiff demands.

3. That is a general warranty, and a war. char. lyes upon it; although he does not say, contr. omnes gentes, ve. 1. Rep. 2. And judgment now given accordingly.

Eveling against Sawyer.

In trespass. It was resolved upon evidence at Bar, that where the defendant intitles himself to land, by a feoffment made to A. to the use of the defendant of a mannor, in which, &c. is parcel. That that was **[147]** naught, because no attornment is shewn to be made to the feoffee, to the use of A. although that it was shewn, that the tenants have paid their rent to the defendants.

Andrews against Webb.

It was agreed by the Court, that the Court of Chancery, may be by prescription; as the Counties Palatine, and the Mayors Court of London, which is called the Mark Court, because the mayor may mark any cause in the Sheriffs Court before judgment; although it be after verdict, and may examine it, 10 H. 6. 14. But by Cooke Chief Justice. The Court of Chancery or Equity, cannot be by grant of the King. Because it took its birthright from the subject. And that he had seen the grant of the County Palatine of Chester to Hugh de Lupus, who was the first Earl of Chester after the Conquest; to hold it tam libere per gladium, quam Rex regnum Angliæ per Coronam; yet the Chancery might be before that by prescription. And he said, that the dignities before the Conquest, were not patrimonial, to descend. Which Doderidge, the Kings Serjeant affirm'd. And he said, that he had seen charters before the Conquest, with the additions of dukes and earls: and in our principal case a procedendo was granted to the Mayors Court.

Randall against Knowles.

A prohibition was prayed upon a surmise, that the tithes, for which the sute was, belonged to the vicar, and not to the parson; by the Court, that a consultation shall be granted; for the right of tithes is confessed. And if they belong to the parson or to the vicar, that is meerly spiritual. And that so it was ruled in one Bushels case. The parson of Pancras, and in one Milbrays case it was adjudged accordingly.

Phillips against Slacke.

By the Court; that a prohibition shall not be granted, upon a bare surmise, that he is sued for tithes by the parson of D. of lands in the parish of S. unless it appears, in the pleading in the Spiritual Court. For they there shall not be judges of the bounds of the parish, ve. 5 H. 5. 10. 22 E. 4. 24.

Pawlinge against Baker.

An ejectione firm. of 10 acres. The verdict upon not guilty, found the defendant guilty of 8 pieces, and for that cause judgment was staid; for the verdict ought to be certain: so that the execution may be made of it. Also they did not find him guilty of the residue. And for that it was also naught.

Smith against Foaves.

In a quare impedit, it was resolv'd and agreed by all upon evidence at Bar.

1. That a resignation to a proctor, does not make the church void; until it be accepted by the bishop, and acknowledged before him. So that a presentation in the mean time was void.

2. The special verdict finds an instrument under the seal of the bishop, **[148]**

upon which was indorsed, that the resignation was acknowledged and accepted by the bishop; yet that is no absolute finding that it was a resignation in facto, as the finding of a deed with an indorsement that livery was made, is not good finding of a lease for life; or the finding of an acquittance of the debtee, is not good finding, upon an issue of plene administravit. For it was but a circumstance and inducement to the jury.

SHARPE AGAINST SHARPE.

A prohibition was pray'd upon a sute in the Spiritual Court for tithes in kinde of of a park now converted into tillage, upon a surmise de modo decimandi, to pay a buck and a doe for all tithes. And allowed by the Court and agreed,

1. Although that they are feræ naturæ, yet they may be given for tithes. So to pay feasants, &c.

2. Although they are not tithable of themselves, yet they may be given for modus decimandi; as a great tree may be given for tithe of trees tithable.

3. That that is a discharge to the very soyl, and the park is not but a liberty, and the owner may furnish it with game, when he please. But after a consultation was granted, because the surmise was not proved within the 6 months. So adjudged, H. 6 Jac. C. B. The vicar of Clare in Suffolke, who sued for hopps. And there also a prohibition was granted upon such a surmise. But after a consultation was granted in that case. For the modus decimandi was alledg'd for discharge of tithes of hay and herbage, and not of all tithes, where the libel was for tithes of hopps. And Cook Chief Justice, voucht one Shibdens case, that such a modus decimandi generally for the park, is not good, if it be disparked. But it shall be particularly, for all acres conteined in the park.

PELLAMS CASE.

A quare impedit was brought against the Archbishop of Canterbury (sede vacante de Chichester) and the disturber and the clark. The plaintiff had judgment upon a non sum informatus. By the Court, the writ shall be directed to the new bishop, in the mean time chosen and consecrated: although he was not party to the first writ, 22 E. 3. 13.

GOODWIN AGAINST TOMKINS.

A sute was in the Admiral Court for setting a ship in a wharf to the damage of the plaintiff: so that none could come to his wharf, which is said within the bill to be within the ward of Saint Mary Hill: and a prohibition was granted: upon a suggestion, that it was good for the ordering of ships. A consultation was granted, but afterwards upon good advice and opening the matter, a supersedeas to the consultation was granted, & quod prohibitio stet; for the wrong and fact is said to be within a county and ward; and for that it does not belong to the admiral: and for civil contracts or trespasses done upon the river of Thames, or any other river that is proper to the common law, triable in that county, which is next to the bank, and that side of the river where the fact done, but in criminal matters upon any river, that is given to the admiral, by the statute, 28 H. 8. cap. 15.

[149] NORTON AGAINST GLOVER.

It was adjudg'd upon a demurrer. A. makes an obligation to baron and feme, the baron dyes, the wife takes letters of administration, and brings debt upon that obligation, as administratrix, and declares accordingly. But she dyes before judg-

ment, and her executor brought debt upon that obligation. And adjudg'd that it does not lie.

1. That personal duty being chose enaction, shall well lie in joynture between baron and feme. But otherwise of other personal things. ve. 4 H. 6. 6. a.

2. That is a sufficient election and waiver. Although she had judgement to have it as administratrix, and not in her own right.

THOMPSON AGAINST JACKSON.

In a warrantia chartæ upon warranty, his ancestor the defendant pleaded riens per discent. By the Court, that judgment shall be entered for the plaintiff without tryal if he will. For the warranty is confest pro loco & tempore. For the tryal may be long and chargeable.

THE KING AGAINST THE BISHOP OF CHICHESTER.

In a quare impedit it was doubted. If A. having two benefices with the cure, by dispensation, and then takes a third benefice with cure, if now both the first benefices, or the first of them only be void. Heron said, that it was adjudg'd that both of them should be void.

ARNOLD AGAINST SKEALE.

Baron and feme joyntenants for life. The husband he sowes the land and dies: the wife takes the corn, and the executor of the husband brought trespass, quare clausum fregit. And two justices were against two. If the wife, or the executor shall have them. ve. Dy. 316. a. But all agreed that if they belong to the executor, that he may well have that action, quare clausum fregit. For as to that intent, for the corn, the close is his. 27 H. 6. 28. a.

ROOPER AGAINST BULBROKE.

Upon a prohibition to the High Commissioners: and it was disputed from M. 3 Jac. Untill now by the Court. The High Commissioners have nothing to do with the interest of meum and tuum, or legacies, tithes, or pensions, which are given to the King by 31 H. 8. And there was no remedy for them at the Spiritual Court, (notwithstanding the saving) in 31 H. 8. until the 34 H. 8. It was enacted, which recites the mischief, and gives jurisdiction for them to the Ordinary, and that was before the statute of 1 Eliz. for the High Commission.

WHARTONS CASE.

Upon an habeas corpus, the cause was return'd to be, that he being churchwarden, and refus'd to take the oath upon enquiry of 39 Articles touching ecclesiastical matters. And the warrant of the commit-**[150]**-ment of the commissioners, was to retain him, and untill we shall give order for his delivery. By the Court the cause is not traversable. Because there is no person in Court to take issue upon that. But the party is put to his action upon the case if the return of the cause be false, or may have a false imprisonment. 9 H. 6. 44. 10 H. 7. 17. b.

2. Untill we, that is all we, 22 E. 4. 3. a. 1 H. 7. 7. a. that is not good: for if then any of them dyes or be removed: the party shall never be delivered by that means. But it ought to be, until he shall be lawfully delivered. But notwithstanding, Wharton was not out upon bayl, because now also he refused to take that oath: but with a so far forth as the articles do agree with the law of God and the land. Note,

that such subscription or consent to the articles 13 Eliz. by a parson is not good. As it was adjudg'd in 33 and 34 Eliz. B. R. Clark against Smithfield. But afterwards Wharton was delivered by the High Commissioners.

PINSON AGAINST READHEAD.

P. brought debt for 11l. 5s. and declares that he was herauld of Chester by several letters patents, with the fees and profits: and that 11l. 5s. belong'd to him for his share of fees, of a knight lately made, and that the defendant was collector of the said fees, and had made a bill of that 11l. 5s. to the plaintiff, upon which he now declared. And the question upon the evidence was, P. was a compleat officer by the very letters pattents, without the ceremony of the investure, and allowance of the six Commissioners of the Marshal Court, according to their rules and commission, in which there is a clause; that none shall be herauld, if he hath not been before a pursevant. Cook delivered his and the opinion of the whole Court. That he was a good officer by the letters patents, and vouch'd one Dethicks case, who was indicted by the name and addition of Garter King of Arms, and yet he had only the letters patents, without ceremony. Also a nobleman is compleat by his patent of creation, without the ceremonies of the robes, or to be gladio cinctus, as it was Anthony Browns case a justice; who being questioned in the Upper Bench of Parliament, for being so without being a gent. He pluckt out his patent of his creation as Baron out of his bosom. And that was allowed him. One is a Judge by letters patents', although he be not sworn, or hath not sat upon the Bench in Court: and Clarentius now a herauld, never was a pursevant. And the jury found accordingly.

Note, if two recover in debt, &c. and before execution one of them dies, if execution be sued in both their names it is not errour. Brownlowe said, that in such a case, the survivor ought to sue a scire fac. before that he can sue execution. But Cook, and all the Court said, that he may sue execution without a scire fac. because he is privy and party to the judgment; and vouch'd 21 E. 3.

Note, that divers outlawries were revers'd that term; because upon the return and proclamations, it appears that some proclamations were made in the time of the former sheriff, and others in the time of the now sheriff, and his name to them. But does not return, istud breve mihi deliberat, fuit de recordo, of the proceedings of the former sheriff.

[151] SMITHS CASE.

An action upon the case for words, thou hast had the French pox. And upon issue not guilty, it is found for the plaintiff. It was now moved in arrest of judgment. Because the words are in the preterperfect tense, and the party it may be now is well, and sound, and no scandal. To which all the Court agreed, and judgment arrested. Cooke Chief Justice took this difference of such a slander, de tempore præterito, when it touches the mind, and when it touches the body. If it be a scandal to the mind, and the affections, as perjury, felony, &c. there the mind that remains is slander. But if it be of an accidental infirmity, or disease of the body, otherwise it is. For none now will forbear his company, although he had the plague in times past.

PARSON LATTERS AGAINST SUSSEX.

T. & M. Jac. C. B.

He was convented before the High Commissioners, and they would put him to his oath touching simony (supposing it to be committed by him). And a prohibition

was granted, that none shall be compelled to accuse himself upon his oath; where he is to incurr a temporal punishment, at the common law, or a temporal loss, as in that case of his church: so for usury. Note Dyer 175. in the margin. And Cooke Chief Justice voucht 10 Eliz. Smiths case, an atturney of that Court. The High Commissioners would put him to his oath, for hearing of mass. And a prohibition was granted: for by that he is to lose 100l. by the statute, and a prohibition was now granted by the Court.

The King against The Bishop of Litchfield, &c.

The King brought a quare impedit against the bishop, Smith incumbent, and Langford the incumbent. Plead no patron was named in the writ. And by the Court, that is a good plea in barr, although the King be plaintiff, claiming to present by lapse for simony. Also the patron now, was only grantee of the procheine avoidance, and had presented Smith, yet he ought to be named; but if the clerk had been in by collation by the Ordinary for lapse, or provision of the Pope in former times, or ex presentatione Regis, against whom no writ lyes. If a common person had been plaintiff in the quare impedit. In those cases it might be without any patron, ve. 7 H. 4. 37. 7 Rep. 26. 9 H. 6. &c.

Symonds against Cockeril.

Upon a demurrer, in a replevin for 20l. and an avowry, &c. the plaintiff pleads in barr, that the defendant had not given 100l. and for that he granted to him 20l. per annum for 8 years annually, as a rent-charge; and after that for two years more, if three men live so long, and concludes that it was a corrupt deed. And this difference was agreed by the Court. If the original contract, was for to have a rent-charge, as in our case, that is not usury but a good bargain and pennyworth; but if the party had come for to borrow the money, and then such a contract ensued by security, then that is usury; but the party there also ought to plead that, quod fuit per viam corruptæ barganiæ. See 5 Rep. 69. **[152]** And it is not sufficient to conclude that it was corrupt, although that by the demurrer only it be confest. And now the Court mediated an agreement, to take the principal. And so it was concluded.

Allin against Nash.

Intr. H. 5 Jac. C. B. rot. 208.

In an ejectione firm. it was resolv'd, that if a copyholder surrenders according to the custome, to the use of N. after the death of the surrenderer; that that is good notwithstanding that one cannot preserve the same estate to himself; for the estate is in the lord. And the surrenderer during his life shall take the profits, and afterwards the lord ought to admit B. according to the direction of the said surrender.

2. Although that after the death of the surrenderer, the lord admits an estranger, who leases to the plaintiff, and the defendant, who had right to enter without admittance, enters. He is not guilty as to the stranger, because his entry is lawful, and the admision of the stranger was void. And Cooke Chief Justice voucht a case, there are two copyholders, and the one surrenders to the use of his will, and makes his will, &c. and dies. And adjudg'd there shall be no survivorship. And judgement was given accordingly in the principal case.

Atkins against Gage.

Huntingdon ss.

A writ of deceit, upon recovery in dower, for default of summons was abated.

1. Because Edward Cooke, &c. dated apud Castrum Norwici. Now where it was a judicial writ, it ought to have been dated there where the Common Bench is.

2. Resolved by the Court clearly, although that the words of the writ of deceit are, Interim terram illam in manus nostras, capias, ita quod neuter eorum manum apponat, &c. Yet the sheriff cannot remove the party out of possession; but he ought only to make a general seizure. See Bracton 365.

3. That the summoners, that appear to be examined, shall not have any charges, by the course of the Court. But the plaintiff at his peril ought to procure them, and to bear their charges.

ROCHESTER AGAINST PORTER.

Upon a surmise to have a prohibition after sentence, at the Spiritual Court two judgments were voucht, upon the statute 2 E. 6. for not setting forth of tithes. And 43 Eliz. B. R. A parishioner privately sets forth his tithes, and takes witness of it, and immediately after he carries them away; that is not a setting forth within the statute. For the words are truly, justly, and without fraud or covin, ve. 10 H. 4. 2.

2. 44 Eliz. B. R. Bakers case. A parishioner sells his grain upon his land, and after, by command of the vendee, he takes his corn, being severed, without setting forth of the tithes. That the parson may well have an action against him upon the statute, and shall not be compelled to sue the vendee, who it may be was not known to him. And it is not traversable, if the tithes were set forth according to 47 Eliz. It was resolved in T. 7 Jac. B. R. Brickendine against Denwood.

[153] SIR WALTER SANDS AGAINST ADAMS AND CURWIN.

Mich. 3 Jac. C. B. rot. 519.

The case was thus. A. leases to B. for 35 years rendring 10l. rent, &c. B. dies intestate during the years. The lessor himself enters and then enfeoffs one Goddard, who leases to I. S. for 21 years. Sir William Sands takes letters of administration to B. and enters, &c. The defendants as bayles to G. distrained for rent of a year. But that case was not then adjudg'd. But they cited many cases. As Plou. 433. and 6 Rep. 5, 6. & 69.

Note upon motion to have a prohibition to the counsel of York. Walmsly seem'd, that no prohibition may be originally granted out of the Common Bench, unless there be a plea there depending for the same thing, and not upon a bare surmise. ve. Regist. 34. N. B. 43. 1. 2 E. 4. 11. Except in case de modo decimandi, because the Spiritual Court will not allow that. ve. 22 E. 4. 20.

Note in debt upon an obligation by Cook Ch. Justice. And that so was the opinion of the civilians, that a disagreement to the marriage had under the age of consent. At the age it ought to be published in Court. Otherwise the issue may be bastarded. For a disagreement in writing is not a sufficient disagreement, nor a good proof.

FITCH AGAINST VAUGHAN.

In an ejectione firm. the case was thus. V. leases Bl. acre to A. for 20 years, rendring a rent, &c. And afterwards leases Wh. acre, and the rent and reversion of Bl. acre to F. by demise, grant, and to farm let for 99 years: habend. Wh. acre, the reversion of Bl. acre, the rent and premises for 99 years rendring rent, &c. A. never atturns, the 20 years expire, and F. enters in Bl. acre; and by the Court well, for that shall enure as a lease. By the words demise, &c. Cook Ch. Justice put this case, A. leases to B. for 10 years. And after he demises and grants that land to C. for 20 years. That is a good lease for 10 years presently. But if B. happen to have atturnment, then he shall have the reversion presently. And those two estates shall be in him, and stand divided.

The Prebend of Hatcherlies Case.

The deanry of Wolverhampton annex'd to the deanry of Windsor, being peculiar, and having ordinary jurisdiction, the dean makes a commissary by his deed, which is confirm'd by the chapter. The dean dies. The question was, if that was good to bind the successor. By Doderidge that such a jurisdiction is judicial, and that grant is but a commission and authority, all times remaining in the Ordinary. True it is, that ecclesiastical jurisdiction in judicial acts may be executed by substitute. But in law, they are the acts of them who substitutes the other. ve 11 H. 4. 64. a. 7 E. 4. 14. 20 H. 6. 1. That a commissary may excommenge and prove a testament: but that shall be made in the name of an Ordinary. 20 E. 3. And a grant of that by the bishop is not good, but during his life; and shall not bind the successor: for the law hath appointed, that he shall exercise that jurisdiction (sede vacante) (si licet) the archbishops in their several provinces. ve 17 E. 3. 23. That the archbishop and the dean and chapter, cannot grant the juris-**[154]**-diction of the warden of the spiritualties, after the death of the archbishop, which is a more strong case. And if the substitute as abovesaid offends, the Ordinary shall be punish'd for it. Which is unreasonable: so that the grant being void, that cannot be made good by the confirmation of the chapter. Cooke Ch. Just. If that should be a good grant to bind the successor: then the successor cannot remove him. And yet the successor shall answer for the acts and offences of the commissary, which would be too hard.

Intr. P. 19 Jac.

In the Star Chamber between the King ex relatione of the deputy of Ireland, and the Lord Desmond, Sir Percy Cresby and other defendants it was resolv'd.

1. That if there be divers defendants, and one of them does not accuse himself, but accuses his companion another defendant, he shall not be receiv'd as a competent testimony to condemn his companion, but if he had accus'd himself, then he should have been received as a competent testimony to condemn his companion.

2. If there be divers defendants in the Star-Chamber, and one of them is examined upon interrogatories for the King. None of the other defendants shall take advantage, nor shall bind any part of his testimony, which was not bound for the King: for it was their folly that they had not examined him upon their own interrogatories: but every defendant may take advantage of every thing that any testimony hath depos'd. Although that the King hath not bound his deposition for himself, if he be not a defendant ut antea, &c.

3. That if a Privy Counsellor be to be examined in the Star-Chamber. If the Privy Counsellor said, that the defendant related that to him, as a Privy Counsellor, and not otherwise. The counsellor is not bound to render more over to any thing than the defendant hath related to him.

The Widow Dolbins Case.

A. for debt extended the lands to B. D. to extend the lands of B. for his own debt, and to have the lands out of the hands of A. (by recognisance) acknowledges himself to be indebted to the Kings auditors. For which debt of D. the lands of B. were extended and taken out of the hands of A. for abusing the prerogative of the King. In that D. was censured in the Star-Chamber.

Evers against Teynton.

A. seis'd of lands, acknowledges a recognisance to B. in the Chancery, and afterwards sells the lands to C. and dies. B. sued a scire fac. against C. terretenant and the heir of A. To which C. pleads that A. was not seis'd of the lands at the time of

the acknowledgment of the recognisance. And it was found by the jury for the plaintiff, upon which C. moves to arrest judgment. For that, that the sheriff had return'd the terretenant only, and not the heir. Upon which judgment was staid until the sheriff had made an alias return ; and return'd the heir as well as the terre-tenant. And then judgment was given for the plaintiff. The plaintiff himself shew'd the very case to me.

[155] Banisters Case.

Tr. 15 Car. B. R.

Banister was indicted and found guilty by the jury of common barretry in Denbigh, and he brought errour in the Kings Bench. And in the record in Denbigh it was entred ideo venit inde jurata, and no venire fac. nor præcipe to summon them was entred upon the roll. And that was the exception, for it was agreed by the Court, that in superiour Courts, as at Westminster, the entry is ideo venit inde jurat. But in inferiour Courts, as now the use is, to recite the venire fac. or præcipe. But the Court gave a day to shew presidents of the entry. Ideo venit inde jurat.

Note, Executors ought to pay debts upon judgments, before debts upon specialties. 7 E. 6. Dyer 80. 21 E. 4. 21.

An indictment for a forcible entry. And because it was said expulsatus, where it should have been expulsus, and fortiori modo, where it should have been forti modo. The party was discharg'd.

Note, it was said by the Court, that a covenant to pay money shall be forfeited to the King by attainder of felony. And so it was adjudg'd in the case of George Norice.

Barcham against Nethersale.

An action upon the case was brought for saying, B. is a bad minded man, and none but he did burn my fathers barn, and he doth use to set fire of barns about Michaelmas, when they are full of corn. Hadd. that an action is not maintainable, because it is not surmis'd that there were barns burn'd about Michaelmas. Also it is not shewn that they were near a dwelling house. Yet adjudg'd for the plaintiff.

The Lord Comptons Case.

Robbery upon the Statute of Winch.

Upon the Statute of Winchester, for robbing of his servant in the hundred of Ogden : upon evidence to the jury at Bar. It was resolv'd by the Court.

1. That the party rob'd ought to give convenient notice so soon as he can.
2. If any other aske him what he ayles, and he says that he was robbed, that is good notice.
3. If the hundred of A. and B. are adjoyning, and the robbery is done in the utmost confines of A. and the party not knowing the hundreds goes to B. there gives notice, that is sufficient, because he is an estranger, and they ought to make hue and cry, east, west, north, and south. And so the hundred of A. shall know it.
4. If a man be rob'd in an hundred, and after the hundredor sells or leases his land ; the purchasor or the lessee shall be charg'd. For the land it self is for that charg'd.
5. If the party robbed, knows the robber, now he shall be bound in a recognisance to prosecute the robber ; but yet he shall have his action against the hundred, if he be not taken.

6. The party robbed is not bound to lend his horse, to pursue the **[156]** thief, nor he himself is bound to go and pursue the thief presently.

Tr. 4 Car. B. R.

In a replevin the sheriff does not return any pledges; and after issue joyn'd, and found, it was moved, if they can be put in by the Court after verdict. And by the Court, that they may, notwithstanding the statute of W. 2. cap. 2. For before that statute, the Court might take pledges upon the omissions of the sheriff. But that diversity was agreed, between

1. Pledges of prosecuting: and those may be inserted at any time after, and then the sheriff cannot be punisht, 3 H. 6. 3.

2. As well of prosecuting, as retorn. habend. as now and there by the common law. Also the Court may take pledges for default of the sheriff. But then the sheriff shall be only amerc'd. But now by that statute, a penalty is likewise given against the sheriff: but that statute does not take away the power of the Court, to take pledges for default of the sheriff: for if the sheriff omit that, and the Court take pledges, yet the party shall have his action against the sheriff, upon that statute. And for that, the taking of pledges now by the Court, will not make the judgment erroneous.

The Grand Case of the Habeas Corpus.

The Privy Counsel directed an order to the Mayor of London, to apprehend certain citizens of London, and to make them appear before the Lords of the Privy Counsel to answer all such matters as should be objected against them. And the mayor took them and imprisoned them, because they would not enter into recognizance. And the prisoners sue an habeas corpus in the Kings Bench. And the mayor returns, quod virtute cujusdam Ordinis ad illum direct. à Dominis Privati Concilii, and does not recite the particulars of the order. He imprisoned them, because they would not enter into a recognizance, &c. as abovesaid; and exception was taken to that return, by Peard, Maynard, Keely, Holborne, and St. John.

1. It is said to be virtute cujusdam ordinis, and not does recite the particulars of the order, and that is ill,

1. Because the order remains with the mayor, and he is conusant of it.

2. That is of the essence of the return; and therefore in Baggs's case, all the warrants were returned in hæc verba.

3. Otherwise all that is for the prisoners in the order shall be amist, and all that shall be against them, shall or may be included, and so a grand inconvenience shall ensue.

2. Exception. The mayor ought to shew, for what cause there ought to be recognisance entred into. Which he hath not done; therefore naught.

1. That a recognisance is a restriction to his liberty: so that he ought alwayes to attend for saving his recognisance; and if it shall be broken, his lands are chargeable.

2. A recognisance is a judicial act upon record, and for that the Judge ought to have some internal cause to move him to take that recognisance; and if he ought to know the cause, then he may make it known to the Court.

3. The cause ought to be known to the mayor, for then he may make it known to the Court over. For if the King intrusts him to be a justice of oyer and terminer, which is a thing of great consequence; **[157]** then the Privy Counsel may intrust him with a lesser matter; as in our case. And for that, it is not like a warrant made to a constable, or a warrant or command made by the justices at Westminster to a tipstaff. For there it would be inconvenient to reveal the cause to such petty officers. But now the mayor is a great Judge (as tis said) and so no inconvenience.

4. A grand inconvenience should ensue if otherwise. For if that warrant of the Privy Counsel, was directed to take a man at remote parts of the realm, as Carlisle. He ought first to come to London to know the cause, and after returns for his

witnesses or evidences to clear and discharge himself; and so he shall make two journeys, where one would have served, if he had known the cause at first.

5. Perhaps the Privy Counsel attacht him to appear and answer to a thing of which they have not jurisdiction, and for that the cause ought to be returned: so that the Court now may judge, if they have jurisdiction or not. And for that it was resolved in that Court, upon an habeas corpus returned, that if the High Commissioners fine, and imprison for that fine, and the prisoner sues an habeas corpus; it is not sufficient to return, that he was fined, and for the said fine was imprisoned. But he ought to shew precisely the cause for which the Court imposed that fine. For it is a rule, that alwayes where the Court hath but a limited jurisdiction, there upon the habeas corpus, the cause ought to be certified; for perchance it is out of their jurisdiction; upon which the Court ought to adjudge. So now that Court shall be judge, if the return of the order and all the cause be insufficient or not.

3. Exception. For that, that it is to enter into a recognisance, and they have not power to compel them to enter into recognisance; for it is that the counsel may apprehend them, but not compel them, for to enter into recognisance, and for that no inconvenience may ensue to the counsel; for they may attach him to appear. But if they shall compel the party to enter into recognisance, a grand inconvenience should ensue to the party. But if he enters or not enters, the mischief shall be great to him. For first, if he will not enter, then he shall be deteined in prison, until he will enter. And of the other side, if he does enter into a recognisance, then he hath no remedy to adnull that recognisance. But it shall be good against him for ever.

2. A recognisance is a judicial act, and the counsel cannot give authority to them to take a recognisance.

3. Every recognisance is either

1. Voluntary; and this is not so.

2. Compulsory; and that cannot be but for a crime committed. But now no crime appears to be committed. But it may be objected, that upon a supplicavit in Chancery the sheriff or justice of peace may take a recognisance to keep the peace. So upon a ne exeas regnum. To that it was answered, that the sheriff or a justice of peace have power to take a recognisance. But the mayor now hath not jurisdiction. For the counsel cannot give it to him.

HARBIN AGAINST LOBY.

In an ejectione firm. upon not guilty pleaded, the jury gave a special verdict. A. and B. joyntenants for life. A. makes a lease for 99 years to commence after his death, if B. shall so long live. B. surrenders to the lessor during the life of B. And it was resolved and adjudged by 3 justices: but Fenner against them. That the lease is void by the death of A. and two points were moved.

[158] 1. If that lease was good in point of creation (viz.) if two joyntenants are, and the one makes a lease to commence after his death, and then dies, and all survives to the other. And agreed by the whole Court that it was.

2. If A. and B. jointenants. A. makes a lease for 99 years, and then B. surrenders, or makes partition; and then A. dies: yet the lessee shall return the part of A. during the life of B. And it was objected, that so because the land was bound by the lease; and if he had survived, then it is clear, that the lessee shall retain. But now it does not lie in the power of the lessor or his companion to defeat that that was once executed. But it was answered and adjudged, that now by the death of A. the lease is become void. For first the lessee had not but a possibility to have it during the life of B. which is now destroyed by the severance of the joynture.

3. In that case B. was the cause of the severance of the joynture, and not A. But it would have been all one, if A. or B. destroyed the joynture; for the lessee shall not have that absolutely during their two lives, but upon a contingency and a possibility, that the joynture continues. But now it is destroyed, and with that the lease. And in that case, this case was put. Two joyntenants joyn in a lease for years to two; and afterwards they make partition, and the one dies. Yet the term continues for all.

COURTNEY AGAINST THOMPSON.

An action upon the case was brought for words. Thou art a bankrupt. And in the declaration they set out, that he was a tradesman that dealt by retayl, and no merchant, and judgement for the plaintiff. And it was moved in arrest of judgement, because they do not set out in their declaration, that he was a merchant, but one that sold wool, which is not within the statute. But the Court said, that that was all one, and no difference, but the statute extends to such a tradesman, as well as the word merchant. And so judgement was affirm'd.

THE KING AGAINST BORESTON AND ADAMS.

In Exchequer.

An information of intrusion was exhibited pro Dom. Reg. against Boreston and Adams for entry in Alton woods in the county of Worcester, who entred as servants to the Countess of Warwick. And the point of the case was thus. William Hobby had issue, Philip Hobby his son, and Mary his daughter. Philip purchases land to him and his heirs in fee. William Hobby the father was attainted of treason, and Philip dies without issue. The question was, if Mary be heritable to Philip or not, by reason of the corruption of blood in the common ancestor. And that term the case was argued before the Barons of the Exchequer, by Stephens, who argued for the countesse, and that she may well inherit, he said, that the circumstances to be considered in this case are,

1. That a descent between brethren requires intirety of blood: and the eldest son is not heir because he is more near of blood; but because he is more worthy. But in other descents, the more near of blood shall be preferred, as to the uncles or cozins. Also the brother in making of his descent shall not make mention of the father, nor shew as he is brother; as cozen shall make. As appears 40 E. 3. And Britton said expresly, that the eldest does not inherit, ergo he is more old, or near of blood; but for that, that is more worthy. And Green said so: for he said, the daughter is as near to the father as the son. So that the attainder of the father, shall be a disablement for all heirs to claim by descent, where the descent is made by him. 17 E. 4. 1. 20 H. 6. 43. The **[159]** uncle of the part of the mother; shall not have an appeal of the death of the son of the mother; for he ought to convey by the mother, and ought to make mention of her. But where an immediate conveyance may be made without mention of him that is disabled; it is contrary. Littleton said, that if lands be given to a man and the heirs males of his body: if he hath issue a daughter, who hath issue a son, that son cannot inherit, for he cannot convey by an heir male, but he ought to name the daughter in the conveyance, and that destroys his title. But if it had not been requisite to have nam'd the daughter, the son might inherit. If a son hath issue a son, who purchases lands, the mother of the son is attainted, and he dies without issue, the uncle of the part of the father shall inherit, for he does not convey nor makes a descent by the mother. So if the issue of a bastard purchase lands, and dies without issue; although that land cannot descend to any heir of the part of the father, yet the heir of the part of the mother may: so if the bastard was attainted. For the heirs of the part of the mother makes not any conveyance by the bastard. Littleton said, that by the attainder of the father, the bloud is corrupted between him and all those which are his heirs. By which it may be collected, that if they are not to make them heirs by him, that between them the bloud is not corrupted, but there was objections raised out of Stanford: for he said, that by the attainder of the father, the heirs are desabled to make a discent from any ancestor; but that is to be intended from those of whom he ought to claim by the father; for otherwise by the attainder of the father the heir should not inherit the mother. And Bracton saies expresly, that notwithstanding the mother be attainted, yet the son might inherit the father. 12 H. 7. There it is, that if a man hath issue by his wife, the husband is attainted and pardoned, if he hath issue another son, he shall be tenant by the curtesie.

Stanford yet says, that by the attainder of a nobleman his heirs shall be ignoble. But that is to be intended of the nobility that descends from the person attainted. If an alien hath issue two sons, the eldest purchases lands, and dies without issue, the youngest shall inherit; and yet there is not any privity of bloud in them to inherit the father, as a common ancestor.

An other objection was made, for that, that the father is their fountain, and if it be corrupt, all the branches and streams must of necessity be corrupt, that is, when the father is the conduit, and they are to derive their estate from him: but these do not claim so. And to make a privity in their bloud, the mother suffices. An other objection was made upon that; the fathers bloud is more worthy, so that his disability destroys all: but that is not so. For the bloud of the son is indifferently participant of both. 12 E. 4. If a purchasor hath issue, who dies without issue, that land shall go to the heir of the part of the mother of the purchaser; if there be no heir of the part of the father. And 5 H. 7. Colts case. If land be given to baron and feme, and the heirs of their two bodies, the husband being attainted dies, the issue shall not inherit. But now in our case it is not so; for he is not to make a conveyance by the father: and consequently his attainder shall not disable him to inherit. Fleminge the Queens sollicitor argued on the contrary. The question is now, whether Mary shall be heir to her brother Sir Philip, the father being attainted of felony, and he said, that the attainder did disable the sister to be heir to her brother. In the argument of the case two general points were to be considered.

1. The course of descents.
2. Attainders and their effects.

1. For descents, there can be no descents, without an inheritance to [160] descend, and a person upon whom it may descend: and the person upon whom it doth descend is called hæres, ab hæreditate. And this person is not made heir by any act or disposition of the owner. For he dyeth, and leaveth it indispos'd; but it is setled by the course of the law. The law doth not cast or settle an inheritance upon any person, at adventure; but by a sure and setled course, founded and grounded upon reason. Let us then examine the reason, why the law doth settle the descent by inheritance upon one person more than upon another, and wherefore one person is preferr'd in course of descent, before another? The reason of our law therein, is grounded upon the law of nature, and the law of God, to provide, love, preserve and advance the same person, the law will prefer and advance, executing that which the owner by all intendment would or should in his lifetime have done. But by nature and Gods law, every man is bound to love, preferr, and advance his own blood before any stranger. Therefore the law following nature and reason, will advance him to be heir; that is, of the bloud of the owner; for where there is no derivation of bloud, from or between the owner, and him that shall succeed as heir, there the law will not advance or preferr him to be heir. And as every one of bloud by possibility may inherit, so all of bloud cannot inherit simul, but there is a preferment of one of the bloud before another, in the next of bloud, before one more remote. And if in equal degree, then the worthiest. And to discern who are of bloud, who near, who remote, we must resort to a line mentioned both in our law, the civil law, and the law of God, which line is a collection descending or deriving from one common stock, containing certain degrees, by which it may easily be discerned, what distance and degree there is between persons linked and coupled in bloud, the one from the other, and they are called degrees, ad similitudinem graduum, per quos gradimur à primo ad proximum; and this line is either recta or transvers. and these other, ascendent or descendent, and those in linea recta descendente are alwaies preferred before those in linea transversali, and in both lines the descendents are preferr'd before the ascendents from the common stock, quia hæreditas est quoddam ponderosum cadens, as Bracton saith, and hereby it is very evident, and cannot be denyed, whatsoever person is not comprehended within this line of consanguinity, that person cannot be heir by any means; for the law respects no man that is not of bloud, because of the line of bloud and consanguinity. The law cannot ground itself upon such a sound and certain rule, as is the law of nature; and therefore our law doth yield many tollerations, between those persons that are united in bloud, which it doth not tollerate in strangers, viz. one brother cannot have an assize of mortd.

against an other, no descent in the youngest shall take away the entry of the eldest, where the warranty is collateral, it is a barr only in presumption, that the one will not hurt the other. Between them no wager of battail: so that the law presumeth such love between those that descend from one and the same parentage, that she intendeth that the one will not wrong the other, the one will revenge the loss of the other; and where there is such love to revenge, and not to wrong, there must also be a love to prefer and advance before all other. And because this love between those that are of bloud and consanguinity, is the bond of nature, the surest and the greatest, therefore God to enlarge and spread this love in the world, did prohibit marriage within certain degrees of consanguinity. Hereof I thus conclude, that for as much as the law in course of descent will admit no man to be heir, but such as the owner by nature, and the law of God was bound to love, prefer, and advance, and that is that person that is nearest cou-[161]-pled unto him in bloud, whom nature it self doth invite to love: therefore where there is not this natural love proceeding from bloud and consanguinity, there is no advancement, no descent: so that the efficient and effectual cause of descents is proximity of bloud.

And touching attainders, and their operations and effects. Stamf. saith, and common experience sheweth, that in penal judgment of treason or felony, there is no mention made, that the offender shall forfeit his lands or goods; that his wife shall lose her dower, or that his bloud or linage shall be corrupted. But the same in every judgment is implyed. But wherefore shall his wife lose her dower, or his bloud be corrupted, and his children and kinsmen be disabled? they are not offenders. Litt. and Stamf. give these reasons, grounded upon the law of nature also: viz. men will more eschew those capital crimes, when they shall see those persons who in nature are nearest and dearest unto them, and by nature most to be beloved, shall be punished with themselves: so that if themselves will not refrain from such crimes for themselves; yet they should the rather refrain for the love of their wife, children, kindred, upon whom, through their faults they bring so perpetual punishment and stain of so infamous a note, as that their stock, bloud and linage shall be corrupted and attainted, and their children disinherited. And hereby it is truly collected, that as in descents the effectual and efficient cause, is, the natural love that is presupposed to be between those that are linked in bloud; by reason whereof the law doth prefer and advance one man to be heir to another: so also in attainders, for that the offenders do not restrain from committing these capital offences, for the love of their wives, children and kindred, but unnaturally, as it were, to hate their own bloud; the law doth also with them abhor their offences, and hate their bloud: so that it doth not think any person descending of that bloud, worthy of any advancement, but disablement and exheredation; and our law in both these points touching descents, and disablement of descents by attainder, is grounded upon nature, and the law of God, in the plea and judgment of the daughters of Zelophead, Numbers 27. 6. and 36. 2. Of which general reasons I may thus infer, if there be not a person from whom, as from a common stock, his bloud is deriv'd to others, whereby they are with the bloud of the same bloud united, as descending from the unity of one and the same stock, there can be no heir to succeed: and on the other side, if that common stock be rotten and corrupted, that the succeeding from thence be as no bloud, because it is corrupted; then cannot any person be heir to another, that is not united otherwise in bloud, but from and by this corrupted and attainted stock. From these general grounds, let us descend to particulars, and to no further degrees in bloud, than between brother and brother, or sister, as our case is. Is there any cause or reason to be given, why one brother shall be heir to an other, but this only, that they are born of the same parents, participating of one and the same bloud, and descending from one and the same stock? the civilians say, that fratres aut sorores proprie sint consanguinei, quia ex eadem parte prognati, & consanguinitas, & sanguinis unitas, à con & sanguine, quia de communi sanguine descendit; for one brother deriveth not bloud from an other. And therefore I make my first argument out of Littleton, for the person who shall be heir in this case, whose words are, If a man purchase land, and dye without issue, his next cozin of the whole bloud of the part of the father shall inherit. Then put our case, Sir Phil. Ho. purchased Alton woods, and is now dead, without issue of his body. Now by Littletons description, that

person must be heir, that is his next cozin of the whole bloud of the part of the father; then if Mary Ho. be such a per-[162]-son, she must inherit; if not, she cannot inherit. But you have pleaded William Hoby and Alice his wife had issue, the said Sir Ph. and Mary, and so plainly Mary is the next cozin of the whole bloud to Ph. on the part of the father. And you have told us, that William her father was attainted of felony, and then out of your pleading I thus answer you, It is true, that she is sister, and next cozin on the part of her father to her brother, natura, or secundum carnalem consanguinitatem, but not jure secundum jus consanguinitas; there is sanguis naturalis, or sanguis hæreditarius, or civilis, the natural bloud can never be attainted, corrupted or taken away between them; but the civil or hereditary may be. And herein the civilians say truly with us, Consanguinitas diminutione capitas non tollitur sed jus consanguinitatis tolli potest. Sir Ph. and Mary are brother and sister in respect of the natural bloud. But civili ratione & intellectualiter, they are not cozins, the father being attainted; nor of bloud to be heir one to the other: for as the law would have judged them heirs one to another by their bloud, so long as the same bloud had remained hereditary bloud of the same hereditary bloud being taken away and corrupted by the attainder is now in judgment of law no bloud, and now the law cannot judge them to be heirs by that bloud, which jure and civiliter is no bloud; for every corruption is as it were a privation, presupposing a thing ought to have been and now is not; and therefore though re & subjecto the blood remain, yet jure and civiliter it is not: for what in law hath no force nor virtue is truly said not to be, as every void thing in law is said to be nothing. And therefore to prove this distinction of bloud, and attainted bloud is no blood, these cases following may satisfie. 1. An alien hath issue two sons, who are made denizens, which purchase land and dieth without issue, his brother shall not be his heir; yet are they cozins naturaliter, but not jure or hereditary. 2. A man marrieth a wife precontracted, they have issue two sons; a divorce is had, one of them purchaseth land and dieth without issue, th'other shall not be his heir, causa qua supra. 3. A man hath many cozins, he is attainted and executed; the natural bloud remaineth, yet none of them shall inherit. The law saith the land shall escheat for want of heir, & Persaye 48 E. 3. 2. saith, The lord may have his writ of escheat, either that his tenant was attaint, or that he died without heir, at his election. Therefore I conclude from Littleton, that Mary cannot be cozin and next heir unto her brother Ph. of the bloud of her father, because the fathers bloud is no hereditary blood, nor effectual, nor available to make them cozins, jure & civiliter. There is between them consanguinitas, but there is not jus consanguinitatis; for that by the attainder is taken away. A second argument I take from Stamf. from the consequents and effects that follow attainders, he saith, that the bloud and linage shall be corrupted by attainder, and his children cannot be heir to him, nor any other ancestor, and not only himself if he were noble, is become ignoble, but his children also, having regard to the nobility of their birth. I will not deal with the science of heraldry, I leave that to the professors thereof. Yet I hold it plain, that the arms which William Hoby the father could bear, Ph. his son cannot bear. And what arms Sir Ph. by his own desert did newly acquire, his brother a cozin collateral by the law of heraldry cannot give or bear. But out of the generality of the words of Stamf. I frame this argument. The children of a man that is attainted cannot inherit any ancestor. But one of them is ancestor to another; therefore one cannot inherit the other. The first proposition consisteth of Stamf. own words, another to be reverenced, who in those matters he in his book hath handled, hath very laboriously and judicially [163] travailed, and it is to be proved by reason; for resort to the line which before I mentioned, and see whether there can be any ancestor to the children by the unity or bond of any bloud; but that of necessity is derived from one and the same stock, that is the person attainted, you shall plainly perceive by the line that one of these children cannot have any ancestor, or be cozins to any but by the bloud of the father; and seeing that bloud is ineffectual to make them heirs or cozins jure and hereditarie; therefore they can have no ancestors. Now that one brother is ancestor to an other, no man will deny; therefore the conclusion standeth, one of them cannot be heir to the other. A 3. argument from Littleton, a fortiori, A man hath two sons by several venters, one purchaseth, and dieth without issue, the other shall not be his heir, but

the next of the whole blood of the part of the father, that is the uncle. viz. the fathers brother; examine the reason why the uncle shall be prefer'd: is not one of those brothers nearly lincked to the other, both of them immediately participating the blood of the father, then is the uncle, between whom there is not immediate participating of blood but in degrees remote, viz. in the grandparents; but forasmuch as the uncle and one of those brothers do fetch their cozinage from the unity of the whole blood, although by a remote stock, yet shall the cozin of the whole blood inherit before the brother of the half blood, because the whole blood is more forcible than the half: if then the half blood want force to make an heir, how can corrupted blood? which in the eye and judgment of law is void blood, and as it were no blood, cause any man to be heir by no rule of reason where the sons cannot be heir to the father by reason of an impediment on the part of the father, there cannot those sons be heirs, the one brother to the other; for if the blood descended from the father be not effectual to make the son heir to the father, the same blood by which brothers are consanguinei cannot be available to make them heir one to another: if the blood cannot have hereditary operation in linea recta, it is impossible to have operation in linea transversali: as for example, let the case be remembered which I put before, which as they are put no man will deny for law. An alien hath two sons, aliens, they are made denizens, the father purchaseth and dyeth, none of these sons shall inherit, even so if one of the sons purchase and die without issue, the other shall not be his heir, the reason is the blood of the father was not hereditary between him and his son, and therefore cannot possibly be hereditary between the brothers: and the same law do I hold, if the two sons had been born in England, and no difference albeit by their birth they had been born denizens, for their birth as brothers will not avail them, unless there be any hereditary bloud also between them, as the next case doth plainly prove. A man taketh a wife within the degrees prohibited, or precontracted, and hath issue two sons, and after a divorce is had, these sons cannot be heir to the father, so can they not be heirs one to the other, yet were they at their births inheritable to their father, and one of them to the other: but by matter ex post facto, that bloud that made them to be inheritable, is after made unable, and uneffectual to make them heirs, viz. son to be heir to the father, and by consequence, the brother to the brother. By all which arguments grounded upon Littleton and Stamf. and upon the reasons of the law in course of descents, I hope I have sufficiently proved that Mary Hobby cannot be heir to her brothor Sir Ph. which shall more evidently appear by the resolutions and answers made to the objections and arguments of the contrary part. And first it is said of the contrary part, that descents between brothers do differ from all other descents collateral, for that is an immediate descent **[164]** the one brother to the other, and not from father or mother, and therefore the one shall be heir to the other, without making narration of father or mother, or other collateral ancestor, and where the father or mother or other ancestors attainted need not be mentioned, but by his omission the descent may well be conveyed, there the attainder of that person omitted cannot hinder the descent, but wherein the conveyance of a descent of a necessity mention'd must be made, there the attainder will hurt, and to prove their intent they vouch 17 E. 41. 20 H. 6. 43. 31 E. 3. bar ult. 3 E. 2. 7 E. 3. 46 E. 3. 22 Eliz. I will first answer their reason, and after the cases, that in form of pleading a descent between brothers, it sufficeth to say that one brother is dead without issue, but that the other is his heir, without mentioning how they are brothers. I willingly grant, and it must also be granted, that if in pleading the father and the mother be mentioned, the pleading is not evil, for so you shall see it sometimes allowed and in Cleer and Haddons case of the part of Yonger it is so pleaded, and no exception: and it was pleaded in our case; so then this reason consisteth in formality of pleading, and not upon the substance of matter; but let us examine the reason why this form of pleading is allowed, and we shall easily perceive that it concerneth form and not matter, good pleading, saith Litt. is laudable and profitable; laudable for a pleader to set forth to the Judge certainly and briefly, without superstitie frustra fit per plura quod fieri potest per pauciora: profitable to plead all that which may profit his clyents cause, and to leave unpleaded that which is not for his profit, whereof cometh this rule, that no man is bound to shew matter against himself: if a man in pleading will intitle himself, as cozin and heir to his

ancestor, he must also shew how cozin, or otherwise, his plea is uncertain; for whether he be cozin in the first, second, or third degree non constat, and there may be many between them and the ancestors; beside the shewing how cozin, doth offer certain matter to the adverse party to answer the cozinage: the same reason is, if a man intitle himself proximus sanguine upon the Statute of 6 R. 2. of Ravishment, he must shew how proximus, although he be brother, because proximus is too general, and hath no certainty in this case. If one will plead he holdeth in copercenary, with an other, he must shew how; for besides sisters there can be others that may hold in copercenary, in degrees more remote; and therefore when the pleading doth contain such words of generality, there must that be shewed in certainty. But when a man intitleth himself as brother, that is so certain as none can come between them, as there may when he is pleaded cozin and heir, and therefore between brothers need not for certainty and brevity, that their father and mother had issue between them these two brothers, for in saying they are brothers all this is certainly intended prima facie, and therefore to plead at large that is included in few words were but surplusage, and so having certainty and brevity in this manner of pleading, it is formall, and good; but if it be otherwise pleaded, as in our case it is pleaded, that William Hobby and Alice his wife had issue Philip and Mary, and then shew the attainder of the father, his pleading is also good, for where the matter is plainly set forth, the pleading is not evil, and albeit the defendants were not compellable to set forth the attainder in their plea, because it is matter against themselves, yet who doubteth but that the plea touching the form hereof is good, and the defendant had omitted to mention the attainder of the father in their plea, Mr. Atturney for the Queen in the replicate might have shewed it, for where there is matter which one side doth omit to plead, as not profitable for him, the adverse party in his advan-**[165]**-tage shall be received to alleage the same. A man hath two sons by divers venters, a bastard or an alien hath two sons, if one of the sons will intitle himself to be the brother and heir to the other, shall not the adverse party allege by bar or replication, as the cause shall fall out, that the father had two wives, or that he was a bastard, or an alien what more certain, what more common in our books? now let us come to the inferrence made thereupon, where in the conveyance of the descent, mention must be made of the person attainted, there his attainder will hurt, but otherwise it is where the descent may well be conveyed, without making mention of such person; I hold this difference not good, consisting more of form of pleading than matter of substance, as before I have said; but if the descent between the ancestors and the heir cannot be made in veritate, but by reason of a cozinage that groweth by unity of blood attainted, and otherwise they be cozins; I hold the matter so appearing in pleading, that the attainder will be an impediment to the descent, as before I have proved. Now let us consider the cases of 17 E. 41. a feme had issue a son that was murthered, the uncle could not have an appeal, because the mother was disabled, by the same reason, if the mother had been attainted, the uncle could not inherit the sons land, & sic è converso: the reason, because the uncle to the son, the son to the uncle in their conveyance must needs mention the mother: I say that is not the main and material reason. But in as much as the uncle and the son were compelled in cozinage by the bloud of the mother, and her bloud by her attainder unavailable to make any descent, therefore the one cannot succeed the other: and hereof I collect, that if the attainder of the mother be an impediment to the uncle to be heir to her son, albeit the uncle deriveth no bloud from her, but he and she as participants of the blood they receiv'd from the common stock above, a fortiori must her attainder be an impediment to her sons, the one to be heir to the other, forasmuch as they both do derive blood from her, and not the one from her, and the other from the common ancestor, as the son and the uncle do: but they do further inferr upon this case, that if a son had issue two sons, and the one were murthered, the other should have an appeal, and so if a man attainted have two sons, one shall have an appeal of the others death. If I should deny the cases, the books vouched prove rather for me than against me, and they are æque dubii with our case in hand, yet I may answer them well, if I should grant them: first I hold a difference between a disablement, which cometh natura, and that which groweth a culpa, for the one is odious and hatefull to the law, the other is not: I will explain the difference more hereafter. Also there is a difference between an action

of appeal as heir, and the course of descent as heir to an inheritance. The one is to receive an advancement, therefore an appeal is given to him that is not heir to the party murthered, but in the respect of the loss the party hath of him that is killed, and therefore by the common law the wife might have an appeal of the death of her husband, as appeareth by Stamford, and that hath been agreed by all the Judges about 26 Eliz. That if the eldest son kill his father, the youngest shall have an appeal against his brother, and yet if his brother be attainted at his sute, he shall never inherit his fathers lands. The case of 20 H. 6. 43. is, that one brought an appeal of the death of his ancestor, and made his descent as heir, viz. fitz. Katherine, file dels ancestor; and shewed that Kat. died in the life of the ancestor, yet adjudged that the appeal will not lie, because he makes his descent by the daughter that can have no appeal of the death of her father, and albeit she were dead in the life of the ancestor, yet because her issue must needs mention his mother, therefore they say the appeal lies not; other-[166]-wise where omission may be made, and therefore all the rest of the cases are put 8 E. 1. 13 E. 3. 1 E. 3. 11 H. 6. 31 E. 3. bar ult. all these cases are, that if the son be attainted in the life of the father, and survive, the land shall escheat: but if he dye without issue in the life of the father, then his brother shall inherit the father, the reason they say, that being dead in the life of the father, without issue, the other son shall make himself immediate heir to the father, but so could he not if brother attainted had surviv'd, that is but a formal reason, and not substantial, as shall appear out of these and the like cases: a man hath issue two sons by divers venters, and die seis'd, the eldest never entreth, or is seised, and dyeth without issue, the son of demy sancke shall be heir to the father: because notwithstanding the eldest son surviv'd the father, and had no seisin, the other son may make himself mediate heir to the father. So if a lease for life be made, or an estate tayl, the remainder to I. S. and his heirs, I. S. hath two sons by several venters, and dieth, the eldest son after dieth without issue, the second son shall be heir to the father, albeit the first did survive, causa qua supra, but in these cases it is not evident and clear, that if the eldest son had been attainted, and survived, and after died before any seisin, that the other son shall not be heir to the father: yet if your reason hold, he should not hold, for he need not mention him in the descent from the father: yea, that is formality. Here is matter, that hindreth this formality of pleading when it is disclosed that is the attainder: even so in our case the reason is the same as here, and so are the cases for me, and not against me. Every descent between brothers doth require to be of the whole blood, both of father and mother, but mother, in other collateral descents it sufficeth to be heir of the part of the fathers side, or of the part of the mothers side alone, therefore the impediment of the fathers side will not hinder one brother to be heir to an other on the part of the mothers side, and è contra; and to this end these cases have been put, if an alien marry an English woman, and he have issue two sons, the one purchaseth and dyeth without issue, his brother shall be heir on the part of his mother, although not of the part of the father, and so if the son of a bastard purchase and dye without issue, his next cozin on the part of the mother shall inherit. If one brother purchase and die, his brother enters and dieth without issue, and without heir of the part of the father, his heir of the part of his mother shall inherit, which cannot be, if the brother were heir to the brother ex parte matris tantum. If the father be attainted, the son shall inherit the mother, and if the mother be attainted, the son shall inherit the father; or else by the book, the father having charter of pardon and issue after, could not be tenant per le curtisie, unless the issue might inherit. The conclusion thereupon is, that albeit Mary Hobby cannot be heir to her brother on the part of the father, yet she may be heir of part of the mother: first I answer the reasons, and the cases afterwards, and then the conclusion. It is true, that one brother that will succeed an other as heir, must be of the whole bloud both of father and mother, and therefore it doth not absolutely follow, that an impediment of the fathers side will not disable them to be heir on the part of the mothers side, contr. But I rather conclude, that if of necessity brothers must be of the intire bloud of the fathers and mothers side, then uno deficiente deficit alter. But admit the cases to be law, yet are they thus to be answered, there are impediments to hinder descents of the part of the fathers side, or of part of the mothers side, some that happen sine

culpa, and some cum culpa civiliter, or criminaliter: those that are civiliter, or sine culpa, are such as to make the father and mother not capable of any descent, or heir **[167]** ab initio, or à nativitate; those that are criminaliter, or cum culpa, are such as deprive or disable the father or mother to be capable of any descent or heir, where before they were capable. The one sort of impediments will not happily hinder descents between brothers, the other will. Therefore, when in the first case an English woman hath issue by an alien two sons, and the one purchaseth and dieth without issue, now in default of heir of part of the father, the heirs of part of the mother shall inherit: but in this case the father can have no heir, because he is an alien, and never was capable of succession; therefore the brother dyed with heir of the part of the father, not because the father was disabled culpa, and so forfeited the capacity he had to have an heir, but civiliter and sine culpa, is never born and endued with any such capacity. The second case standeth also upon the same reason. For the father of the purchasor being a bastard, was never inheritable to any descent, or can have other heir than the issue of his body. So as when the son of a bastard doth purchase and dye without issue, he also dieth without heir of part of the father, not because his father hath lost or forfeited by any crime or offence, the capacity he had to have any heir collateral: but for that he was never born worthy that dignity, and so ab initio nativitatis he never had it. But if a bastard have issue two sons, the one purchaseth and dyeth without issue, it is plain that his brother shall be his heir, not ex parte matris, but patris, as most worthy, and the father although a bastard, yet he was inheritable by his blood to make his sons or heir to another, albeit himself could derive no blood from any ancestor whatsoever; for a bastard may purchase, and have heir of his body, as his blood is available to make his son to inherit him. So also it is to make one of his sons to inherit the other; and where there is an heir of the blood of the father, the heir of the blood of the mother shall never inherit the purchasor; otherwise it is in the case of the alien, for that he could not purchase to his own use, nor could his son without him, and by consequence one of the sons in regard of his blood cannot inherit the other; but in regard of the mother they might. But in this case also if the alien be made denizen, and then take an English woman to wife, and have two sons; there because each of them by possibility may inherit the father, they also shall be heirs the one to the other, not ex parte matris, but ex parte patris; which reason proveth the third case to be grounded upon a falacy; for albeit when one brother purchaseth and dyeth without issue, the other brother doth enter, and dyeth likewise without issue, and heir of the part of the father, that the heirs of the part of the mother shall inherit, yet the heirs of the part of the mother shall not inherit the second brother, because he did inherit his eldest brother ex parte matris; but because that when a descent is ex parte patris, and then that line doth fail, by his death the land shall resort to the heir of the purchasor of the part of his mother. So here, the second brother had his land as heir to the brother ex parte patris, and when he dy'd, having no heir of part of his brother by the fathers side, then it shall descend to the heirs of the brother the purchasor of part of his mother, which although she be one mother to both brothers, yet her heirs shall inherit not as mother, not to the mother to the second brother, but to the first that was the purchasor. The 4th. case seemeth at first to make much against me, and hath been very strongly rely'd upon; for thence the impediment grows non culpa, and doth disable the father of that capacity he once had, and now by his attainder hath lost it, shall the son inherit the land of the mother, & è contr. But if this case be well examined it will not match with our case, nor make anything against **[168]** me; for between husband and wife there are several lines of blood in consanguinity and descent to be drawn: the husband to have his heir, is to have his heir, which cannot be heir to the wives land, the wife for her land is to have her heir, which cannot be heir to the husbands land. And as they have several inheritances, so by the law they have several heirs by descent, whosoever is heir to the husband claimeth to be heir in blood onely from the husband, not from the wife, whosoever claims to be heir to the wife, claims only to be heir in blood to the wife, and not to the husband; and so must they that be heirs to either of them of necessity make their several resorts and line by their several blood, and not joyntly by both their bloods, when they claim by descent from either of them: as for example. A man is seised of land in fee in his own right, and also in right of

his wife, and they have issue a daughter, his wife dieth, and by another wife hath issue a son, and then dieth, the daughter shall inherit the mothers land, and the son the fathers land, and so several heirs, because one is of the mothers blood, and the other of the fathers, and here the attainder of the father will not prejudice the daughter to inherit the mother, nor the attainder of the mother prejudice the son to inherit the father; because the lines by which these several heirs claim are several. A man seized in fee hath issue a daughter, and taketh a wife also seised in fee, and by her also hath another daughter, these two daughters shall inherit the fathers land; but the last daughter onely shall be heir to the mother; here be two daughters only of demy sancke, and both these shall inherit the father; for in respect of him, they are of his intire blood, and therefore shall make one intire heir to him; but one daughter onely is of the mothers blood, and therefore shall solely be heir to the mother, and between themselves they are of demy sancke, and one cannot be heir to the other, and hereby doth appear a plain difference between descents from father and mother to their children, and between the brothers and sisters, for it sufficeth that the son or the daughter be of the blood of either father or mother, viz. which of them have inheritance; but the brothers and sisters must of necessity be of the same father and mother, or else they cannot inherit one the other, and see the 4th case put upon the 3 H. 7. matcheth not our case. Now put the case of one son as thus: the husband and wife have several inheritances, and they have issue one son and dye, this son supplyeth the place of several heirs, and must make his claim and descent to land severally, viz. to the lands of the father as son and heir to the father, and shall not intitle himself to that land as son to his mother, nor name his mother, and to the land of the mother as son and heir to the mother, and never mention the father: and yet it is true that the son as he had a father, so had he a mother, and from them both doth derive his blood and issue; yet will it not follow, that by the attainder of the father the son shall be disabled to inherit the mother; nor by attainder of the mother be disabled to inherit the father, for the son claimeth not to be heir to both by the intire blood he receiveth from both; but severally to be heir to the father by the blood from the father, and heir to the mother by the blood of the mother. And this will be plain if you do remember the distinction before made of blood. There is sanguis naturalis, and sanguis hereditarius. The son, as touching his natural blood, hath it proceeding both from the father and the mother, joyntly, intirely, and inseparably: but as touching his hereditary blood, that is descended unto him, he hath that derivedly and severally from his father for his inheritance from his mother, for her inheritance; therefore the fathers attainder which doth not corrupt sanguinem, but jus sanguinis, is not the natural, but the hereditary blood may **[169]** be an impediment that the son cannot be his heir, because between them the hereditary blood is corrupted. But it can be no impediment to the son to inherit the mothers land, for that hereditary blood between the mother and the son is not corrupted by the attainder of the father, so that hereby it appears that the case collected, upon 13 H. 7. doth neither match our case, nor make against me, and therefore the conclusion inferred thereupon is weaker, for Mary Hob. cannot be heir to her brother, by the blood of the mothers side, because she must be of the whole blood to her brother both by father and mother, and both their bloods must unite in her, and continue also not one entire blood natural, but hereditary. But by the attainder of her father for hereditary blood to her brother derived from the father is corrupted, therefore by the mothers blood solely she cannot inherit her brothers land, albeit she may inherit her mothers land, for the reason aforesaid. But before I passe further, I will object against my self in this manner; admit their father had not been attainted, but their mother, should her attainder have discharged Mary to have been heir to her brother; yet will there be a difference between their attainders, for admit also, as the other side would have it, that it sufficeth for the sister to be heir to her brother, either by the fathers side, or by the mothers side. Yet it is by Littleton plain as before I have shewed, that when one purchaseth and dyeth without issue, his next cozin collateral of the part of the father must inherit, before the heir of the part of the mother, hereof it followeth that Mary Hobbs, admitting that neither father nor mother were attainted, should be heir to her brother by the blood of her father as the worthiest, and not by the blood of her mother; and so then the fathers blood is sanguine hæreditatis and not her mothers blood until there be defect on the

fathers part. But the father not being attainted, there is no defect, therefore though the mother be attainted, yet that hereditary blood from the father which is sound, and to be preferr'd, cannot be corrupted by the attainder of the mother; and therefore Mary Hob. may by her fathers blood be heir to her brother. But on the other side, when the father is attainted, then that hereditary blood which should have had preferment to make M. heir to her brother; is corrupted in Mary, and she having that corrupted blood and living, that corrupted blood in her is an impediment that the mothers blood cannot take place, for there is no difference when both bloods are in one person, and when they are in several persons; as before I have shewed: for if Mary be heir to her brother on part of father, she cannot be heir also of her brother on part of the mother. And then being to be preferred by the line of her father, and cannot because his linage is corrupted, that line in her must be an impediment unto her self, that her self cannot be his heir on the part of the mother. But it hath been objected, that brothers by the blood, that is, between themselves, are immediate heirs one to the other, and so born heirs one to the other, and that they have by their birthright cannot be taken from them by the act of a third person, but by their own act. And therefore the attainder of the father cannot take away that immediate right between them to be heir the one to the other. And if a man be attainted and have his charter of pardon, he shall be heir to the father, and by consequence, if he had two sons after the pardon, the one of them shall be heir to the other. That brothers are immediate heirs one to the other by any blood between them derived from the one to the other, that I deny, for one brother takes no blood from the other, they are immediate heirs by the blood derived between them from their common stock, which is the father. And this is manifestly proved by all those authorities in our books, that if the eldest brother be attainted [170] in the life of the father, his attainder shall not prejudice his younger brother to be heir to the father, if the eldest dye without issue in the life of the father. The reason is, because the youngest is of blood of the father, and by that blood is now become heir of the father, and is not of the eldest sons blood, for then his attainder would be an impediment to all of his blood to inherit. And albeit brothers by their birth are inheritable one to the other, yet doth the attainder so strongly relate, that look whatsoever they gained by their birth, by the blood of their father, there the same even from their birth, they have lost, the same blood being corrupted, and therefore Stamford saith, albeit they were born noble, they are now ignoble from the birth as having lost all dignity and advancement whatsoever they had by their birth. And when as a man taketh a wife precontracted, and have two sons, now at the time at their birth they are born inheritable one to the other, yet if divorce be had these sons have again lost from their birth, that they had by their birth, and as the divorce coming after maketh them to be no children inheritable. So the attainder ex post facto, makes them also no children inheritable, and where you vouch 9 H. 6. that if a man attainted have a pardon, and then have issue, that this issue shall inherit; I deny that book to be law, for the contrary is proved by E. 4. and divers other authorities, for the attainder doth corrupt the blood between father and son, as well such as were born before the attainder, as after, and a pardon coming after cannot make restitution of blood, as all authorities do agree. But it must be by Parliament, and therefore there is a great difference between charter of pardon, and charter of denization, for if an alien be made denizen and then have a son and purchase, his son shall inherit, for while he was an alien, he was not capable of inheritance to his own use, nor to have a son and heir; but when he was made free by his denization, then there was a capacity in him to take inheritance, and to have an heir to inherit him, not by way of restitution lost, and now restored, which the Queen by her charter cannot do, but onely to make the person free, and a denizen, which by her charter the Queen may do, and the descent is by consequence in free blood never corrupted and attainted, otherwise it is case of attainder. But if you make such interruption of descents by reason of corrupted blood, why, so you may do where the grandfather was attainted, and the father purchase, that his son shall not inherit, for the same is of the grandfathers corrupted blood, which he received by his father, yea, and so he is, if he will claim any hereditary blood from the grandfather, viz. to claim to him, the son should be barred, but when the son to inherit the fathers land, doth claim by the blood hereditary between him

and his father, and that by a fresh blood and not by the old corrupted blood, then is there no impediment, but that the fresh blood shall be available to make him heir to his father. Lastly, it hath been objected, that it is plain that if the brother had died before the attainder of the father, then the sister should have been his heir. And the attainder after should never devest that descent, and therefore as the attainder after will not destroy the descent, the attainder before will not disable the descent negate argumentum. A more neer heir will divest a descent of them that was one in by descent by a remote decree, as if a man dyed having a daughter his wife priviment enfeant with a son, now this daughter is heir, and in by descent, but when the son is born he now shall be heir and the other descent avoided, but it is clear otherwise in case of attainder which giveth title of escheat; and if when the title of escheator came, the lord hath a tenant in by title, he then hath no right to the land; for **[171]** his right is for want of a tenant; but he findeth a tenant, and such a one as is in by descent, whom the law favoureth. Otherwise it is when the title of the escheat happeneth before the descent can come. And so is there none of those objections which are sufficient to alter my former reasons. Wherefore I conclude, that Mary Hobby cannot be heir to her brother Sir Philip, by reason their father was attainted. And so judgment ought to be given for the Queen.

T. 42 Eliz. Usury.

Upon evidence that term at Guild-hall, London, in the case of one Dalton. Where in debt upon an obligation, where the Statute of Usury was pleaded, it was said by Poph. If a man lend 100l. for a year, and to have 10l. for the use of it. If the obligor pays the 10l. 20 dayes before it be due, that does not make the obligation void, because it was not corrupt. But if upon making the obligation, it had been agreed, that the ten pound should have been paid within the time, that should have been usury. Because he had not the 100l. for the whole year. When the 10l. was to be paid within the year. And verdict was given accordingly.

It was agreed, that if the lord maim his villain, he is infranchised.

DOROTHY WATTS AGAINST BRYNES AT SEVERSAM.

Murther.

In an appeal of the death of her husband. The defendant there, upon the indictment was found guilty of man slaughter, and the issue was if he kill'd the husband or not, and the evidence was very strong against the defendant. (scil.) The begining of the quarrel was, on Monday there, the person that was kill'd beat the now defendant. On Tuesday, Watts in the defendants shop being a butcher, flurted him on the nose. On Wednesday, Watts, and one Bissei walking by the shop, made a wry mouth at the defendant: upon which the defendant comes out of the shop, with a short sword behind the back of Watts, and gives him a great stroak upon the calf of the legg, whereof he died. And the Court directed the jury to find it murther.

JOHNSON AGAINST BACON.

Time to assign errors.

Johnson of Grayes-Inne recovered in debt against Bacon of Grayes-Inne upon a bond of 400l. where the condition was to save harmlesse, being surety for Bacon. And Bacon was outlawed after judgement: and a cap. utlagat. was delivered to the sheriff in Court. And now Bacon brought errour. And would assign errours without yielding himself in execution, quod contra legem. By the clerks, that a man outlawed may not take benefit of the law, without a submission to it.

GAGE AGAINST TAYLOR.

To reverse a fine.

It was mov'd to reverse a fine. Because the writ of covenant bore test. 15 of April, returnable Quindena Paschæ. And that year Quindena Pasche was the 14 of April. And so the return was before the teste. And the fine was revers'd.

HART AGAINST ARROWSMITH.

The lord licences a copyholder for life to make lease for twenty years; if he shall so long live. And he leases for years 20 generally. And a good lease; for the licence is pursued in effect.

A man was indicted upon the statute of E. 6. That in the churchyard, such a day, extraxit gladium against I. L. et ipsum per-**[172]**-cussit. And because the statute was, If any person malitiously strike another, or shall draw any weapon with an intent to strike any person. And the indictment was, quod extraxit. But does not say, ad percutiendum. And because it is, quod percussit, without saying malitiose, the party was discharg'd upon judgement.

SIMSON AGAINST GILLION.

Where trespass may be brought by a copyholder without admission.

Simson brought trespass. And the defendant pleads, that the land is copyhold, and parcel of the mannor of Dale. And that J. Farmer in 24 Eliz. granted that to him by copy. The plaintiff replies, that Sir H. Farmer in 28 H. 8. granted it to one Thomas the husband, and his wife, and their heirs. And the husband dies, the wife survives and dies. J. Farmer admits the defendant, and the plaintiff as heir to the wife re-enters, and upon that re-entry brought this action: upon which the defendant demurrs. And adjudg'd for the plaintiff without argument. And the point was this, the copyholder dies, the lord admits a stranger: the heir may enter, and upon the re-entry maintain trespass, without an admission by the lord.

Errour was brought upon a judgment given in the Kings Bench, in an action upon the case for an escape, and errour assign'd in this. That that action does not lie, but debt; and judgment was affirm'd; because he might have that action at common law: by the opinion of all the Justices of the Common Bench, and the Barons of the Exchequer.

A man said, Thou hast stollen my mare, or was consenting to it. By Fenner and Clench, No action lies: for he may consent tacendo, and yet be faultless.

BISSE AGAINST WILLS.

Errour was assign'd, for that the venire fac. in the Common Bench was 12 liberos & legales homines quorum quilibet habeat quatuor librat. where the new statute is quatuor libras. For it was said that libratus is a pound weight: but because it was a general case, the justices would view how the Parliament roll was, and it was found to be libras. And then it was mov' dagain. And Poph. said, that the intent of the statute was only to have sufficient jurors. Gaudy agreed to that. And the statute

is to be expounded, as the usage has been ever after the making of it. And the form of the writ is not upon any demand upon title. Fenner agreed. The Statute de Mercatoribus, that the manner of the recognisance shall be of money starling: but it is sufficient, if it be lawfull money. To which Clench agreed: for it was said, that if that should be revers'd, a thousand judgments in the Common Bench would be revers'd upon the same point.

Rowles and How arrest a man upon a latitat. And there was an obligation made to the sheriff, with a condition to make an appearance; and the question was if it be good; for he may make his appearance by his atturney. Yet Clench and Fenner, cæteris absentibus, thought it to be good; for the law intends, that he is in person, when he is in custodia marescall. And Kempe said it was adjudg'd. Where Mr. Sackford Bayly of the liberty of St. Andrew, took an obligation in his own name, for a personal appearance, upon a latitat. At another day Doderidge mov'd that the bond was void. For the statute being **[173]** general, that he shall take a bond for his appearance, and the sheriff hath not taken a bond for his personal appearance, and he may answer to the action by his atturney; but that he ought to be alwayes in custodia marescall. which is intended in proper person, and ought to be put in bayl, which is good enough. And it was rul'd, that judgment should be entred for the plaintiff, unless better cause were shewed within four dayes. And so it was adjudged, 30 Eliz. Rot. 126. In Banstons the Sheriff of Sussex.

EDWARD DARCY Esquire } Plaintiff. } THOMAS ALLIN OF LONDON Haberdasher } Defendant,

Action upon the case.

[S. C. 11 Co. Rep. 84 b. See *Marsden* v. *Saville Street Company*, 1878, 3 Ex. D. 206; *R.* v. *County Court Judge of Halifax*, [1891] 1 Q. B. 798; [1891] 2 Q. B. 263.]

Mr. Fuller,

The plaintiff declareth, that whereas the Queen perceiving that divers subjects of able bodies which might go to plow, did imploy themselves in the art of making of cards, she did by her letters patents, dated the 13 Junii, anno 30. grant to Ralph Bowes Esquire, that he by himself, his factors, and assigns, as well denizens as strangers, might buy and provide beyond the seas playing cards, and cause them to be brought into England, or in her dominions, by whatsoever means, and to utter, sell, or distribute the same in grosse, or by retail, and that he should have the whole trade of making and selling of cards in England, &c. And that none should have the making and selling of cards within her dominions, but he, for 12 years, streightly restraining all other subjects other than the said Ralph Bowes his factors and assigns from the making and selling thereof.

Then he rehearseth the letters patents made to himself, dated 11 August. anno 40. for 12 years to begin after the expiration of the former term of 21 years, and that he was possessed of that interest, and that the former term expired 13 Junii, anno 42. and that he ult. Junii, caused 4000 grosse of cards to be made in London at his charges, amounting to 5000l. for the necessary use of the subjects.

That the defendant knowing the premises 15 Maii, anno 44. caused 80 grosse of cards to be made, he being a subject, and no assignee or factor to the plaintiff, and that the defendant 16 Maii, anno 44. did sell half a grosse of playing cards to John Freer and Francis Freer for 13s. 4d. which were not made in England, or brought into England by the plaintiff or his factor, without licence of the Queen, or consent

of the plaintiff, he being a subject, whereby the plaintiff was defrauded of the benefit which he was to enjoy by his charter to his damages of 200l.

The defendant pleadeth to all, except half a gross of cards sold to Jo. Freer, and Francis Freer, not guilty, and for them pleadeth that the City of London is an ancient city, and that from time whereof no memory of man is to the contrary, within the same city, there hath been a fellowship or company of citizens called Haberdashers of London: and that within the same city one lawful custom hath been used de tempore, &c. That every citizen of the said company may buy, sell, and merchandize all things merchandable within the realm of England. And sheweth that the defendant tempore quo, &c. and before and since was a citizen and haberdasher of London: and that by reason thereof he did sell the said grosse of cards, as was lawful for him to do, and **[174]** averreth that they were things merchantable.

To this plea the plaintiff hath demurred in law.

Edward Darcy Esq. plaintiff. Thomas Allin defendant.

Mr. Fuller,

This cause is of great weight, and to be dealt in with good regard, for on the one side, it concerneth the prerogative of the Queens Majesty in a material point thereof; and on the other side it doth concern many of Her Majestys subjects in present; and in the rule thereof it may concern all the subjects in England; and yet the cause is such, as may, yea ought to be disputed and censured before competent Judges, as this Court is. For I learn in Bracton, lib. 1. cap. 8. thus. Ipse autem Rex non debet esse sub homine, sed sub Deo & sub lege, quia lex facit regem, attribuat igitur Rex legi quod lex attribuat ei. And after he saith, Non est enim Rex ubi dominatur voluntas, & non lex: which latter words, as also the cases following, prove the intent to be sub lege loquente. According to the opinion of Bracton it is said, 19 H. 6. fo. 62. That the law is the most high inheritance of the realm, by which the King and all his subjects are governed; and that if the law were not, there would neither be King nor inheritance: for to outrun the law, is to hast to confusion.

This law all subjects are bound to obey, and the Queens Majesty hath given her assent to perform the same in some sort at her coronation by her oath, which I know not precisely what it is; but I find by the statutes of 2 E. 3. and 14 E. 3. and others, that the King shall grant no pardon contrary to his oath, and that if he do grant any such pardon contrary to his oath, it shall be void; which sheweth, that his oath referreth to some rules of law. And to come near to the point of prerogative, it is said in the Commentaries, fol. 236. That the law doth so admeasure the Kings prerogative, that it shall not tend to the prejudice or hurt of the inheritance of any of his subjects.

Being thus inabled to speak in this weighty cause, to the intent that the whole course of my argument may the better be conceived, I have divided that into these heads.

1. That all patents concerning the King and his subjects are to receive exposition and allowance how far they are lawful, and how far not, by the Judges of the law.

2. That the Judges in the exposition of the Kings letters patents, are to be guided not by the precise letters, and the words of the letters patents, but by the laws of the realm, the laws of God, and according to the ancient allowance thereof. And herein I mean the laws of God, because we are now the house of God and the people of God, the Jews being cut off to whom God was the law-giver, and we being ingraffed in their stead: so as the judgments that are executed, are not the judgments of men but of God, and he is with them in the cause and in the judgment.

3. That the letters patents made to the plaintiff are contrary to the laws of the realm, contrary to the laws of God, hurtful to the commonwealth, and in no part good or allowable.

[175] 4. That the action upon the case grounded upon this void patent, is no lawful action.

5. In the last place I will answer all the material matters and cases that have been alledged on the plaintiffs part, to the intent that this monopoly patent should have no ground to stand upon.

In the argument of this case I am eased much: for that it is confessed by Mr. Solicitor, who very learnedly argued on the part of the plaintiff, that such letters patents as tended to change the law, or course of any mans inheritance, or that was contra commune jus, or that tended to any generall charge of the subjects, were void in law, for which I meant to have put divers cases, which I omit.

It is agreed by the Court, that the grants of the King shall not be expounded according to the letter; but according to the antient allowance, and to prove the same, I will put some particular cases. (10 H. 7. f. 14.)

The Kings grants in many cases are controlled by the Judges of the law for the benefit of the King, contrary to the expresse letters of the grant. As when the King granteth the mannor of Dale, and all manner of woods, underwoods, mines and quarries in the same: yet mines of gold and silver shall not passe. And so when the goods and chattels of persons qualitercunque damnatorum are granted, yet the goods of persons attainted of treason passe not, because by rule of law these things of prerogative will not passe by such general words. So in cases that concern the subjects as shall hereafter appear, the Judges shall controll patents contrary to the letters, because they have liked rules of law so to do, whereby it shall appear that the Judges stand indifferent between the King and his subjects, for which many cases more might be put on the Kings part: for power of judgment is so commited to the Judges. (Com. fo. 337. 45 ass. p. 15. 22 ass. p. 49.)

Now I will shew you that patents shall be controlled for justice sake, albeit they do concern but particular persons, and not generall ones. (1 E. 3. fo. 26.)

The King granteth to I. S. that he shall not be sued by N. T. this is void: so when it is more particular. As when the King doth grant to the Chancellor of Oxford, that he shall not be sued for debt or trespass concerning his office, is void. And when the King doth grant conusans de plee licet ipsemet fuerit pars, or generally, not naming before whom, is void for the reasons abovesaid, being contrary to the rule of justice. (8 H. 6. fo. 19. 1 H. 4. fo. 6. 44 E. 3. fo. 27. 6 H. 4. fo. 1.)

A commission is granted under the Great Seal of England to persons of credit, to take the body and goods of I. S. without indictment and due proceeding according to law. This is adjudged unlawful. (42 ass. p. 5.)

A commission is awarded to persons of credit to examine the title of Scrogges concerning the office of exigenter, and to commit him to prison, if he refused. Scrogges refused, and was committed to prison, but was delivered by the Judges of the Common Place upon a habeas **[176]** corpus, as an unlawful imprisonment, the reasons I gather to be these. (23 Eliz. fo. 175.)

The law knoweth no commandement but by writ, nor no minister to execute the commandements of the law, but the sheriff and the officers under him, for he is the only lieutenant in the time of peace, who is to be guided by the law, and to be controlled, if he follow not the course of law in the commandements of the King or of the law.

For commissions to subjects of any absolute power, which be occasions of absolute wrongs, as the law knoweth them not, so the law alloweth not such proceedings. I do not here speak of justices of peace, who have power given them by divers statutes, who if they exceed their power, are to be punished by law, nor of commissioners of bankrupts, nor of sewers, which are grounded upon particular Acts of Parliament. (13 Eliz. cap. 7. 23 H. 5. cap. 5.)

Now touching patents that tend to prejudice or to charge particular subjects, how they are to be controlled, I will put some cases.

20 acres of land are holden of the Bishop of Winchester, by I. S. I. S. granteth the same 20 acres to the King, to the intent that the King should grant them in mortmayne to a monastery; which is done accordingly. Afterwards, notwithstanding that the grant to the King were lawful, and the grant of the King to the monastery in itself is lawful; yet because it tended to take away the mean surrender of the Bishop of Winchester, upon petition it was repelled. (19 E. 3. fo. 39. 46 E. B. Pet. 19.)

The King granted to A. B. his servant the office of measuring of cloth in London, with a fee, and a writ was awarded to the Mayor and Sheriffs of London to put him in possession thereof, who refused to put him in possession, and returned that there is no such office in London. Hereupon it is excellently argued by the Judges, how far the King may charge his subjects by his patents, and agreed, that without the Parliament the King cannot grant any new office with charge to charge the subjects: and although in this case there had been a former grant of this office to an other man deceased, and that he had executed the office, and received some fees for a time, yet the Judges thought that seisin by wrong upon an unlawful patent to be of no force. (13 H. 4. fo. 15.)

It is agreed, that the King cannot grant toll to be taken in the highway, which is free, but pontage and murage may be granted; because there is quid pro quo; and no longer than the bridge is maintained for use of the subjects, nor shall continue for defence of the subject, the toll is not due to be paid for the pontage, nor for the murage. (13 H. 4. fo. 15. 50 E. 3. tit. p. 112. Brook.)

Like learning in the cases of the office of brocage, tonage, &c. and the difference between the clerk of the market and such offices. (22 H. 6. fo. 14. 21 E. 4. fo. 1.)

I. S. is indebted to R. in 20l. by contract. R. is outlawed, the Queen shall not have this debt, for the Queen shall rather lose this debt, than the subject lose the benefit of waging of law, wherein it is to be noted, how indifferent the law is for the subject. (49 E. 3. fo. 5. 50 Ass. p. 1. 16 E. 4. fo. 4.)

[177] The King shall not arrest one for suspicion of felony or treason, because if it be without cause the subject hath no remedy. By Markham. So that the King shall rather lose the liberty that a subject hath, than that the subject shall lose the benefit of his action. (4 H. 7. fo. 4. prerog. 139. Brook.)

To come near to the point of prerogative, the King did grant a protection, quia profecturus, to I. B. and sheweth it was for the service of the King, and of his realm at Rome, to continue for 3 years, & sit quietus ab omnibus actionibus sectis, &c. and it was refused by the Judges, for that it was for 3 years, and the law alloweth but for one year. And for that there was not exception of dower, quare impedit and assize, as should be in such protections. (39 H. 6. f. 39.)

A protection was granted to I. B. quia profecturus in a voyage royal with the King into Ireland, and rejected by the Judges, because it was no voyage royal into Ireland, otherwise in Scotland. Per Noyle. Note that these protections are not to

take any thing from the subject; but tend only to delay the lawful sutes of some particular subjects, and yet rejected as abovesaid. (1 E. 4. f. 29.)

NOW TOUCHING THE KINGS MERCY, HOW THAT SHALL BE CONTROULED FOR THE GOOD OF THE SUBJECTS, IT IS MEET TO SEE.

The King doth pardon I. S. the making or repairing of a bridge, which he ought to do: now for that in this bridge the subjects have a use or kind of interest, for that reason the pardon is void. 2 R. 3. Rex potest dare licentiam alicui ad deferend. literas apostolicas infra hoc regnum, ubi tantum Regem tangat, sed non ubi tangat partem. (Com. f. 48. 3 E. in Northf. ss. 445. 2 R. 13. fo. 12.)

Thus it appeareth how all the attributes given to the King, of power, justice and mercy are in him to dispose to the good of the subjects: that justice controuleth both the power and mercy in grants, commissions, protections, pardons, as for the good of the subject in the time of 1 E. 3. H. 4. H. 6 E. 4. H. 7. &c. why did the Judges withstand the Kings letters patents in this sort? And why are these things recorded and left to us, but that it may appear to the ages following what great care those reverend Judges had to leave the land and people in like liberty to the ages following as they found it, and so ought every man in conscience in his place to have the like care.

NOW TOUCHING THIS PARTICULAR PATENT.

The pretence is chiefly upon this, viz. that the Queen may restrain all card-playing, and then by consequence all making, buying and selling of cards, because for the good of the whole common-wealth, the card-maker or seller may receive particular loss in his trade.

First it is not to be confessed, that the Queen may by letters patents without Parliament restrain all card-playing, which I will prove by reason, use, and by intent of statutes.

For this is true without any contradiction, that no man can continue alwaies in labour, alwaies in reading, or alwaies in meditation, but he must have reasonable recreation, and all persons cannot take recreation **[178]** abroad, for some be sick, weak, or impotent, that need refreshing, some seasons are such, as that there is no recreation abroad, and in these times, and to these persons to make restraint is wrong.

For as Mr. Solicitor said, that the benefit of government was not that the subjects should live safely only, but tutè vivere, pacificè vivere, honestè vivere, & jucundè vivere. And the law in ages past alloweth as much: for Cicero saith, that sex est vinculum civitatis, fundamentum libertatis, & sons æquitatis; and how can it be said that freemen should according to the Statute of Magna Charta, use libertatibus & liberis consuetudinibus suis, when Mr. Darcy hath a patent to restrain cards, another to restrain tennis play, another hawking and hunting, &c. Is not this to make freemen bondmen? And if the Queen cannot to maintain her war, take from her subject 12d. but by Parliament, much lesse may she take moderate recreation from all subjects, which hath continued so long, and is so universal in every country, city, town and houshold, but to punish the abuse is necessary: for common-weals are not made for King's, but Kings for common-weals. (Mag. car. c. 29. 25 E. 3. a. 8.)

The statutes of 12 R. 11 H. 4. and 5. do shew plainly that none were restrained from playing at dice, but servants, and they not altogether restrained, but at times, and from card-playing none restrained untill 33 H. 8. and in that statute, certain persons and certain places restreined, which declareth the intents of the Parliaments to be, that it should be lawful for the rest not restrained, and for them restrained in

the times prescribed for times for them to play in. 12 R. 2. cap. 6. 11 H. 4. cap. 4. 33 H. 8. cap. 9.

And if in the times of K. R. 2. H. 4. and 5. it was thought necessary to have several Acts of Parliament to restrain the use of playing in servants, much more is it necessary to have an Act of Parliament to restrain all the subjects of the realm from the moderate use of playing, and not by letters patents only.

But allow that the Queen could restrain card-playing; yet that proveth not that this patent is good, which restraineth not the place, but rather increaseth playing at cards, and taketh away the trade of making and selling of cards from many subjects that used it well, and giveth it to another that knoweth not how to use it: for thus should the argument be to uphold this monopoly patent.

Major. All patents made for the general good of the realm may restrain some subjects in their particular trades lawfully.

Minor. But this patent is made for the general good of the realm.

Conclusio. Therefore this patent may restrain some in their particular trades lawfuly.

The minor proposition or assumption is untrue, and that I will prove so plainly as no man shall gainsay that, and so the force of these letters patents must needs fall to the ground.

[179] Before the making of these letters patents, many subjects were set on work in making of cards, as the preamble of the patent doth partly expresse, and as in truth it is, for that many carvers, painters, carpenters, card-makers and card-sellers maintained themselves, their children and families by their trade.

And now Mr. Darcy hath power to bring all from beyond the seas, contrary to the intent of the statute of 3 E. 4. cap. 6. 1 R. 3. cap. 12. and to restrain all the subjects from making and selling of the same, which is a manifest hurt to the realm, by the opinion of 2 Parliaments.

Where before this patent, men skilful in the trade, being subjects born, and brought up 7 years as apprentices in the trade, according to the statute of 5 Eliz. were imployed in this work in due order, to be seen and corrected by the wardens of the company.

Now Mr. Darcy may set to work in this trade I. a done, and his fellows, without any view search or correction: yea he may set a work only strangers if he will, which is also hurtful to the realm.

Where before cards were, and ought to be sold at reasonable prizes, or else to be punished as enhauncers of merchandize, as appeareth 27 E. 3. by the common laws of the realm.

Now Mr. Darcy by the words of this patent may sell cards for his most advantage, as he doth, viz. one grosse for 35s. where the haberdashers have offered to sell better for 20s. the grosse, and this is malum in se against the common law, that cannot be dispenced with by pat. as malum prohibitum may be.

Where before if any made naughty and false cards, one might buy of others better cards; for that there were then many makers and many sellers.

Now by this patent, be they good, be they bad, be they false, be they true, be they dear, or good cheap, you must buy all of him and his assignes in what manner pleaseth him.

Where before if any person by his industry had obtained excellent skill in his trade, he might have reaped the fruits thereof, and that hath been thought the surest thing a man could obtain, skill and knowledge, because theeves could not steal it.

Now Mr. Darcy hath devised a means to take away a mans skill from him, which was never heard of before, which if others should do the like in other trades, it would discourage men to labour to be skillful in any art, and bring in barbarism and confusion.

Where by the laws of God, the poor and the stranger were to be relieved with the gleaning of the harvest, and the latter grapes of the vintage.

Mr. Darcy by his patent may take all the harvest and vintage of this trade from the natural subjects, and give it to strangers, and not leave so much as the gleaning of the harvest or latter grapes of the vin-[180]-tage for natural born subjects, which is an hatefull thing:

And may not these subjects thus put from their trade, say as the steward in the Gospel said, when he was put out of service, What shall I do? digg I cannot, and to beg I am ashamed, I will use this fraud, &c. And if none will trust them to be beguiled, then will they rob and steal, and become thieves and traitors; for extreamity breedeth nothing but thefts, and then what comfort this will be to him that procured this mischief, I leave to God and his own conscience, remembring this withall, that Bracton saith, It is a good part of a King to reject no person, but to make every person profitable to the common-wealth. And Cicero saith, Qui autem parti consulunt, partemque negligunt, seditiones & discordias inducunt.

NOW TO PROVE THAT IT IS AGAINST THE LAW OF GOD AND MAN.

The ordinance of God is, that every man should live by labour, and that he that will not labour, let him not eat. (Thess. cap. 3.)

This general ordinance of God, by the policy of the realm, and by the laws and customs of the same, is distributed into several arts, manual occupations and trades, whereby we may have the mutual help one of another, and all governed in due order by the wardens and governours of the same society and fellowship.

Now therefore it is as unlawful to prohibit a man not to live by the labour of his own trade, wherein he was brought up as an apprentice, and was lawfully used, as to prohibit him not to live by labour, which if it were by Act of Parliament, it were a void act: for an Act of Parliament against the law of God directly is void, as is expressed in the Book of Doctor and Student, much more letters patents against the law of God are void.

But Mr. Darcy will say this is no necessary trade, and therefore, &c. so others may say the like of silk lace, another of womens tyers, another of gilt rapiers and gilt daggers, and some already have added a reason for the onely making of aqua vitæ aqua composita, vinegar and allegant throughout the whole realm, whereby the several trades that now maintain many thousand good subjects may be cut off by letters patents at an instant upon bare sugestion, which ought only to be done in Parliament; where amongst the assembly of such wise men, some will consider the inconvenience, some the damage, some the profit, some the mischief; some what is meet for this place, some for that place: therefore it is well said of Plato, Except wise men be made governours, or governours made wise men, mankind shall never have quiet rest, nor vertue be able to defend it self.

Now I will put a case of the common law. I. S. is bound to A. B. in 40l. that he shall not use the trade of a dyer in the town of Dale for the space of half a year. The condition of this bond is thought to be against the law, to restrain a man from his

lawful trade, though it were but in one town, and but for half a year: much more this patent, which is to restrain men from their trade 21 years, and throughout the whole realm. The like patent whereof is not to be found in any record, or **[181]** in any book-case within this realm, since the Conquest, until within 20 or 30 years last past, which I do more confidently affirm, because Mr. Solicitor being a very learned man, and others who have argued in this cause for the plaintiff, after much search and study cannot find any such case or record. (2 H. 5. fol. 5.)

I will put other cases where the laws of God and the laws of the realm do agree, as one squared by the rule of the other, to confound this monopoly patent.

Thou shalt not take to pledge the upper or nether milstone, for it is his living. By this law none may take to pawn that which was the living of another, and so to force him to seek another trade, though constrained by need, he give his consent thereunto. (Deut. 24. 6.)

But Mr. Darcy will take from men against their wills, their living and lawful trade, and force them to seek other trades, directly contrary to the law of God.

Agreeing to this rule of God are these book-cases, viz. that none shall distrain, which is a kind of taking to pledge, the upper or nether milstone; yea though the milstone be not then upon the mil, but lieth in the house to be picked, because it is his living, where the other goods in the house are destrainable by law. (14 H. 3. fo. 25.)

In like manner the anvil in the smiths shop, the garment in the taylors shop, the horse within an inne, or at a smiths forge a shooing, are not distrainable, because it is their trades and living, although the rest of the goods in the house are distrainable. (22 E. 4. 49.)

This difference I have always thought reasonable, that because justice floweth from the Queen, as from the head or fountain of justice, that therefore she may grant or restrain the same, more liberally or more sparingly, as she thinketh good, according to the rules of law.

As to grant conusans of plea in such actions, within such precincts as she thinks good, and to save the defaults of the tenant by writ of warrantia die, giving of power to make atturneys in Court by dedimus potestatem, and such like things.

But arts and skill of manual occupations rise not from the King, but from the labour and industry of men, and by the gifts of God to them, tending to the good of the commonwealth, and of the King, the head thereof, and do meet with commutative justice by the way, to see that there be just measure and just weight in things to be measured and weighed, and that no deceipt or fraud be used therein, to the deceipt of the subjects, and for that purpose the office of the clark of the market, gager, and garbler, &c. are used; but to restrain men from any lawful trade whereunto they are inclined, is unnatural and unmeet.

By these statutes and others, as well all merchant-strangers as denizens, have liberty granted to them to bring their wares into England, and to sell the same in grosse, or by retail, notwithstanding any patent, priviledge or custom to the contrary: therefore this monopoly patent to restrain, or take away that from the subjects being merchants, which was **[182]** given unto them by Parliament, is not good in law, for it is not like the case where the King may dispense with malum prohibitum, and there it is said, that such a charter is hurtful to the King and to his people. (9 E. 3. cap. 1. 25 E. 3. cap. 2.)

And the statute of 26 H. 8. cap. 10. doth give power to the King during his life to restrain or set at liberty traffick beyond the seas for certain countries, which act had been an idle and vain act, if the King by letters patents might have done so much

without act. And the writ of ne exeas regnum, was never granted generally against all merchants, but against particular persons, for particular causes; for if partial affection by private discretion do govern publique affairs, there one mans will becometh every mans misery. (26 H. 8. cap. 10. 31 E. 3. cap. 9.)

It is a ground in law, that the King by his patent cannot do wrong, as to make discont. &c. and that his prerogative is no warrant to injure any subject. (Case de Alton woods, fo. 44.)

And sith the law is clear, that if the King grant my lands or goods, the grant is void and unlawful. I see no reason when the King cannot grant away 22d. which I have gotten by my trade, that he should grant away my trade whereby I got that 22d. and maintained my wife and children. (1 H. 4. c. 8. 21 Ass. 24. 8 H. 4. fo. 168.)

That this is a monopoly patent it appeareth by the description or definition set forth by Mr. Solicitor, which is thus. It is a monopoly cum penes vestrum potestas vendendi sit. But when there be many sellers, although they be all free of one company, as goldsmiths, clothiers, merchants, drapers, taylors, shoomakers, tanners, and such like, who have settled governments, and wardens and governours to keep them in order, they were never accounted a monopoly, which the statute of anno. 5 Eliz. in some sort proveth, because in many of these trades all persons are prohibited to use the same, but onely such as have served in the same trade seven years as an apprentice. But if they, or any other like society, should conspire together to inhaunce the prices of their wares, or of their labours, it is a thing punishable by the common laws, presentable in every Court, and to be censured severely in the Star Chamber; but in this patent the sole and whole traffick for the making, buying and selling of cards throughout the realm is given to Mr. Darcy and his assigns onely for twenty one years; which is plain monopoly patent.

Now therefore I will shew you how the Judges have heretofore allowed of monopoly patents, which is, that where any man by his own charge and industry, or by his own wit or invention doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before: and that for the good of the realm: that in such cases the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth: otherwise not.

In the 9th Eliz. there was a patent granted to Mr. Hastings of the Court. That in consideration that he brought in the skill of making of frisadoes as they were made in Harlem and Amsterdam beyond the seas, **[183]** being not used in England: that therefore he should have the sole trade of the making and selling thereof for divers years; charging all other subjects not to make any frisadoes in England during that time, upon pain to forfeit the same frisadoes by them made, and to forfeit also 100l. the one moiety thereof to the Queen's Majestie, the other to Mr. Hastings: upon which patent Mr. Hastings about 20 years past exhibited an information in the Exchequer against certain clothiers of Coxsall for making of frisadoes, contrary to the intent of this patent. To which information, for that it was against law to have such penalties of the goods, and 100l. to be forfeited by force of a letter patent; therefore did demur upon the information, and moved the Court, and the opinion of the Court being clear against him, he never went further in his information: but exhibited his English bill in the Exchequer Chamber against them, where upon the examination of the cause it appeared that the same clothiers did make baies very like to Mr. Hastings frisadoes, and that they used to make them before Mr. Hastings patent; for which cause they were neither punished nor restrained from making their baies like to his frisadoes.

Another monopoly patent was granted to Mr. Matthey a cutler at Fleetbridge in the beginning of this Queens time, which I have here in Court to shew, by which patent it was granted unto him the sole making of knives with bone hafts and plates of lattin; because as the patent suggested, he brought the first use thereof from beyond seas; yet neverthelesse when the wardens of the company of cutlers did shew

before some of the councel, and some learned in the law, that they did use to make knives before, though not with such hafts, that such a light difference or invention should be no cause to restrain them, whereupon he could never have benefit of this patent, although he laboured very greatly therein.

Lastly the monopoly patent granted to one Humphrey of the Tower, for the sole and only use of a sive or instrument for melting of lead, supposing that it was of his own invention, and therefore prohibited all others to use the same for a time: and because others used the like instrument in Darbyshire, contrary to the intent of his patent, therefore he did sue them in the Exchequer Chamber by English bill. In which Court the question was, whether it was newly invented by him, whereby he might have the sole priviledge, or else used before at Mendiff in the west country, which if it were there before used, then the Court was of opinion he should not have the sole use thereof.

In Easter term last, in the Kings Bench Gowby brought an action of trespass against Knight for false imprisonment. Knight justified because of the Mayor and Citizens of C. have used time out of mind to nominate a town chandler within Cant. and that all the butchers within Canter. should sell there tallow to him at such a price as the mayor should appoint, or else to be committed: and that because the plaintiff was a butcher in the town, and refused to sell his tallow to the town chandler, was committed, and so justified, &c. Whereupon the Court was moved this term, that the issue concerning the custom might be tryed out of Cant. And the Court then thought that the custom was not good, but unreasonable and unlawful, because it did tend to a monopoly. Wherefore the plaintiff did demur upon the same plea.

[184] NOW TOUCHING THE ACTION OF THE CASE GROUNDED UPON THE MONOPOLY PATENT.

There is no wrong done to the plaintiff by the defendant selling of cards better cheap than the plaintiff would, though he received loss, and therefore no cause of action, like unto the case of 11 H. 4. f. 47. where there was a school of long continuance, and another had erected a new school in the same town; whereby the school-master of the ancient school gained not so much as he did before, yet he could have no action against the new school-master for the same: and Mr. Darcies case is much stronger against him: for that he newly intruding into the trade of making and selling of cards, doth bring his action against the ancient card-seller for hindring his sale: which is all one, as if the new school-master should bring his action against the old school-master for teaching so well that he cannot gain so much by teaching his scholars as he desired, which the law will not allow, being damnum absque injuria, as in this case. (11 H. 4. f. 47.)

A man hath a mill in a town of ancient continuance, and another buildeth a mill in the same town, whereby some of his customers doth forsake the ancient mill, this is no wrong though it be damage, and therefore no cause of action, and then also I compare that to this case. (22 H. 6. fo. 14.)

I. S. hath a pasture in the town of Dale, where the tenants do use sometimes to put their cattel to jost, and another person in the same town doth recover grounds overflown with water, and doth make that good pasture, where the tenants have cattel better cheap to the damage of I. S. and yet no cause of action, being neither wrong to I. S. nor hurt to the common-wealth.

The case was this, B. said unto R. that I. S. said, that if he did meet R. he would kill him, whereupon R. for fear of I. S. fled so fast that he killed his horse: this was damage to him, and yet he had no cause of action. So in our case, although the ancient cardseller do sell better cheap than Mr. Darcy, yet it is no wrong to him nor to the common-wealth, so no cause of action.

NOW TO ANSWER THE CASES AND MATTERS MATERIAL TO BE ANSWERED.

Object.

It is first objected, that it is unlawful and hurtful the playing at cards in all parts of the realms, and therefore restrainable by pat. in all parts of the realm.

Resp.

I answer, that moderate playing at cards was never thought unlawful, or prohibited generally, but for servants, and in some particular manner for some persons, which by the intent of the same laws must be thought lawful for the persons not thereby prohibited. And Mr. Darcy in his declaration saith: that he made 4000 grosse of cards for the necessary use of subjects, &c. which necessary use cannot be of a thing hurtful. (12 R. 2. c. 6. 1 H. 4. c. 9. 33 H. 8. c. 9.)

This patent is no restraint of card-playing. But rather an occasion **[185]** of increase of play, as I can prove plainly, as it is now used, and doth but take the trade of making and selling of cards from many persons, and giveth that trade to one, which is unlawful.

Object.

Where it is objected, that an action of case was maintainable for money won by false dice.

Resp.

This maketh rather against the plaintiff, than with him, for that if it had been won by true dice, it had been so lawfully done, that the party had had no remedy.

Object.

Where they object a writ in the register, rehearsing of a grant made to the Abbot of Westminster, that he should have a fair to continue 32 days at Westminster, and that none during that time should buy or sell any merchandise, within seven miles of the fair.

Resp.

To this I answer, that upon this writ there was never judgment or allowance given in any Court, and that it is unreasonable and absurd that none should buy or sell within seven miles, whatsoever occasion should happen: as many times men are robbed of their apparel, and then they must go seven miles to buy new, or go naked, and there be divers writs in the register which have no warrant of law, as action of waste against tenant for life, when there is a mean remainder for life between, and likewise an action of waste by the heir for waste done in the time of the father, which are against law, and it is a fit answer to vouch against this writ, the writ that Thorninge saith he hath seen in the register, precepe Domino Regi, which is as absurd as the other, though in an other degree, which writs are more meet to be concealed than vouch'd, by such as regard the credit of the law. But it was adjourned till another day.

DIXSON AGAINST WILLIAMS.

An action upon the case was brought against Chester. And he counts, how the plaintiff did certain businesses for him the defendant. And the defendant said to him, Do it, and I will repay whatsoever you lay out. And he shews that he had expended 4l. And does not shew in certain and particular circa quid. And for that cause it was held ill.

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